NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 76

16 JULY 1985

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17 SEPTEMBER 1985

RALEIGH
1987

CITE THIS VOLUME

76 N.C. App.

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Gell v. Manuel	76 N.C. App. 163	Denied, 314 N.C. 665
Grier v. Grier	76 N.C. App. 679	Denied, 315 N.C. 587

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Harrison Realty v. Gen. Homes Corp.	76 N.C. App. 542	Denied, 314 N.C. 665
Harris-Teeter Supermarkets v. Hampton	76 N.C. App. 649	Denied, 315 N.C. 183
Hayes v. Browne	76 N.C. App. 98	Denied, 315 N.C. 587
Hunnicutt v. Griffin	76 N.C. App. 259	Denied, 314 N.C. 665
Indiana Lumbermens Mut. Ins. Co. v. Unigard Indemnity Co.	76 N.C. App. 88	Denied, 314 N.C. 666
In re Application of Goforth Properties	76 N.C. App. 231	Denied, 315 N.C. 183
In re Clark	76 N.C. App. 83	Denied, 314 N.C. 665 Appeal Dismissed
In re Terry	76 N.C. App. 529	Allowed, 315 N.C. 390
In re Will of Parker	76 N.C. App. 594	Denied, 315 N.C. 184
King v. Allred	76 N.C. App. 427	Denied, 315 N.C. 184
Levine v. Parks Chevrolet, Inc.	76 N.C. App. 44	Denied, 315 N.C. 184
McCombs v. Kirkland	76 N.C. App. 336	Allowed, 315 N.C. 588
McKnight v. Cagle	76 N.C. App. 59	Denied, 314 N.C. 541
Miller Wire v. Butler	76 N.C. App. 345	Denied, 314 N.C. 667
Morton v. Morton	76 N.C. App. 295	Denied, 314 N.C. 667 Appeal Dismissed
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N. C. Association of ABC Boards v. Hunt	76 N.C. App. 290	Denied, 314 N.C. 667
Olive v. Great American Ins. Co.	76 N.C. App. 180	Denied, 314 N.C. 668
Pasour v. Pierce	76 N.C. App. 364	Denied, 315 N.C. 589
Phelps v. Duke Power Co.	76 N.C. App. 222	Denied, 314 N.C. 668
Reid v. Durham Herald Company	76 N.C. App. 680	Denied, 315 N.C. 391
Rodgers Builders v. McQueen	76 N.C. App. 16	Denied, 315 N.C. 590
Russell Ford v. Curry	76 N.C. App. 345	Denied, 314 N.C. 668
Sanyo Electric, Inc. v. Albright Distributing Co.	76 N.C. App. 115	Denied, 314 N.C. 668
Shelton v. Morehead Memorial Hospital	76 N.C. App. 253	Allowed, 315 N.C. 185
Smock v. Brantley	76 N.C. App. 73	Denied, 315 N.C. 590
Sperry Corp. v. Lynch	76 N.C. App. 327	Denied, 314 N.C. 669

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Stanford v. Owens	76 N.C. App. 284	Denied, 314 N.C. 670
State v. Barnes	75 N.C. App. 360	Denied, 314 N.C. 118
State v. Bell	76 N.C. App. 680	Denied, 314 N.C. 670
State v. Blakely	76 N.C. App. 680	Denied, 314 N.C. 392
State v. Brown	76 N.C. App. 345	Denied, 316 N.C. 380 Appeal Dismissed
State v. Brown and Gooding	76 N.C. App. 542	Denied, 315 N.C. 392
State v. Bryson	76 N.C. App. 163	Denied, 314 N.C. 332
State v. Bynum	76 N.C. App. 542	Denied, 315 N.C. 185
State v. Carlos	76 N.C. App. 543	Denied, 316 N.C. 196
State v. Corley	75 N.C. App. 245	Appeal Dismissed 315 N.C. 186
State v. Couch	76 N.C. App. 543	Denied, 315 N.C. 186
State v. Curtis	75 N.C. App. 200	Denied, 314 N.C. 670 Appeal Dismissed
State v. Duncan	75 N.C. App. 38	Denied, 314 N.C. 544
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State v. Ferrell	75 N.C. App. 156	Denied, 314 N.C. 333 Appeal Dismissed
State v. Field	75 N.C. App. 647	Denied, 314 N.C. 671 Appeal Dismissed
State v. Glidden	76 N.C. App. 653	Allowed, 316 N.C. 198
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State v. Johnson	75 N.C. App. 363	Denied, 314 N.C. 544
State v. Jones	75 N.C. App. 615	Denied, 314 N.C. 544
State v. Jones	76 N.C. App. 681	Petition Dismissed 315 N.C. 187
State v. Jordan	75 N.C. App. 637	Denied, 314 N.C. 544
State v. Kelly	75 N.C. App. 461	Denied, 315 N.C. 187 Appeal Dismissed

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State v. King	75 N.C. App. 618	Denied, 314 N.C. 545 Appeal Dismissed 314 N.C. 672
State v. Lowe	76 N.C. App. 682	Denied, 315 N.C. 187
State v. McDaniel	76 N.C. App. 543	Denied, 315 N.C. 594 Appeal Dismissed
State v. Mackins	76 N.C. App. 543	Denied, 315 N.C. 188
State v. Martin	76 N.C. App. 682	Denied, 315 N.C. 394
State v. Mason	76 N.C. App. 154	Denied, 317 N.C. 711
State v. Massey	76 N.C. App. 660	Supersedeas Allowed 314 N.C. 672
State v. Middleton and Kornegay	76 N.C. App. 345	Denied, 314 N.C. 673
State v. Mitchell	76 N.C. App. 346	Denied, 315 N.C. 594
State v. Neal	76 N.C. App. 518	Denied, 315 N.C. 394
State v. Nelson	76 N.C. App. 371	Supersedeas Allowed 314 N.C. 673
State v. Norman	76 N.C. App. 623	Denied, 315 N.C. 188
State v. O'Quinn	76 N.C. App. 682	Denied, 315 N.C. 394
State v. Parker	76 N.C. App. 465	Supersedeas Denied 314 N.C. 546 Petition Denied 314 N.C. 673
State v. Parker	76 N.C. App. 508	Allowed, 314 N.C. 673
State v. Peele	76 N.C. App. 682	Denied, 315 N.C. 394
State v. Sanders	76 N.C. App. 683	Supersedeas Denied 314 N.C. 673 Petition Denied 315 N.C. 189
State v. Saunders	76 N.C. App. 683	Denied, 315 N.C. 189
State v. Singletary	75 N.C. App. 504	Denied, 314 N.C. 335
State v. Smith	76 N.C. App. 164	Denied, 314 N.C. 546
State v. Stewart	76 N.C. App. 346	Denied, 315 N.C. 395
State v. Thompson	76 N.C. App. 346	Denied, 315 N.C. 675
State v. Traywick	76 N.C. App. 683	Denied, 314 N.C. 675
State v. Watts	76 N.C. App. 656	Denied, 315 N.C. 596
State v. West	76 N.C. App. 459	Allowed, 314 N.C. 547

Case	*Reported*	*Disposition in Supreme Court*
State v. White	76 N.C. App. 544	Denied, 315 N.C. 596 Appeal Dismissed
State v. Wright	76 N.C. App. 673	Denied, 315 N.C. 396
State v. Wright	76 N.C. App. 683	Denied, 315 N.C. 189 Appeal Dismissed
State ex rel. Utilities Comm. v. N. C. Natural Gas	76 N.C. App. 330	Denied, 314 N.C. 675
Tate v. Gardner	76 N.C. App. 164	Denied, 314 N.C. 675 Appeal Dismissed
Taylor v. Brittain	76 N.C. App. 574	Allowed, 315 N.C. 597
Thomas M. McInnis & Assoc. v. Hall	76 N.C. App. 486	Allowed, 315 N.C. 597
Threatt v. Hiers	76 N.C. App. 521	Denied, 315 N.C. 397
Tom Togs, Inc. v. Ben Elias Industries Corp.	76 N.C. App. 663	Allowed, 315 N.C. 397 Appeal Dismissal Denied
White v. Blackwell Burner Co.	76 N.C. App. 544	Denied, 315 N.C. 190

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRANCH BANKING AND TRUST COMPANY (FORMERLY INDEPENDENCE NATIONAL BANK) v. KENYON INVESTMENT CORPORATION; GARSON RICE; THOMAS A. ROBINSON, SUBSTITUTE TRUSTEE; AND SUNSTATES CORPORATION

No. 8427SC1033

(Filed 16 July 1985)

1. **Mortgages and Deeds of Trust § 15.1— priorities—party assuming principal obligation and giving second mortgage**

Independence National Bank, a first mortgagee, held legal title to the subject land and whatever rights Kenyon, the second mortgagee, had in the property by virtue of its deed of trust were subject to the deed of trust held by Independence where Independence held a first mortgage, Kenyon a second, and Gardner, who had assumed the principal obligation from the initial purchaser, held the beneficial title or equity of redemption.

2. **Mortgages and Deeds of Trust § 15.1— purchase of mortgagor's interest by second mortgagee—mortgagor personally liable—first mortgagee may declare balance due**

Where Kenyon, the holder of a second mortgage, foreclosed and purchased the mortgagor's (Gardner's) interest and there was no agreement of record for Kenyon to assume the principal debt, Kenyon took the land subject to the first mortgage and had no personal liability for the debt. Gardner remained personally liable and Independence National Bank, under the terms of its first mortgage, could refuse to allow assumption and could declare the balance due and payable.

3. **Mortgages and Deeds of Trust § 15.2— assumption of first mortgage by second mortgagee after foreclosure of second mortgage**

A second mortgagee (Kenyon) assumed personal liability on the mortgage debt and the debt was not discharged when the principal obligor was dis-

charged in bankruptcy where there had been a transfer of equitable title to the second mortgagee (Kenyon) which, by operation of law because the deed was silent, was subject to the first deed of trust held by Independence National Bank; there was a collateral agreement between Kenyon and Independence National Bank whereby Kenyon undertook to pay the preexisting mortgage debt on the property in return for which Independence agreed not to foreclose; and, although the letter stated the agreement was not a formal assumption, the agreement evidenced by the letter made a disposition of Kenyon's and Independence's rights and liabilities, there was consideration in Independence's forbearance of foreclosure and agreement to relinquish its option to accept or refuse prepayment, and there was evidence that the parties thought a valid agreement existed in that Kenyon made payments according to the agreement and paid Independence for release of its lien on a part of the land. A provision in the agreement that it did not constitute a formal assumption merely insured that Independence would be able to sue Gardner, the principal obligor, for any deficiency remaining after a foreclosure. G.S. 45-45.1.

4. Mortgages and Deeds of Trust § 24— foreclosure—principal obligor discharged in bankruptcy—bankruptcy settlement

Branch Banking and Trust, the successor in title to the first mortgagee (Independence National Bank), was entitled to summary judgment where the relief it sought was a court order for foreclosure of the first deed of trust, the second mortgagee (Kenyon) had assumed the indebtedness with the mortgagor (Gardner) being liable for any deficiency remaining after foreclosure, Gardner had been released by Independence in a bankruptcy settlement, and Kenyon had agreed in its bankruptcy settlement to assume any liability Gardner "may have had or now have" on the first mortgage. Kenyon was primarily liable for the full amount and BB&T could either sue on the note or foreclose on the deed of trust upon default.

APPEAL by plaintiff from *Gaines, Judge.* Judgment entered 10 July 1984 in Superior Court, GASTON County. Heard in the Court of Appeals 8 May 1985.

In this civil action plaintiff Branch Banking and Trust Company seeks to foreclose on a deed of trust on certain land in which defendant trustee Thomas Robinson, defendant Sunstates Corporation through its predecessor in interest, defendant Kenyon Investment Corporation, and Garson Rice, claim a competing ownership interest. The pertinent facts may be stated as follows:

On 7 June 1977, Gardner Land Co. sold and deeded certain land to Sonny Hancock Pontiac. Hancock executed a promissory note (Hancock note) in the amount of $152,000 in favor of Gardner Land Co. and secured the note with a deed of trust (Hancock deed of trust) to O. Max Gardner, III, as trustee for Gardner Land

Company. On 1 December 1977, Hancock conveyed the land to Max Gardner in his personal capacity. With the consent of Gardner Land Company, Max Gardner assumed liability on the Hancock note which was still secured by the Hancock deed of trust. Max Gardner held the Hancock deed of trust in his trustee capacity for Gardner Land Co. until 15 February 1978, when John Mull Gardner was substituted as trustee.

On 24 August 1978, Max Gardner and his wife borrowed $500,000 from Kenyon Investment Corporation and Garson Rice and executed a promissory note (Kenyon note) for that amount. The note was secured in part by a deed of trust to Kenyon and Rice on the land that Gardner had purchased from Hancock Pontiac (Kenyon deed of trust). The Kenyon note recited that its security was subject to the prior Hancock deed of trust.

On 6 October 1978, Gardner Land Co. assigned all of its right, title and interest in the Hancock note and deed of trust to Independence National Bank, predecessor in interest to plaintiff Branch Banking and Trust Co. Max Gardner, as owner of the subject property, consented to the assignment. On 24 January 1979, the Gardners defaulted on the Kenyon note. Kenyon and Rice foreclosed on the Kenyon deed of trust on 20 March 1979. Kenyon and Rice purchased the land at the foreclosure sale for $250,000. They received a trustee's deed to the property on 27 June 1979.

By letter dated 26 June 1979, Independence National Bank indicated to Kenyon that it would not permit Kenyon to assume the Hancock indebtedness to which the property was still subject. The bank demanded payment in full on the Hancock note on 1 July 1979, the date of the next annual installment. From then until 19 July 1979, the parties engaged in negotiations concerning the Hancock note and deed of trust. 1 July 1979 passed with neither the annual installment nor the balance due on the note being paid.

In a letter to Kenyon Investment Corporation dated 19 July 1979, the bank agreed not to foreclose on the Hancock deed of trust so long as Kenyon kept the loan in a current status and cured the existing default by payment of the 1 July 1979 installment. The letter also contained the following paragraph:

> Third, both parties agree that acceptance of payments made by Kenyon to the bank does not constitute a formal loan assumption by Kenyon, and that the bank's rights as lienholder are in no way diminished nor altered in the event of future default, including it's [sic] remedies against Mr. and Mrs. Gardner.

The registered letter was received by Kenyon Investment Corporation and signed by Harold V. McCoy, president of Kenyon, with the notation, "Accepted this 27th day of July, 1979." Thereafter, payment of $20,773.33 was made by Kenyon to cure the existing default and to keep the loan current.

On 24 August 1979, Kenyon and Rice filed an action against the Gardners for the deficiency that remained on the $500,000 Kenyon note after the foreclosure sale. The Gardners answered and counterclaimed for damages arising from alleged irregularities in the foreclosure proceeding. Independence National Bank filed a claim against the Gardners based on some promissory notes unrelated to the present action. Max Gardner filed a separate action in another county based on the same notes.

On 14 December 1979, Max Gardner filed a voluntary petition for bankruptcy under Chapter 11 of the federal bankruptcy law. All pending litigation involving Max Gardner was removed to U.S. Bankruptcy Court for the Western District of North Carolina and restyled as "adversary proceedings." On 18 December 1979, Gardner filed an adversary proceeding against Kenyon and Rice in which he sought to have the foreclosure sale declared invalid because of alleged irregularities.

On 13 May 1980, the adversary proceeding between Independence Bank and the Gardners was settled. The settlement agreement contained a general release which included the following language:

> Independence does hereby and for its successors and assigns release, acquit, and forever discharge Gardner, Mrs. Gardner and their heirs, executors and administrators from any and all claims, actions, demands or rights to or for any damages, costs, or compensation whatsoever, which Independence now has or which may hereafter accrue on account of or in any way growing out of all present indebtedness of Gardner and

> Mrs. Gardner to Independence, including specifically the indebtedness represented by the promissory notes which are exhibits to this Agreement, it being the intention of the parties to effect a full and complete settlement among the indicated parties according to the terms herein.

On 31 July 1980, the adversary proceeding between the Gardners and Kenyon and Rice was settled. The only items involved in that settlement agreement were the Kenyon note and deed of trust. In language substantially similar to that quoted above, the Gardners were released from their obligation to Kenyon and Rice on the Kenyon note. The agreement recited that the property given as security for the 1978 loan "was free and clear of all mortgages, pledges, liens, charges and other encumbrances *except* . . . a first Deed of Trust to Gardner Land Company, Inc. (which was subsequently sold and assigned to Independence National Bank) in the face amount of $152,000.00." (emphasis in original). Kenyon and Rice entered into a stipulation and agreed to assume responsibility for the indebtedness as follows:

> Kenyon and Rice expressly agree to assume any and all liabilities that [the Gardners] may have had or now have under the Promissory Note secured by the said Deed of Trust and further agree to hold [the Gardners] harmless should Independence National Bank ever seek to take any action against them as a result of their having executed any Note or other Loan Documents secured by the said Deed of Trust filed against a portion of the subject property.

Both settlement agreements were approved by the Bankruptcy Court.

Kenyon and Rice made the 1 July 1980 payment on the Hancock note. On 10 October 1980, they paid Independence National Bank $15,000 on the principal indebtedness on the Hancock note. In return, the bank released its lien on a portion of the property. This was done to facilitate the transfer by Kenyon and Rice of clear title to a tract of land which included the portion of the subject property released by the bank. The tract was sold as a package to a commercial developer and clear title was required for the transaction to occur.

The next annual installment on the Hancock note was due on 1 July 1981 but was not paid. Kenyon and Rice refused the demand of plaintiff Branch Banking and Trust Co. (BB&T) with whom Independence National Bank had merged, for payment. On 2 December 1982, BB&T filed an action seeking to foreclose on the Hancock deed of trust in order to satisfy the indebtedness remaining on the Hancock note. Meanwhile, Kenyon had merged with Sunstates Corporation, a named defendant. Thomas A. Robinson, also a named defendant, had been substituted as trustee under the Hancock deed of trust.

On 13 February 1983, defendants answered the complaint, denying any obligation with respect to the Hancock indebtedness. Defendants also counterclaimed seeking to have BB&T's lien removed as a cloud on the title. BB&T responded and, in February 1984, both sides moved for summary judgment. Summary judgment was granted in favor of defendants. BB&T's motion for summary judgment was denied and BB&T appealed.

Mullen, Holland, and Cooper, by Raboteau T. Wilder, Jr. and William E. Moore, Jr., for plaintiff-appellant.

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

EAGLES, Judge.

The question presented by this appeal is whether BB&T may foreclose on the deed of trust to the real property acquired by Kenyon and Rice from the Gardners through foreclosure. For the reasons set out below, we hold that BB&T has the right to foreclose on the land and that they were entitled to summary judgment in their favor.

I

[1] Prior to the foreclosure by Kenyon and Rice (hereafter collectively referred to as Kenyon), Independence National Bank (Independence) held a recorded deed of trust to the property as security for a $152,000 promissory note on which Max Gardner was the principal obligor, having assumed the obligation from Sonny Hancock. Gardner Land Company, Independence's predecessor in title to the deed of trust, consented to the assumption. Kenyon held a second deed of trust on the same land as partial

security for a $500,000 debt owed by Max Gardner and his wife. The second deed of trust recited specifically that it was *subject to* the first deed of trust.

In this situation, the relationship of the parties with respect to one another is well-established. Independence held legal title to the land and Gardner held the beneficial title or an equity of redemption. *Riddick v. Davis*, 220 N.C. 120, 16 S.E. 2d 662 (1941). As between Gardner and Hancock (the original mortgagor), Gardner was the principal debtor on the note held by Independence and Hancock was the surety. *Keen v. Parker*, 217 N.C. 378, 8 S.E. 2d 209 (1940); *Rector v. Lyda*, 180 N.C. 577, 105 S.E. 170, 21 A.L.R. 411 (1920). The assumption agreement between Gardner and Hancock inured to the benefit of Independence, who was entitled as a third party beneficiary to maintain an action for enforcement of the agreement. *Beaver v. Ledbetter*, 269 N.C. 142, 152 S.E. 2d 165 (1967); *Baber v. Hanie*, 163 N.C. 588, 80 S.E. 57 (1913). Gardner Land Company's consent to the agreement, which was binding on Independence, recognized the principal-surety relationship between Gardner and Hancock and likewise recognized Gardner's personal liability on the note while essentially releasing Hancock. *Keen v. Parker, supra. State-Planter's Bank and Trust v. Randolf*, 207 N.C. 241, 176 S.E. 561 (1934). *See generally*, 9 N.C. Index 3d, *Mortgages*, Sections 15-15.3 (1977 and Supp. 1984); Hetrick, *Webster's Real Estate Law in North Carolina* Section 269 (rev. ed. 1981); 59 C.J.S. *Mortgages* Section 408 (1949); 55 Am. Jur. 2d *Mortgages* Section 1037 (1971).

The deed of trust held by Kenyon was, as noted above, expressly subject to the deed of trust held by Independence. Under established law, whatever rights Kenyon had in the subject property by virtue of the deed of trust would be subject to the Hancock deed of trust held by Independence. 55 Am. Jur. 2d *Mortgages* Section 1038. *See Weil v. Casey*, 125 N.C. 356, 34 S.E. 506 (1899); *Vanstory v. Thornton*, 112 N.C. 196, 17 S.E. 566 (1893) (rights of prior judgment creditors not affected by subsequent execution of mortgage in favor of third party). The nature of the interest possessed by Kenyon by virtue of the deed of trust is less clear. The Hancock note provided that no assumption would be allowed without the holder's consent. Accordingly, Kenyon, whose interest was subject to the prior mortgage, did not have a clear right to step into the shoes of the Gardners with respect to the

note in the event they succeeded to the Gardners' equitable interest in the land. While a mortgagee may not impose restrictions on the alienability of property subject to a deed of trust, the deed of trust may contain a due on sale clause that permits the mortgagee to accelerate the mortgage for the purpose of negotiating more favorable terms, such as a higher interest rate, with the transferee. *Crockett v. Savings and Loan Association*, 289 N.C. 620, 224 S.E. 2d 580 (1976). The Hancock deed of trust provided that if any of its terms or the terms of the note were violated, the note would, at the holder's option, be due and payable. Thus, Kenyon's interest in the Gardner equity would preserve for him a good bargaining position for renegotiating the mortgage terms.

II

[2] When the Gardners defaulted on the Kenyon note, Kenyon foreclosed and purchased the Gardners' interest at the foreclosure sale, succeeding the Gardners as the holders of equitable title. The relationship of the parties among themselves is less clear cut. The trustee's deed conveying the Gardners' interest to Kenyon is silent regarding the Hancock mortgage. There was no agreement of record between Kenyon and the Gardners for Kenyon to assume the debt. In such situations, the law deems the transferee to have taken the land subject to the prior mortgage. *See Harvey v. Knitting Company*, 197 N.C. 177, 148 S.E. 45 (1929); *Arnold v. Howard*, 29 N.C. App. 570, 225 S.E. 2d 149 (1976). Since there was no assumption of the mortgage debt incident to the transfer of the land, Kenyon had no personal liability for the debt either as to Independence or as to Gardner. *Henry v. Heggie*, 163 N.C. 523, 79 S.E. 982 (1913), and Gardner remained personally liable on the note. *Keller v. Parish*, 196 N.C. 733, 147 S.E. 9 (1929). Independence could not prevent the transfer of the land securing its note but could, under the terms of the note and the deed of trust, refuse to allow assumption of the debt and could declare the balance due and payable. *Crockett v. Savings and Loan Assoc., supra.* This they did by their letter of 26 June 1979.

Regardless of who was personally liable on the note or who held equitable title to the land, the law is clear that Independence had the right, upon default, to foreclose on the deed of trust and satisfy the debt from proceeds of the sale of the land. *McKinney*

v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928). *See generally*, Hetrick, *supra*.

III

[3] Although Independence communicated to Kenyon its intent to accelerate the debt, they entered into negotiations instead. The installment due on the Hancock note on 1 July 1979 was not paid and the mortgage, according to its terms, was in default. The negotiations between Kenyon and Independence produced an agreement that was evidenced by the 19 July 1979 letter from Independence to Kenyon. Its terms were essentially that Independence would not foreclose on the deed of trust as long as Kenyon kept the loan payments current. Kenyon also agreed to cure the existing default by payment of a lump sum of overdue principal and interest. The agreement apparently did not increase the principal amount of the debt or the rate of interest. Further, the maturation date of the mortgage was not changed. The agreement, however, did permit prepayment of the note in case of sale or development of the land by Kenyon. Prepayment was not allowed under the Hancock note without consent of the holder. The letter recites the further agreement of the parties that the acceptance of payments by Independence "does not constitute a formal loan assumption by Kenyon" and that Independence's future rights as lienholder were not diminished or altered in the event of a subsequent default.

a.

The relationship of the parties resulting from this agreement is, in our opinion, a key to the resolution of this appeal. The agreement resembles an assumption agreement in the obligations that it imposes upon the parties. However, one of the requisites of an assumption agreement is that the intent of the parties be clear. *Beaver v. Ledbetter, supra.* It is a general rule of contract law that the intent of the parties, where not clear from the contract, may be inferred from their actions. This general rule applies to transfers of land so that a transferee's intent to assume the mortgage debt may be implied from the actions of the parties. 59 C.J.S. *Mortgages* Section 406 Osborne, Nelson, Whitman, *Real Estate Finance Law* Section 5.8 (1979). Though we find no binding precedent, at least one authority has indicated that this consequence may be avoided by specifically providing in the instru-

ment that the agreement is *not* an assumption. Osborne et al., *supra*, Section 5.8.

Kenyon argues that the language in their agreement indicates clearly that no assumption was intended and that no personal liability attached to them by virtue of the agreement. This being so, they argue that Independence's subsequent release (in the Bankruptcy Settlement Agreement of 13 May 1980) of Max Gardner's obligation on the note that was secured by the deed of trust had the effect of satisfying the debt, entitling Kenyon to cancellation of the deed of trust thereby uniting legal and equitable title in Kenyon. In support of this argument, Kenyon relies on the well established rule that satisfaction of a debt secured by a deed of trust entitles the holder of the equity of redemption to cancellation of the deed of trust. *Walston v. Twiford*, 248 N.C. 691, 105 S.E. 2d 62 (1958); *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785 (1954). *See generally*, 9 N.C. Index 3d *Mortgages* Section 17; Hetrick, *supra*, Section 284. The general rule is that release or forgiveness of a secured debt has the same effect as satisfaction of the debt. 55 Am. Jur. 2d *Mortgages* Section 462.

b.

BB&T argues that even if the agreement does not constitute a formal assumption, it nevertheless evidences the clear intention of the parties that Kenyon assume the obligation represented by the Hancock note and secured by the Hancock deed of trust. BB&T argues that the intent of the parties is not only evident from the letter, but also from Kenyon's subsequent actions in compliance with the agreement: the payment of $15,000 for the partial release, and the provision in the Bankruptcy Settlement Agreement that Kenyon would assume liability for the Hancock debt and hold the Gardners harmless in any action instituted against them by Independence respecting the Hancock mortgage.

c.

Although not a formal assumption, the agreement between Kenyon and Independence evidenced by the letter makes a disposition of their rights and liabilities with respect to one another and to the Gardners. So far as our research can determine, the result of the foregoing transactions is without precedent in the jurisprudence of this state. There was a transfer of equitable title

to Kenyon which, by operation of law because the deed was silent, was subject to the Hancock deed of trust. There was also a collateral agreement between the parties, detailed above, whereby Kenyon undertook to pay the preexisting mortgage debt on the property transferred in return for which Independence agreed not to foreclose on the mortgage in default.

The courts of other jurisdictions have confronted similar situations and the following general rule has evolved in the reported cases: Where a transferee takes an equity of redemption subject to a prior deed of trust, but does not assume the grantor's obligation on the note secured by it, the grantor occupies the position of a surety. In the event of a valid agreement between the mortgagee and the transferee to pay the note, the grantor is discharged from any personal obligation to the extent of the value of the land transferred. *See e.g., Shine v. Washington Loan Co.*, 112 Ga. App. 827, 146 S.E. 2d 371 (1965); *North End Savings Bank v. Snow*, 197 Mass. 339, 83 N.E. 1099 (1908); *McFarlane v. Melson*, 323 Mo. 977, 20 S.W. 2d 63 (1929); *Hulin v. Veatch*, 148 Ore. 119, 35 P. 2d 253, 94 A.L.R. 1319 (1934); *Singer-Fleischaker Royalty Co. v. Whisenhunt*, 402 P. 2d 886 (Okla. 1964). *See generally* 55 Am. Jur. 2d *Mortgages* Section 1117; *Annot.* 94 A.L.R. 1329 (1935); 59 C.J.S. *Mortgages* Section 401(b). The cases hold generally that the agreement to pay the debt, if supported by consideration, stands on its own and that the mortgagee may recover either by suing the transferee on the note or by foreclosing on the deed of trust. *See Annot.* 94 A.L.R. 1329 at 1334. *E.g., Person v. Plough*, 174 Wash. 160, 24 P. 2d 591 (1933). The effective result is a *de facto* assumption of the mortgage debt by the transferee of the equitable interest.

Though we have found no North Carolina cases directly on point, G.S. 45-45.1 sets forth the following general rule:

> (3) Whenever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust makes a binding extension of time of the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property at the time of the extension agreement.

BB&T argues that the statute applies to and controls the situation before us. That argument fails because the transfer to Kenyon by the trustee's deed was not *expressly* subject to the Hancock deed of trust. Nevertheless, we think that the result required by the statute, in cases where it does apply, is the proper result in cases like this one where the transfer of equitable title is subject to a prior deed of trust by operation of law.

d.

The question remaining, then, is whether the agreement evidenced by the letter contains a valid and enforceable promise by Kenyon to pay the mortgage debt which would survive the subsequent release in bankruptcy of the Gardners' obligation. Because of the similarity between this agreement and a formal assumption agreement, we think that the criteria for determining the validity of assumption agreements are relevant here.

The letter evidences an agreement that is collateral to the conveyance but clearly separate from it and not contemporaneous. In order to be valid and binding, Kenyon's promise to pay must be supported by some new consideration, the earlier conveyance of the equitable interest from the Gardners not being sufficient. 59 C.J.S. *Mortgages*, Section 409. Though there are cases to the contrary, *e.g., Citizens Permanent Savings and Loan v. Rampe*, 68 App. Div. 556, 74 N.Y.S. 192 (1902), mere forbearance by a mortgagee of his right to declare the balance on a note due and payable is not sufficient consideration to support a separate, collateral agreement to pay a note. *E.g., Alsobrook v. Taylor*, 181 Ga. 10, 181 S.E. 182 (1935); *Adler v. Berkowitz*, 254 N.Y. 433, 173 N.E. 574 (1930); *Schafer v. Seller*, 156 Ore. 16, 64 P. 2d 1334 (1937). *See generally, Annot.*, 94 A.L.R. 1329 (1935); 59 C.J.S. *Mortgages*, Section 401. Generally, an actual extension of the maturity date of the mortgage without the knowledge or consent of the mortgagor is sufficient consideration for the transferee's promise to pay the underlying debt. *E.g., Conway Savings Bank v. Vinick*, 287 Mass. 448, 192 N.E. 81 (1934); *Person v. Plough, supra. See generally, Annot.*, 94 A.L.R. 1329, 1334-35 (1935); 55 Am. Jur. 2d *Mortgages*, Sections 1069, 1117; 59 C.J.S. *Mortgages*, Section 401(b). We note further that G.S. 45-45.1(3) (quoted *supra*), in the cases to which it applies, also contemplates an extension.

Applying principles of contract law, however, the important consideration in determining whether a promise is enforceable is whether it is merely a naked promise or whether it is part of an agreement that stands on its own as a contract. *See Annot.*, 94 A.L.R. 1329 (1935); 3 N.C. Index 3d *Contracts* Section 4 (1976). Regarding the adequacy of forbearance as consideration, our Supreme Court has said:

> It is not necessary that the promisor receive consideration or something of value himself in order to provide the legal consideration sufficient to support a contract. Forbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance even though the forbearance is for a third person rather than that of the promisor. *Myers v. Allsbrook*, 229 N.C. 786, 51 S.E. 2d 629 (1949). In a guaranty contract, a consideration moving directly to the guarantor is not essential. The promise is enforceable if a benefit to the principal debtor is shown or if detriment or inconvenience to the promisee is disclosed. 38 Am. Jur. 2d, Guaranty Section 43, p. 1046.

Investment Properties v. Norburn, 281 N.C. 191, 196, 188 S.E. 2d 342, 345 (1972). Based on this precedent, forbearance is adequate consideration for Kenyon's promise to pay. Even if we were to follow the general rule and hold that mere forbearance is not adequate, we think that under the circumstances of this case, there is other consideration that is adequate to support Kenyon's promise to pay the mortgage debt and make it enforceable. This case differs from the usual case because at the time Independence and Kenyon reached their agreement the Hancock mortgage was already in default. Under the terms of the Hancock deed of trust, upon Independence's demand the balance on the note was due and payable on 1 July 1979. No payment was made and the default was not cured within the fifteen days allowed under the terms of the deed of trust. Rather than foreclose, Independence negotiated what in essence was a new agreement for the payment of the note under which Kenyon became the principal obligor by operation of law, as discussed above. At least one reported case holds that such an agreement constitutes an extension releasing the mortgagor from liability on the note. *Hoffman v. Piccone*, 137 Misc. 537, 242 N.Y.S. 707 (1930). Further, Independence relinquished its option to accept or refuse prepayment of the loan,

agreeing unequivocally to accept prepayment in the event of a sale or development by Kenyon. One North Carolina authority indicates that a novation is sufficient to discharge the mortgagor's personal obligation. Hetrick, *supra*, Section 267.

Kenyon attempts to counter the application of this general rule by arguing that Max Gardner's consent to the extenstion can be inferred from the following language in the Hancock deed of trust: "If the Grantor [Hancock or successor] shall pay the Note secured hereby, in accordance with its terms together with interest thereon *and any renewals or extensions* in whole or in part, . . . then this conveyance shall be null and void. . . ." In support of their argument, Kenyon cites *Wachovia Realty Investment v. Housing, Inc.*, 292 N.C. 93, 232 S.E. 2d 667 (1977). We disagree with Kenyon and find the authority it cites inapposite. The maker of the note in *Wachovia* consented to be bound by the note until it was paid "notwithstanding any extensions." The Supreme Court accordingly held that an extension of time would not release the maker from principal liability on the note. However, the language of the Hancock deed of trust that is relied on by Kenyon does not evidence such consent. Rather, it states a condition in the contract to reconvey, upon the performance of which the mortgagor will be entitled to cancellation of the deed of trust. Hetrick, *supra*, Section 257(b). Kenyon further contends that there is no evidence of the value of the property transferred against which the extent of Gardner's release may be calculated. While we agree with Kenyon, we point out that this deficiency in no way diminishes the effectiveness of the agreement to shift personal liability on the note—Kenyon is still liable.

The lack of evidence of value does raise a question of fact that would ordinarily require further proceedings for proper determination. However, Independence's subsequent release in bankruptcy of Gardner's obligation on the note effectively moots that issue.

e.

The behavior of the parties after the execution of the agreement only reinforces the conclusion that they intended Kenyon to assume personal liability on the mortgage debt. Kenyon made two payments, totalling more than $20,000, according to the agreement and paid $15,000 for Independence's release of its lien on a

part of the land. This conduct is clear evidence that the parties thought that a valid, enforceable agreement existed between them.

IV

As discussed above, the agreement operated to release Gardner from liability on the note to the extent of the value of the interest conveyed to Kenyon. With this in mind, and recalling that a mortgagee's consent to an assumption agreement releases the mortgagor from any personal liability, the provision in the agreement that it did not constitute a formal assumption merely insures that Independence would be able to recover fully in case of a default on the Hancock note by being able to sue Gardner for any deficiency remaining after a foreclosure sale on the land.

[4] This was the relationship of the parties as of the date of institution of bankruptcy proceedings by Gardner. In the agreement resulting from those proceedings, Independence released Gardner to the extent of any obligation remaining on the Hancock note. The effect of this was to release Gardner from any obligations that remained on the note after the agreement by Kenyon to pay it. Kenyon, in its Bankruptcy Settlement Agreement with Gardner, agreed to assume any liability that the Gardners "may have had or now have" on the Hancock note. This language constitutes a formal assumption by Kenyon of the Hancock note, which is consistent with the effective result of Independence's release.

Returning to the principles set out earlier, the formal assumption by Kenyon of the Hancock indebtedness with the consent of Independence makes Kenyon primarily liable for the full amount and entitles BB&T, as successor to Independence, upon default either to sue on the note or to foreclose on the deed of trust. *Beaver v. Ledbetter, supra.*

V

The relief sought by BB&T was a court order for the foreclosure of the Hancock deed of trust. The issues raised by a motion for summary judgment are (1) whether, on the basis of the pleadings, affidavits and other documents submitted in support of and in opposition to the motion, the moving party has established that there is no issue of material fact and (2) whether he is en-

titled to the requested relief as a matter of law. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981); *Cameron Brown Capital Corp. v. Spencer*, 31 N.C. App. 499, 229 S.E. 2d 711 (1976), *rev. denied*, 291 N.C. 710, 232 S.E. 2d 203 (1977). If the movant's burden is carried, the burden is on the opposing party to show that there is a question of material fact that can only be resolved by proceeding to trial. *Carson v. Sutton*, 35 N.C. App. 720, 242 S.E. 2d 535 (1978). On the basis of the documents submitted by both parties, we do not perceive an issue of material fact. On the basis of the applicable law, we think that BB&T was entitled to the relief requested in its motion and that the trial court should have ordered foreclosure on the Hancock deed of trust. Accordingly, the order of the trial court is reversed and the case remanded with instructions that summary judgment be entered in favor of BB&T.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

RODGERS BUILDERS, INC. v. JAMES DOUGLAS McQUEEN; McQUEEN PROPERTIES, LTD., A CORPORATION; AND PARKHILL ASSOCIATES, A LIMITED PARTNERSHIP

No. 8426SC1261

(Filed 16 July 1985)

1. **Arbitration and Award § 7; Judgments § 35.1— judgment on arbitration award—res judicata**

The doctrine of *res judicata* applies to a judgment entered on an arbitration award as it does to any other final judgment.

2. **Arbitration and Award § 7; Judgments § 37.3— judgment on arbitration award—res judicata—issues that could have been decided**

A judgment entered on an arbitration award, like any other final judgment, operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination.

3. Arbitration and Award § 1— claims based on tortious conduct or unfair trade practices—claims for punitive damages—no legislative bar to arbitration

There is no legislative bar to arbitration of claims based on tortious conduct or unfair and deceptive trade practices and claims for punitive damages as long as they arise out of or relate to a contract providing for arbitration or its breach. G.S. 1-567.2(a).

4. Arbitration and Award § 1— scope of agreement to arbitrate

Because the duty to arbitrate is contractual, only those disputes which the parties agreed to submit to arbitration may be so resolved. To determine whether the parties agreed to submit a particular dispute or claim to arbitration, the appellate court must look at the language in the agreement, *viz.*, the arbitration clause, and ascertain whether the claims fall within its scope, and in so doing, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

5. Arbitration and Award § 5— scope of arbitration agreement—tort or contract claims

A contract provision for arbitration of "All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof" was sufficiently broad to include any claims which arise out of or are related to the contract or its breach, regardless of the characterization of the claims as tort or contract.

6. Arbitration and Award § 5— claims for fraud, unfair trade practices and negligent misrepresentation—within scope of arbitration clause

A construction contractor's claims against the owner to recover compensatory and punitive damages for fraud, unfair trade practices and negligent misrepresentation bore a sufficiently strong relationship to the contract or its breach so that they fell within the scope of an arbitration clause in the contract.

7. Arbitration and Award § 5— arbitrability of unfair trade practices claim

A construction contractor's claim against the owner for unfair and deceptive trade practices was arbitrable where the claim concerns essentially a private dispute and appears asserted merely to bolster and supplement the remainder of plaintiff's claims and to increase the amount of damages recoverable.

8. Arbitration and Award § 5— arbitrability of claims for punitive damages

Claims for punitive damages are arbitrable when they fall within the scope of an arbitration agreement.

9. Arbitration and Award § 7— person not party to arbitration bound by award

A person who was not named as a party to arbitration was bound by the judgment on the arbitration award where he had a strong interest in the determination of issues in the arbitration proceeding because of his ownership interest in two parties to the arbitration, and he was an active and controlling participant in the arbitration.

10. Arbitration and Award § 7; Judgments § 37.6— res judicata—claims barred by judgment on arbitration award

A construction contractor's claims against the owner to recover compensatory and punitive damages for fraud, unfair trade practices and negligent misrepresentation were barred by *res judicata* due to a judgment entered on an arbitration award where the claims were within the scope of an arbitration agreement between the parties, the claims concerned essentially the same subject matter, the same issues and the same parties as the prior arbitration proceeding, and the claims were or could have been asserted and determined in the arbitration proceeding.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 27 August 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 May 1985.

This is a civil action wherein plaintiff construction company seeks to recover compensatory and punitive damages from defendants for fraud, unfair and deceptive trade practices, and negligent misrepresentation. From the entry of summary judgment for defendants, plaintiff appeals.

Casey, Bishop, Alexander & Murphy, by Hugh G. Casey, Jr., for plaintiff appellant.

Jones, Hewson & Woolard, by Harry C. Hewson and Hunter M. Jones, for defendant appellees.

WHICHARD, Judge.

On 6 December 1982 plaintiff entered into a written contract with defendant McQueen Properties, Ltd., a corporation apparently controlled by defendant James McQueen, in which plaintiff agreed to construct a multi-unit housing project on land purportedly owned by McQueen Properties. The contract contains an arbitration clause which provides as follows, in relevant part: "All claims, disputes and other matters in question between the Contractor [plaintiff] and the Owner [McQueen Properties] arising out of, or relating to, the Contract Documents or the breach thereof, . . . shall be decided by arbitration . . . ." As plaintiff neared completion of the project, a dispute arose concerning plaintiff's alleged failure to complete the project within the time specified in the contract and McQueen Properties' subsequent refusal to pay a draw request in the amount of $177,000 submitted by plaintiff.

Plaintiff demanded arbitration of the dispute. In its demand plaintiff indicated that it sought the $177,000 due on the draw request, the owner's signature on change orders, overhead and profit in allowances, and the "[r]esolution of all claims arising under the contract." An arbitration hearing was scheduled for 14 December 1983.

Thereafter plaintiff learned that Parkhill Associates, a limited partnership in which James McQueen and McQueen Properties are the general partners, was in fact the title owner of record of the land on which the housing project had been built. Plaintiff thereupon filed an amendment to its demand for arbitration joining Parkhill Associates as an additional party. In its amendment plaintiff indicated that it sought damages in the amount of $611,326.24 caused by the owner's indecision and interference with work on the project. It is clear from the record that the "Owner" referred to in the amendment was James McQueen. Because of the late addition of Parkhill Associates as a party to the arbitration, the hearing was continued until January 1984 at the request of defendants' attorneys.

Plaintiff then instituted the present action for money owed for labor and materials, and for fraud and unfair and deceptive trade practices. Plaintiff requested that the court delay trial and entry of judgment in the action until the outcome of the arbitration. In February 1984 an award was entered "in full settlement of all claims submitted to [the] arbitration" which directed McQueen Properties and Parkhill Associates, jointly and severally, to pay plaintiff $407,259. The award was confirmed by the superior court and entered as a judgment.

Thereafter plaintiff filed an amended complaint in the present action seeking compensatory and punitive damages for fraud, unfair and deceptive trade practices, and negligent misrepresentation. In Count I of the amended complaint plaintiff set forth allegations of fraud which may be summarized as follows: In December 1980 McQueen Properties deeded the property on which the housing project was built to James McQueen. On 23 November 1982 James McQueen deeded the property to Parkhill Associates. As part of the latter transaction Parkhill Associates executed deeds of trust to First Union National Bank and James McQueen. On both deeds of trust James McQueen signed on be-

half of Parkhill Associates. On 6 December 1982 James McQueen, acting individually and as agent for McQueen Properties, falsely represented to plaintiff that McQueen Properties was the owner of the property on which the housing project was to be built. Plaintiff entered the contract with McQueen Properties for the construction of the project in reliance on James McQueen's false representation. The misrepresentation materially deceived plaintiff and resulted in the late joining of Parkhill Associates as a party to the arbitration, which delayed the arbitration. This delay damaged plaintiff by causing it to incur additional interest on loans obtained because its draw requests had not been paid. The aforesaid actions by defendants were committed knowingly and willfully with the intent to deceive plaintiff and did in fact materially deceive plaintiff in its dealings with defendants. Such actions justify punitive damages of one million dollars, the amount plaintiff believes James McQueen expects to realize as profit from the housing project.

Plaintiff further alleged in Count I: James McQueen and Parkhill Associates attempted to convey condominium units in the project without informing purchasers that the units were subject to plaintiff's lien. James McQueen, acting as partner, signed warranty deeds conveying six condominium units even though he knew plaintiff had recorded a claim of lien in the amount of $439,138.79 on the property. The warranty in the above deeds was a misrepresentation. In November 1983 McQueen Properties, through its attorneys, fraudulently and without plaintiff's consent entered a cancellation of plaintiff's lien on the judgment docket. The aforesaid actions were done to defraud plaintiff as a creditor of Parkhill Associates. In December 1983 McQueen's lawyers served a "Motion To Discharge Lien" on plaintiff in a case which they knew had been voluntarily dismissed and did so on behalf of and at the direction of defendants in an attempt to dissuade plaintiff from bringing a lawsuit to perfect its claim of lien. Service of the above-mentioned motion constitutes abuse of process by defendants and was a deceit.

In Count II of the amended complaint plaintiff realleged and incorporated the allegations in Count I and further alleged the following as an unfair and deceptive practices claim: Parkhill Associates placed the deed of trust in favor of James McQueen on record in November 1982 to enable McQueen to foreclose and sell

the property on which the housing project was built in the event plaintiff attempted to enforce a judgment, and did so to defraud and defeat the claims of creditors in violation of G.S. 39-15. James McQueen repeatedly interfered with and delayed work on the housing project and was abusive to plaintiff's employees and the subcontractors working on the project. Such actions by James McQueen were part of his design to delay the project so that he could assert a spurious claim for damages against plaintiff in an attempt to "bully" plaintiff into foregoing sums owed it for its work on the project. Defendants' acts injured plaintiff by forcing it to expend additional labor, material, and overhead, which finally resulted in a cost overrun on the project of approximately $300,000. The above acts of James McQueen were deceptive and in violation of G.S. 75-1.1.

In Count III plaintiff realleged and incorporated the allegations of the previous counts, and alleged that defendants' false representation that McQueen Properties was the owner of the property constitutes substantial and material negligent misrepresentation upon which plaintiff relied to its detriment, and that such misrepresentation by defendants was grossly negligent and committed with reckless disregard of plaintiff's rights and interests and entitles plaintiff to punitive damages.

Plaintiff alleged that as a result of defendants' acts it suffered general and special damages of one million dollars each and that it was entitled to punitive damages of one million dollars. Plaintiff indicated that its special damages were attributable to: interest incurred on loans it was forced to obtain because of defendants' refusal to pay draw requests; the decline in its financial worth and impairment of its bonding capacity caused by the outstanding loans; diversion of labor and materials which could have been used on other jobs to the housing project; lost profits resulting from the impairment of its capital; corresponding loss of business; and cost overrun in the amount of $300,000. Plaintiff sought to recover the above damages, as well as its costs and attorneys' fees, and requested that the court set aside as void the deed of trust executed by Parkhill Associates in favor of James McQueen. Plaintiff further requested that any damages assessed against defendants be trebled in accordance with G.S. 75-16.

In response defendants filed a motion for summary judgment based on numerous documents including the amended complaint, the judgment entered on the arbitration award, and a transcript of portions of the arbitration proceeding. The superior court granted the motion, finding "that there is no genuine issue as to any material fact which is necessary to the consideration of this motion and the entry of summary judgment in favor of the defendants and that the defendants are entitled to judgment as a matter of law." Plaintiff appeals.

Plaintiff contends the court erred in granting summary judgment for defendants. G.S. 1A-1, Rule 56(c) permits summary judgment if the materials submitted to the court show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. The materials submitted in support of the motion here show that the claims asserted in the present action arise out of the dispute which was submitted to arbitration. Thus this appeal presents the question of whether defendants were entitled to summary judgment on the ground that plaintiff's claims are barred under the doctrine of res judicata.

[1] The doctrine of res judicata applies to a judgment entered on an arbitration award as it does to any other final judgment. *See* M. Domke, *Domke on Commerical Arbitration* Sec. 39:04, at 510 (rev. ed., Wilner 1984); *see also* G.S. 1-567.15. Thus, a judgment entered on an arbitration award is conclusive of all rights, questions, and facts in issue, as to the parties and their privies, and as to them constitutes an absolute bar to a subsequent action arising out of the same cause of action or dispute. *See* Domke, *supra; see also King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E. 2d 799, 804 (1973).

[2] Such a judgment, like any other final judgment, operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. *See In re Trucking Co.*, 285 N.C. 552, 560, 206 S.E. 2d 172, 178 (1974); *King v. Grindstaff*, 284 N.C. at 356, 200 S.E. 2d at 805; *Bruton v. Light Co.*, 217 N.C. 1, 7, 6 S.E. 2d 822, 826 (1940); *see also James L. Saphier Agency,*

Inc. v. Green, 190 F. Supp. 713, 719 (S.D.N.Y. 1961), *aff'd*, 293 F. 2d 769 (1961). A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the arbitration or litigation with respect to matters which might have been brought forward in the previous proceeding. *In re Trucking Co.*, 285 N.C. at 560, 206 S.E. 2d at 178; *Bruton v. Light*, 217 N.C. at 7, 6 S.E. 2d at 826. The scope of an arbitration award and its res judicata effect are matters for judicial determination; therefore, whether plaintiff's claims are barred was for the superior court to determine. *See Rembrandt Indus., Inc. v. Hodges International, Inc.*, 344 N.E. 2d 383, 384 (N.Y. 1976); *cf., Development Co. v. Arbitration Assoc.*, 48 N.C. App. 548, 552, 269 S.E. 2d 685, 687 (1980), *disc. rev. denied*, 301 N.C. 719, 274 S.E. 2d 227 (1981) (whether arbitration is barred by the res judicata or collateral estoppel effect of a prior judgment is a matter for judicial determination).

Plaintiff contends that its claims are not barred by the judgment entered on the arbitration award because they could not or should not have been brought forward in the arbitration proceeding. Plaintiff argues that its claims are not within the scope of the arbitration clause contained in its contract with McQueen Properties and are not arbitrable because the claims are based on tortious conduct or unfair and deceptive practices and because plaintiff seeks to recover punitive damages.

[3] Our courts have not previously addressed the arbitrability of claims based on tortious conduct or unfair and deceptive practices, or of claims for punitive damages. G.S. 1-567.2(a), however, provides that parties "may include in a written contract a provision for the settlement by arbitration of *any* controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof." (Emphasis supplied.) Thus, there is no legislative bar to arbitration of these claims as long as they arise out of or relate to the contract or its breach.

[4] Because the duty to arbitrate is contractual, only those disputes which the parties agreed to submit to arbitration may be so resolved. *See Coach Lines v. Brotherhood*, 254 N.C. 60, 67-68, 118 S.E. 2d 37, 43 (1961). To determine whether the parties

agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement, *viz.*, the arbitration clause, and ascertain whether the claims fall within its scope. In so doing, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E. 2d 872, 876 (1984), *quoting Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L.Ed. 765, 785, 103 S.Ct. 927, 941 (1983). This is so because public policy in this State, like federal policy, favors arbitration. *See Cyclone Roofing*, 312 N.C. at 229, 321 S.E. 2d at 876; and *Moses H. Cone Hospital*, 460 U.S. at 24, 74 L.Ed. 2d at 785, 103 S.Ct. at 941; *see also Thomas v. Howard*, 51 N.C. App. 350, 355-56, 276 S.E. 2d 743, 747 (1981). Because federal policy and the policy of this State are the same in this regard, it is appropriate to look to federal cases for guidance in determining whether plaintiff's claims fall within the scope of the arbitration clause.

Other courts have generally agreed that whether a claim falls within the scope of an arbitration clause and is thus subject to arbitration depends not on the characterization of the claim as tort or contract, but on the relationship of the claim to the subject matter of the arbitration clause. *See, e.g., McBro Planning & Develop. v. Triangle Elec. Const.*, 741 F. 2d 342, 344 (11th Cir. 1984); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F. 2d 1163, 1167 (8th Cir. 1984); *In re Oil Spill by Amoco Cadiz, etc.*, 659 F. 2d 789, 794 (7th Cir. 1981); *see also Altshul Stern v. Mitsui Bussan Kaisha, Ltd.*, 385 F. 2d 158, 159 (2d Cir. 1967) ("Plaintiff cannot avoid the broad language of the arbitration clause by casting its complaint in tort."). Arbitration clauses worded similarly to the one here have been found sufficiently broad to include tort claims which arise out of or are related to the contract between the parties or their contractual relationship. *See Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F. 2d 334, 338 (7th Cir. 1984); *Acevedo Maldonado v. PPG Industries, Inc.*, 514 F. 2d 614, 616 (1st Cir. 1975); *Bos Material Handling v. Crown Controls Corp.*, 137 Cal. App. 3d 99, 105-06, 186 Cal. Rptr. 740, 742-43 (1982).

In *Pierson*, 742 F. 2d at 338, the Seventh Circuit held that where the contract between the parties provided for the arbitration of any controversy "arising out of or relating to this contract or breach thereof," the plaintiffs' claims for fraud under the con-

tract, breach of fiduciary duty, negligence, and gross negligence were included within the scope of the arbitration provision. In *Acevedo*, 514 F. 2d at 616, the First Circuit held that contract provisions for the arbitration of "any controversy or claim arising out of or relating to this Agreement or the breach thereof" were sufficiently broad to cover contract-generated or contract-related disputes between the parties regardless of whether the claims are in contract or in tort. Similarly, in *Bos*, 137 Cal. App. 3d at 105-06, 186 Cal. Rptr. at 742-43, the court interpreted a clause in a dealer agreement which provided that "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration . . ." as sufficiently broad to include tort as well as contract claims which " 'have their roots in the relationship between the parties which was created by the contract,' " including the plaintiff's claims for wrongful termination of the dealership, fraud, unfair competition, restraint of trade, and wrongful misrepresentation.

[5, 6] In light of this State's policy favoring arbitration, we conclude that the language of the arbitration clause here is sufficiently broad to include *any* claims which arise out of or are related to the contract or its breach, regardless of the characterization of the claims as tort or contract. The claims asserted here all concern alleged tortious conduct on the part of defendants which occurred in connection with, or as a part of, the formation of, performance under, or breach of the contract between plaintiff and McQueen Properties. The actions which form the basis for the claims allegedly were taken for the purpose of defeating plaintiff's claim for damages arising under the contract. The damages plaintiff seeks to recover, with the exception of the punitive damages, resulted either from defendants' alleged failure to pay money due under the contract or from James McQueen's alleged interference with plaintiff's performance under the contract. Plaintiff's claim for punitive damages is based on defendants' negligent or fraudulent misrepresentation as to the owner of the property to which the contract related; thus, it also has a strong relationship to the contract and its breach. We conclude that there is a sufficiently strong relationship between plaintiff's claims and the subject matter of the arbitration clause, *viz.*, the contract or its breach, that they should be considered as arising out of or relating to the contract or its breach. They thus fall

within the scope of the arbitration clause and are included within the category of claims which the parties agreed to arbitrate.

[7] Plaintiff contends, however, that its unfair and deceptive practices claim pursuant to G.S. 75-1.1 is not proper for arbitration, citing *Wineland v. Marketex Intern., Inc.*, 627 P. 2d 967 (Wash. App. 1981). In *Wineland*, the Washington Court of Appeals held that an unfair and deceptive practices claim brought pursuant to that state's consumer protection act, RCW 19.86.010 *et seq.*, was not referable to arbitration. *Id.* at 970. That court found that the Washington Consumer Protection Act was a state antitrust law and that claims under it, like those under federal antitrust laws, affect the public interest and thus must be judicially enforced. *Wineland*, 627 P. 2d at 969. In so holding the court relied on cases holding that federal antitrust claims are not arbitrable, particularly *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F. 2d 821, 828 (2d Cir. 1968). *Wineland* was subsequently overruled by the Washington Supreme Court in *Garmo v. Dean, Witter, Reynolds, Inc.*, 681 P. 2d 253, 255 (Wash. 1984).

Other courts have declined to exclude similar claims from arbitration. *See, e.g., J & K Cement Const. v. Montalbano Builders*, 456 N.E. 2d 889, 896 (Ill. App. 1983); *Greenleaf Engineering & Const. v. Teradyne*, 447 N.E. 2d 9, 12-13 (Mass. App. 1983); *Flower World of America, Inc. v. Wenzel*, 594 P. 2d 1015, 1019-20 (Ariz. App. 1978).

In *J & K Cement Const.* and *Greenleaf Engineering Const.*, a party set forth allegations in support of breach of contract and fraud claims, followed by a conclusory allegation that the acts complained of also constituted unfair and deceptive acts in violation of the state consumer protection act. In both cases the appellate court found that the allegations of unfair and deceptive acts were not asserted to vindicate any aspect of strong public policy, but were merely an attempt to bolster and supplement clearly private claims. *J & K Cement Const.*, 456 N.E. 2d at 896; *Greenleaf Engineering*, 447 N.E. 2d at 13. For that reason the unfair and deceptive acts claims were held to be arbitrable.

In *Flower World* the court found that the plaintiff's claim that the defendant violated the state's consumer fraud act was "essentially a private dispute arising out of a commercial transac-

tion," that there was "no strong public policy favoring litigation rather than arbitration of the claim," and that therefore the claim was arbitrable under a broad arbitration clause. *Flower World*, 594 P. 2d at 1019-20. In so finding the court convincingly distinguished *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F. 2d 821 (2d Cir. 1968), on which the court in *Wineland* had relied.

We find the latter line of cases persuasive with respect to plaintiff's unfair and deceptive practices claim. The claim concerns essentially a private dispute and does not appear asserted to vindicate any strong public policy which requires that it be litigated rather than arbitrated. It appears asserted merely to bolster and supplement the remainder of plaintiff's claims and to increase the amount of damages recoverable. Accordingly, we find no reason to exclude this claim from arbitration.

[8] Plaintiff also contends that its claims are not arbitrable because it sought to recover punitive damages. Citing *Garrity v. Lyle Stuart, Inc.*, 353 N.E. 2d 793 (N.Y. 1976), plaintiff argues that punitive damages claims are not properly subject to arbitration. *Garrity* was an action to confirm an arbitration award granting a party compensatory and punitive damages. The New York Court of Appeals, in a four to three decision, vacated the award of punitive damages, reasoning as follows:

> An arbitrator has no power to award punitive damages, even if agreed upon by the parties. . . . Punitive damages is a sanction reserved to the State, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, an arbitrator's award which imposes punitive damages should be vacated.

Garrity, 353 N.E. 2d at 794. The court stated that "[t]he evil of permitting an arbitrator . . . to award punitive damages is that it displaces the court and the jury, and therefore the State, as the engine for imposing a social sanction." *Garrity*, 353 N.E. 2d at 796. The court further expressed concern that if arbitrators were permitted to award punitive damages, there would be no effective judicial supervision over such awards and the arbitrator's power would be uncontrollable. *Id.*

While one state court has agreed with *Garrity*, *see School City of East Chicago v. East Chicago Federation of Teachers*, 422 N.E. 2d 656, 662-63 (Ind. App. 1981), its rule has otherwise been criticized and rejected. *See, e.g., Willoughby Roofing & Supply v. Kajima Intern.*, 598 F. Supp. 353, 359-65 (N.D. Ala. 1984); *Willis v. Shearson/American Express, Inc.*, 569 F. Supp. 821, 823-24 (M.D.N.C. 1983); *Baker v. Sadick*, 162 Cal. App. 3d 618, 629-30, 208 Cal. Rptr. 676, 683-84 (1984). *See also* Note, *Punitive Damages In Arbitration: The Search for A Workable Rule*, 63 Cornell L. Rev. 272 (1978). Of these cases, *Willoughby*, 598 F. Supp. at 359-65, presents the most thorough analysis of both sides of the issue. The court there found unpersuasive the reasons stated by the *Garrity* court in support of its holding. It concluded that no public policy prohibits parties to a contract from vesting arbitrators with authority to consider claims for punitive damages and that to hold that such claims could not be arbitrated would be inconsistent with the strong federal policies favoring the arbitrability of issues and the remedial flexibility of arbitrators. *Id.* at 361-65; *see also Willis*, 569 F. Supp. at 824. The court noted that when both tort and contract claims arising from the same dispute are asserted, and punitive damages are sought, as here, application of the *Garrity* rule

> would require two trials—one before the arbitrator and then 'a separate judicial trial on essentially the same facts—obviously a wasteful exercise.' . . . This would undermine the chief advantages and purposes of arbitration—to relieve congestion in the courts and to achieve a quick, inexpensive and binding resolution of all disputes that arise between the parties to an agreement. [Citations omitted.]

Willoughby, 598 F. Supp. at 364. It stated that if parties wish to exclude the issue of punitive damages from arbitration, they are free to so specify in their agreement. *Id.* at 365; *see also Baker*, 162 Cal. App. 3d at 630, 208 Cal. Rptr. at 684. The court further concluded that the arbitration clause there—which was essentially the same as that here—was broad enough to empower the arbitrators to award punitive damages. *Willoughby*, 598 F. Supp. at 357-59.

We believe the *Willoughby* position the better reasoned one. We detect no public policy in this State prohibiting the arbitra-

tion of claims for punitive damages which fall within the scope of an arbitration agreement. Our legislature has not indicated that the arbitration of claims for punitive damages is against public policy as it has not exempted such claims from the Uniform Arbitration Act, G.S. 1-567.1 *et seq.* In light of the strong policy in this State favoring arbitration, *see Thomas*, 51 N.C. App. at 355-56, 276 S.E. 2d at 747, we conclude that such claims are arbitrable and that the agreement here is sufficiently broad to empower the arbitrators to award punitive damages.

[9, 10] Since we have determined that plaintiff's claims are arbitrable and within the scope of the arbitration agreement, we reach the question of whether the claims are barred under the doctrine of res judicata. For a judgment to constitute res judicata in a subsequent action, there must be identity of parties, subject matter, and issues. *See Kleibor v. Rogers*, 265 N.C. 304, 307, 144 S.E. 2d 27, 30 (1965); *Shaw v. Eaves*, 262 N.C. 656, 661, 138 S.E. 2d 520, 525 (1964). The present action concerns essentially the same subject matter (claims arising under the contract executed by plaintiff and McQueen Properties), the same issues (defendants' liability and the damages to which plaintiff is entitled with respect to such claims), and the same parties as the prior arbitration proceeding. Thus, res judicata is applicable. *Id.* Although James McQueen was not named as a party to the arbitration, it is clear that he had a strong financial interest in the determination of the issues there because of his ownership interests in McQueen Properties and Parkhill Associates, and that he was an active and controlling participant in the arbitration. He thus is bound by the judgment entered on the arbitration award just as if he were a named party to the proceeding. *See King v. Grindstaff*, 284 N.C. at 357, 200 S.E. 2d at 806; *Enterprises v. Rose*, 283 N.C. 373, 377-78, 196 S.E. 2d 189, 192 (1973); *Light Co. v. Insurance Co.*, 238 N.C. 679, 692, 79 S.E. 2d 167, 176 (1953), *reh. denied*, 240 N.C. 196, 81 S.E. 2d 404 (1954).

The materials submitted in support of defendants' motion for summary judgment clearly show that the claims asserted here arose out of the dispute submitted to arbitration and that they were relevant and material matters within the scope of the arbitration proceeding. Indeed, plaintiff does not argue to the contrary. These materials further show that at least some of the claims comprising the present action—those for damages based

on James McQueen's interference with work on the housing project and for additional interest plaintiff incurred on loans because of the delay in arbitration—were in fact arbitrated.

The defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief, as attempted by plaintiff here. *Goldstein v. Doft*, 236 F. Supp. 730, 734 (S.D.N.Y. 1964), *aff'd*, 353 F. 2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960, 16 L.Ed. 2d 302, 86 S.Ct. 1226 (1966). *See also Schattner v. Girard, Inc.*, 668 F. 2d 1366, 1368 (D.C. Cir. 1981). We conclude that the materials submitted in support of the motion for summary judgment conclusively show that the claims asserted here were, or could and should have been, brought forward and determined in the prior arbitration proceeding. Thus, defendants have shown that the claims are barred by the res judicata effect of the judgment entered on the arbitration award and that they are entitled to summary judgment.

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

TERRY BRUCE BIDDIX v. HENREDON FURNITURE INDUSTRIES, INC.

No. 8424SC1245

(Filed 16 July 1985)

1. **Nuisance § 4; Waters and Watercourses § 3.2— pollution of stream—common law actions not preempted by Clean Water Act**

The North Carolina Clean Water Act, G.S. 143-211 to -215.9, does not preempt the common law actions of nuisance and trespass to land for the discharge of industrial pollutants into a stream in violation of an applicable NPDES permit.

2. **Nuisance § 4; Waters and Watercourses § 3.2— discharging hazardous materials into stream—statement of statutory claim**

Plaintiff's allegations that defendant discharged hazardous materials into the parties' common stream in violation of defendant's NPDES permit and that the discharge damaged plaintiff's property stated a claim under G.S. 143-215.93, which imposes a strict liability for damages to property or persons from the discharge of oil or other hazardous substances into any waters, not-

withstanding the complaint did not identify the statute as a basis for the action.

APPEAL by plaintiff from *Lamm, Charles C., Judge.* Order entered 11 July 1984 in MITCHELL County Superior Court. Heard in the Court of Appeals 4 June 1985.

Terry Biddix, a property owner in Mitchell County, instituted a civil action against Henredon Furniture Industries, Inc. (hereinafter defendant) alleging that defendant discharged waste effluents, chemicals, toxic wastes and hazardous substances into an unnamed tributary of the North Toe River which damaged plaintiff's adjoining real property. Plaintiff's common law theories of recovery were continuing trespass of land and nuisance, for which he sought damages of $10,000 and a permanent injunction of further pollution discharges.

Defendant answered, denying that its discharges had caused any damage to plaintiff's land. As an affirmative defense, defendant alleged that its discharge of industrial waste was regulated by the North Carolina Clean Water Act of 1967 (hereinafter Clean Water Act), as amended, N.C. Gen. Stat. §§ 143-211 to -215.9 (1983), and that the statutory law preempted the common law civil actions of nuisance and trespass to land for industrial waste discharges.

Defendant moved for dismissal of plaintiff's action pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. The trial court entered an order dismissing plaintiff's action:

> [F]or reason that the . . . common law claims of nuisance and continuing trespass based upon alleged violations of Defendant's duly issued National Pollutant Discharge Elimination System permit have been preempted by laws of the Federal Government and Statutes enacted by the State Government. . . .

Plaintiff appealed.

Lloyd Hise, Jr., for plaintiff.

Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, by Joseph A. Rhodes, Jr., and Watson and Hunt, by Frank H. Watson, for defendant.

WELLS, Judge.

[1] Plaintiff brings forth one assignment of error in which he contends that the question for our review is "[w]hether the Water Use Act of 1967, . . . preempted the common law claims of nuisance and continuing trespass based on damage to real property resulting from alleged stream pollution?" Defendant asserts that the question presented is whether the Federal Water Pollution Control Act and the North Carolina Water Use Act of 1967 "preempt the common law claims of nuisance and continuing trespass based upon alleged violations of a duly issued National Pollutant Discharge Elimination System permit?" After carefully reviewing the record on appeal, we conclude that the issue presented for our determination is whether the Clean Water Act preempts the common law actions of nuisance and continuing trespass to land for the discharge of industrial waste in violation of an applicable National Pollutant Discharge Elimination System permit (hereinafter NPDES). We conclude that the common law civil actions of nuisance and trespass to land have not been abrogated for discharge of industrial pollutants in violation of a NPDES permit, and, therefore, the trial court erred in dismissing plaintiff's action.

We narrowly frame the question to be decided based upon plaintiff's factual allegations. Plaintiff alleged:

. . .

> 6) That the defendant has received from the North Carolina Department of Natural Resources and Community Development a permit to discharge waste water into said stream. Said permit is NPDES Permit No. NC0023582. Said permit regulates both the amount and quality of the waste water being discharged into the stream and prohibits the discharge of waste and chemicals not specifically permitted to be discharged by the permit.
>
> 7) Defendant has regularly and continually, for a period of at least three years, violated the terms and conditions of said permit by discharging chemicals and waste into the stream which are not permitted by the permit.
>
> . . .

Plaintiff alleges that defendant's waste discharges in excess of its NPDES permit damaged his real property. Plaintiff does not allege that defendant's discharge of waste materials within the limits of its NPDES permit proximately damaged his real property, and, therefore, the issue of whether the common law civil actions of nuisance and trespass to land have been abrogated for permitted industrial waste discharges proximately damaging real property is not before us.

This appeal requires a determination of whether the trial court properly dismissed plaintiff's action for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Rules of Civil Procedure. A Rule 12(b)(6) motion is the usual and proper method of testing the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The trial court properly dismisses a claim where it appears, to a certainty, that the plaintiff is entitled to no relief under any state of the facts which could be proved in support of the civil action. *Alamance County v. Dept. of Human Resources*, 58 N.C. App. 748, 294 S.E. 2d 377 (1982). Plaintiff's complaint, therefore, must give sufficient notice of the events on which he bases his claim, and state sufficient facts to satisfy the substantive elements of a legally recognized claim. *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983). For the purpose of a Rule 12(b)(6) motion, plaintiff's allegations are treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976).

Notwithstanding the trial court's order which states that federal law has abrogated the common law actions asserted by plaintiff, defendant concedes on appeal that nothing in the Federal Water Pollution Control Act (hereinafter FWPCA), as amended, 33 U.S.C. §§ 1251-1376 (1982), preempts the common law of this state concerning private actions in nuisance and trespass to land for industrial pollution. Defendant correctly recognizes that state statutory and common law rights survive enactment of a federal statute unless the federal enactment specifically preempts or conflicts with the state law. *Gilbert v. Bagley*, 492 F. Supp. 714 (M.D.N.C. 1980). Nothing in the FWPCA abrogates the common law of any state. The remaining question is whether the Clean Water Act abrogates the common law civil actions asserted by plaintiff. Defendant's argument before this court recognizes that nothing in the General Assembly's specific

statutory language abrogates these common law civil actions; defendant relies on interpretation of the nature and scope of the Clean Water Act to support the trial court's order.

In determining the General Assembly's intent, we must apply time honored rules of statutory construction. An appellate court must look to the purpose and spirit of the statute and what the enactment sought to accomplish, considering both the history and circumstances surrounding the legislation and the reason for its enactment. *Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469 (1985). A presumption exists that the legislature was fully cognizant of prior and existing law within the subject matter of its enactment. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). When the General Assembly legislates with respect to the subject matter of a common law rule, the legislation supplants the common law, *McMichael v. Proctor*, 243 N.C. 479, 91 S.E. 2d 231 (1956); *Christenbury v. Hedrick*, 32 N.C. App. 708, 234 S.E. 2d 3 (1977), however, statutes in abrogation of the common law are strictly construed, *Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925 (1955). That a legislative enactment must be strictly construed does not require "that the statute shall be stintingly or even narrowly construed, . . . but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used." *State v. Whitehurst*, 212 N.C. 300, 193 S.E. 657 (1937) (citation omitted); *see generally*, R. Strong, 12 N.C. Index 3d, *Statutes* § 5.2 (1978). In determining the General Assembly's intent, courts rationally construe the legislative enactment recognizing that the General Assembly does not intend "untoward results." *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978).

Regulation of water use, conservation of this invaluable natural resource, and abatement of water pollution are subject to common law rules as well as local, state, and federal regulation. The common law developed intricate rules protecting private landowner rights to the use and quality of waters, the nature of the rights being dependent on the classification of the water as a navigable watercourse, subterranean and percolating waters, and surface waters. *See generally* P. Hetrick, Webster's Real Estate Law in North Carolina §§ 348-59 (1981). A proprietor of real property adjoining a stream has the right to the "reasonable use" of the water passing through the property. The doctrine of "reason-

able use" permits diminution in the quantity and quality of a watercourse that is consistent with the beneficial use of the land. *E.g., Durham v. Cotton Mills*, 141 N.C. 615, 54 S.E. 453 (1906). An upper riparian landowner's unreasonable use of water quantity or diminution of its quality permits a lower riparian owner to maintain a civil action in nuisance or trespass to land. *E.g., Springer v. Joseph Schlitz Brewing Company*, 510 F. 2d 468 (4th Cir. 1975); *Stowe v. Gastonia*, 231 N.C. 157, 56 S.E. 2d 413 (1949); *Clinard v. Kernersville*, 215 N.C. 745, 3 S.E. 2d 267 (1939); *Nance v. Fertilizer Co.*, 200 N.C. 702, 158 S.E. 486 (1931). Our supreme court has described the nature of the lower riparian owner's right as an incorporeal hereditament of the land, the right being:

> [A]s much [of a] property [right] as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor.

Smith v. Morganton, 187 N.C. 801, 123 S.E. 88 (1924).

The regulation of water use is also subject to a public interest that is protected by local, state and federal governments. *See generally* P. Hetrick, *supra*; 1A G. Thompson, Thompson on Real Property § 284 (1964). As the United States and North Carolina have expanded in population and industrialization, increased governmental regulation to abate water pollution has ensued. Legislative bodies have uniformly recognized that unabated pollution imminently threatens man's environment. The North Carolina General Assembly has enacted comprehensive and sophisticated legislation regulating water use, conservation, and pollution control. N.C. Gen. Stat. §§ 143-211 to -215.83 (1983); *see generally* W. Aycock, Introduction to Water Use Law in North Carolina, 46 N.C. L. Rev. 1 (1967). Congress has also systematically extended its regulation of water pollution and control, culminating in the FWPCA.

In the FWPCA, Congress established the national goal of eliminating the discharge of pollutants into the navigable waters of the United States by 1985. 33 U.S.C. § 1251(a)(1). A key feature of the FWPCA is the prohibition of pollutant discharges by any

person except in compliance with applicable regulatory permits. 33 U.S.C. § 1311(a). Congress authorized the Environmental Protection Agency (hereinafter EPA) to establish effluent limitations for pollutants and toxic waste discharges by industry, agricultural operations and public and private waste treatment facilities. All public and private organizations discharging wastes through point sources are required to obtain a NPDES permit based on those limitations prior to any actual discharge. 33 U.S.C. § 1342. Individual states are authorized to assume responsibility for administration of the NPDES permit system upon state statutory authorization and application to the EPA. 33 U.S.C. § 1342(b).

The North Carolina General Assembly amended the Clean Water Act, complying with the requirements of the FWPCA, in order to obtain state administration of the NPDES permit system. 1973 N.C. Sess. Laws, c. 1262, s. 23. The Environmental Management Commission (hereinafter EMC) was directed to develop classifications of waters in the state based on the tolerance of the waters to waste discharges. G.S. § 143-214.1. The Act also directs the EMC to adopt effluent standards and limitations and waste treatment management practices to abate and control water pollution and the discharge of toxic waste materials. G.S. § 143-215. The General Assembly specifically prohibited the discharge of waste materials by any person until a NPDES permit has been secured. The Act forbids any person to:

> (6) Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Environmental Management Commission under the provisions of this Article.

G.S. § 143-215.1(a). The EMC and the Department of Natural Resources and Community Development (hereinafter NRCD), the administrative agencies responsible for issuing permits and monitoring compliance, are given broad investigatory powers. Violation of the Act can result in civil and criminal penalties. In addition, NRCD can request the Attorney General to institute

civil actions for injunctive relief for threatened or actual violations of effluent standards. G.S. § 143-215.6.

Defendant contends that the scope of the General Assembly's enactments demonstrate its intent to abrogate nuisance and trespass to land as civil actions for industrial pollution of riparian waters. Defendant relies on the General Assembly's stated intent:

> [T]o confer such authority upon the Department of Natural Resources and Community Development as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions. Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development, and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources. It is the intent of the General Assembly that the powers and duties of the Environmental Management Commission and the Department of Natural Resources and Community Development be construed so as to enable the Department and the Commission to qualify to administer federally mandated programs of environmental management and to qualify to accept and administer funds from the federal government for such programs.

G.S. § 143-211. Relying on *McMichael v. Proctor, supra,* and *Christenbury v. Hedrick, supra,* defendant contends that the General Assembly, by legislating in the field of pollution abatement, has preempted private rights of action under common law theories. Defendant also contends that by placing enforcement powers in the EMC and the NRCD to seek injunctions against violations or threatened violations of the Act, the General Assembly preempted the right of private action seeking this remedy. In support of their position, defendant notes that the General Assembly specifically omitted from the Clean Water Act provisions

authorizing citizen suits for violations of state law which were enacted by Congress for violations of the FWPCA.

Defendant next contends that because the FWPCA displaced federal common law, the Clean Water Act, by analogy, abrogates North Carolina common law. Defendant notes that the United States Supreme Court has held that the FWPCA displaced the federal common law action of nuisance in pollution cases. *Milwaukee v. Illinois*, 451 U.S. 304 (1981). While defendant correctly cites the Supreme Court's holding, the *City of Milwaukee* court carefully noted that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Id.* The Supreme Court held that when "Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* As previously noted, the presumption as to the abrogation of common law in this state by an enactment of the General Assembly is substantially different. We reject defendant's argument.

Defendant argues that the General Assembly demonstrated its intent to abrogate common law because it failed to incorporate a citizen suit provision in the Clean Water Act that Congress adopted in the FWPCA. We disagree. The FWPCA does contain a citizen suit provision which permits any person, on his own behalf, to seek judicial enforcement of effluent standards or limitations, or to seek an order requiring the EPA to perform statutory mandates. 33 U.S.C. § 1365(a). The citizen bringing suit under the FWPCA must give advance notice in most instances to the EPA, the state regulatory agency, and the alleged violator before initiating the action. 33 U.S.C. § 1365(b)(1)(A). Citizen suits are prohibited if the EPA or state agency is "diligently prosecuting a civil or criminal action . . . to require compliance" with effluent standards, but the citizen may intervene in the proceeding as a matter of right. 33 U.S.C. § 1365(b)(1)(B). The FWPCA specifically states that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." 33 U.S.C. § 1365(e). This provides a supplemental method of enforcement of the FWPCA to expedite administrative action to abate FWPCA

violations, *Com. of Mass. v. United States Veterans Admin.*, 541 F. 2d 119 (1st Cir. 1976), but it does not create a private right of action for monetary damages, and, therefore, any fines levied against a violator are payable to the government and not to the citizen plaintiff. *Sierra Club v. SCM Corp.*, 580 F. Supp. 862 (W.D.N.Y. 1984), *aff'd*, 747 F. 2d 99 (2nd Cir. 1984).

Under the statutory construction principles previously enunciated, the General Assembly was aware of the provisions of the FWPCA and clearly chose not to include a citizen suit provision in the state regulatory scheme. Inclusion of such a provision in the Clean Water Act was not necessary, however, as the FWPCA citizen suit provision adequately provides a citizen of this state with the authority to seek enforcement of the FWPCA. Most importantly, the right of a citizen to seek enforcement of effluent standards or limitations was designed to provide supplementary enforcement of the legislative enactment rather than providing a method of private redress for damages from pollution. The General Assembly's omission of the citizen suit provision only bears on citizen enforcement of the state regulatory scheme rather than demonstrating any legislative intent to preempt private rights of action at common law.

Defendant finally contends that the General Assembly demonstrated its intent to abolish a private right of action by a riparian owner by failing to specifically preserve the right of private suit. Defendant correctly notes that in those sections of the Clean Water Act which permit the EMC to control water usage by declaring an area of the state "a capacity use area," thereby prohibiting any person from withdrawing or discharging excessive amounts of groundwater or surface water in excess of statutory limitations, G.S. § 143-215.13, the General Assembly specifically provided that the statute did not change or modify existing common or statutory law with respect to the rights of riparian owners concerning the use of surface waters of this state. G.S. § 143-215.22. The sections of the Clean Water Act relating to effluent discharges do not contain a similar reservation of common law rights. Notwithstanding the General Assembly's omission of specific statutory language reserving common law rights, we conclude that by enacting legislation to seek state administration of the FWPCA the General Assembly did not in-

tend to act with respect to common law riparian rights for waste discharges in excess of an NPDES permit.

We conclude that the Clean Water Act does not abrogate the common law civil actions for private nuisance and trespass to land for pollution of waters resulting from violation of a NPDES permit. First, the Clean Water Act, as amended, does not specifically abrogate these common law civil actions. Assuming for the purposes of this appeal that industrial discharges made under a NPDES permit would constitute a "reasonable use" of water in accordance with the common law, thereby effectively preventing a civil action founded in nuisance or trespass to land, plaintiff's allegations in the case before us allege waste discharges in violation of defendant's NPDES permit.

Second, to adopt the holding of the trial court would lead to absurd results. By holding that the common law actions of common law nuisance and trespass to land were abrogated by the Clean Water Act, plaintiff would be left in the untenable position of having suffered damage to real property without an effective remedy under the Act. While the Clean Water Act provides for criminal and civil penalties, the Act does not provide a mechanism for compensation of private landowners for damage to their property or personal injury. Based on the trial court's order, plaintiff's only remedy would be to report any NPDES violation by defendant to NRCD without legal recourse for the alleged damages to his property. We cannot conceive that the General Assembly intended any such result in adopting the Clean Water Act. We agree with defendant that the General Assembly has provided a comprehensive statutory scheme for remedial correction of water pollution as well as other forms of industrial and private pollution. Preservation of the common law actions of nuisance and trespass to land for industrial discharges in violation of the laws of this state is consistent with the General Assembly's enactments rather than inconsistent with them as argued by defendant. By retaining the common law civil actions of nuisance and trespass to land, the legislative intent to maintain the waters of this state in a clean and wholesome state for present and future generations is strengthened.

The General Assembly, by its amendments to the Clean Water Act, established standards for waste discharges which, if

violated, create an additional basis for private civil actions. In *Springer v. Joseph Schlitz Brewing Company, supra,* Schlitz discharged waste materials into a city sewage treatment facility in violation of a municipal ordinance. The *Springer* court held that permitted discharges in compliance with the ordinance would afford defendant immunity from liability for the city's failure to properly treat and dispose of the waste which subsequently damaged a lower riparian land owner. That court held, however, that North Carolina:

> [I]s firmly committed to the proposition that the 'violation of a statute designed to protect persons or property is a negligent act, and if such negligence proximately causes injury, the violator is liable.' . . . The statute or ordinance, serving as a legislative declaration of a standard of care, creates a private right not to be harmed by its violation.

Springer v. Joseph Schlitz Brewing Company, supra (citations omitted). G.S. § 143-215.6(b)(1) provides that "[a]ny person who willfully or negligently violates any classification, standard or limitation established pursuant to . . . [G.S.] 143-215 . . . shall be guilty of a misdemeanor . . . ." The General Assembly explicitly expressed its intent to "protect human health, to prevent injury to plant and animal life, [and] to prevent damage to public and private property . . . ." G.S. § 143-211. We find the *Springer* court's rationale soundly reflects the law of this state, and we hold that willful or negligent discharges in violation of a NPDES permit afford a basis for an action in damages to a riparian owner.

[2] We also find that the trial court erred in dismissing plaintiff's action because plaintiff has stated a cause of action under G.S. § 143-215.93. The General Assembly has provided that:

> (a) Unlawful Discharges.—It shall be unlawful, except as otherwise provided in this Part, for any person to discharge, or cause to be discharged, oil or other hazardous substances into or upon any waters, . . . surface water drain or other waters that drain into the waters of this State, regardless of the fault of the person having control over the oil or other hazardous substances, or regardless of whether the discharge was the result of intentional or negligent conduct, accident or other cause.

(b) Excepted Discharges.—This section shall not apply to discharges of oil or other hazardous substances in the following circumstances:

(1) When the discharge was authorized by an existing regulation of the Environmental Management Commission.

(2) When any person subject to liability under this Article proves that a discharge was caused by any of the following:

a. An act of God.

b. An act of war or sabotage.

c. Negligence on the part of the United States government or the State of North Carolina or its political subdivisions.

d. An act or omission of a third party, whether any such act or omission was or was not negligent.

e. Any act or omission by or at the direction of a law-enforcement officer or fireman.

G.S. § 143-215.83. G.S. § 143-215.93 provides that discharge of oil or other hazardous substances imposes a strict liability on the actor for damages to property or persons, either public or private.

In his complaint, plaintiff alleged that:

7) Defendant has regularly and continually . . . violated the terms and conditions of said permit by discharging chemicals and waste into the stream which are not permitted by the [NPDES] permit.

8) Defendant has regularly and continually for a period of at least three years discharged cleansing oils, finishing oils, urea formaldehyde glue and other hazardous and toxic chemicals and industrial wastes into said stream and onto the lands of the plaintiff.

9) The continuing acts of the defendant . . . have caused the waters of said stream to become polluted and filled with filthy, oily substances and impregnated with foul, nauseating

odors and has polluted the land of the plaintiff abutting and adjoining the stream.

. . .

12) That the plaintiff will continue to suffer irreparable harm and injury unless and until the defendant is permanently restrained and enjoined from discharging hazardous, toxic chemicals and substances into said stream and unless and until the defendant is permanently restrained and enjoined from discharging all substances into said stream which are not allowed by its NPDES Permit.

Because the trial court dismissed plaintiff's claim under Rule 12(b)(6), the presumption is that all factual allegations in the complaint are true. *Smith v. Ford Motor Co., supra.* Plaintiff has clearly alleged that hazardous materials in violation of defendant's NPDES permit were discharged into the parties' common stream, and that the discharge damaged plaintiff's property. The complaint is liberally construed, and when the allegations give sufficient notice of a wrongful action, an incorrect choice of the legal theory upon which the claim is founded should not result in dismissal if the factual allegations are sufficient to state a claim under some recognized legal theory. *Jones v. City of Greensboro,* 51 N.C. App. 571, 277 S.E. 2d 562 (1981). We conclude that plaintiff has stated sufficient facts to state a claim for relief under G.S. § 143-215.93 even though the prayer for relief in the complaint does not identify the statute as a basis for the action. *See generally* W. Shuford, N.C. Civ. Prac. & Proc. (2nd ed. 1981) § 12-10.

Because of our holding that the North Carolina Clean Water Act does not abrogate the common law actions of nuisance and trespass to land for industrial discharges in violation of a NPDES permit, it is unnecessary to address plaintiff's constitutional arguments. For the reasons stated, the order of the trial court dismissing plaintiff's action must be and is hereby,

Reversed.

Judges JOHNSON and COZORT concur.

BARRY C. LEVINE v. PARKS CHEVROLET, INC., CLARENCE MILLNER AND WIFE, GLORIA HAIRSTON MILLNER, WACHOVIA BANK & TRUST COMPANY, N. A. AND TOWN AND COUNTRY MOTORS, INC.

No. 8418DC1212

(Filed 16 July 1985)

1. **Automobiles and Other Vehicles § 6.5— knowingly giving a false odometer statement—evidence sufficient**

There was no error in the denial of Parks Chevrolet's motions for a directed verdict and for judgment n.o.v. in an action for knowingly giving a false odometer statement where the evidence was sufficient to permit the jury to find that Parks Chevrolet had some question as to the verity of the odometer mileage, any mechanic could have ascertained from the grease buildup on the chassis that the vehicle had been driven more than 14,000 or 15,000 miles, several pieces of equipment, most noticeably the tires, were not of the original brand, and the truck showed other signs of wear, yet all that Parks Chevrolet did to confirm the mileage was to drive the vehicle, examine the interior, and compare the mileage on the inspection sticker with the mileage on the odometer. G.S. 20-347, G.S. 20-348.

2. **Automobiles and Other Vehicles § 6.5— false odometer statement—refusal to submit separate issues of knowledge and intent to defraud**

The trial court did not err in an action for giving a false odometer statement by not submitting to the jury separate issues as to defendant's knowledge and intent to defraud; furthermore, the court's charge in its entirety adequately recapitulated the evidence and applied the law to the evidence.

3. **Automobiles and Other Vehicles § 6.5— false odometer statement—instruction that sale price of previous owner reflected mileage—no error**

The trial court did not err in an action for giving a false odometer statement by instructing the jury that the price asked by defendant Wachovia took into consideration the actual mileage of the vehicle and by refusing defendant Parks Chevrolet's request for a similar instruction where Wachovia had offered evidence that it offered the vehicle at a price equal to the vehicle's actual wholesale value according to the N.A.D.A. guide without profit being a motive, and Parks Chevrolet admitted that it was in the business of making a profit and offered no evidence as to book value.

4. **Automobiles and Other Vehicles § 6.5— false odometer statement—attorney's fees and treble damages**

The trial court did not err in an action for giving a false odometer statement by trebling damages and awarding attorney's fees where there was sufficient evidence of intent to defraud.

APPEAL by defendant Parks Chevrolet, Inc. from *John, Judge*. Judgment signed 3 August 1984, *nunc pro tunc* 27 July

1984 in District Court, GUILFORD County. Heard in the Court of Appeals 16 May 1985.

This action arises out of the purchase of a truck by plaintiff from defendant Parks Chevrolet, Inc. The other defendants, or their agents, are in the chain of title of defendant Parks Chevrolet. Plaintiff alleged in his complaint, *inter alia*, that defendant Parks Chevrolet sold him a 1979 Chevrolet Scottsdale pickup truck and delivered to him an odometer disclosure statement certifying that the mileage shown on the odometer, 14,563, was the correct mileage of the vehicle, when in fact, the vehicle had been driven 100,000 more miles. He alleged defendant Parks Chevrolet violated G.S. 20-347 and 15 U.S.C. 1988 by knowingly, with the intent to defraud, giving a false odometer disclosure statement.

The evidence presented at trial tended to show that the vehicle in question was purchased new by defendant Wachovia Bank and Trust Co. on 5 March 1979. Defendant Wachovia kept the vehicle for approximately two years, when it decided in March 1981 to sell the vehicle after it had been driven approximately 113,000 miles. Wachovia enlisted defendant Town and Country Motors, Inc. to sell the vehicle. Defendant Town and Country cleaned the vehicle. This cleaning consisted of washing and polishing the vehicle, but did not include removal of grease and grime which had accumulated underneath the vehicle. The president of Town and Country Motors could not say whether or not the engine had been cleaned.

Town and Country Motors sold the vehicle to defendant Gloria Millner on 27 March 1981. Title to the vehicle was placed in Mrs. Millner's name. At the time of sale, the odometer, which registered only five digits, showed between 13,000 and 14,000 miles. Neither Wachovia nor Town and Country Motors gave Mrs. Millner an odometer disclosure statement. The Millners kept the vehicle until December 1981, when Mr. Millner sold the vehicle to defendant Parks Chevrolet.

When Mr. Millner sold the vehicle to defendant Parks Chevrolet, he signed an odometer disclosure statement in blank, meaning he signed the statement leaving the mileage figure blank to be filled in later by defendant Parks Chevrolet. Defendant Parks' sales agent subsequently filled in the blank with the odometer reading on the vehicle. Parks' truck manager testified that he ex-

amined the interior of the truck, test drove the vehicle, and compared the mileage on the odometer, 14,485, with the mileage on the safety inspection sticker as of March 1981, which showed a mileage of 12,787, and found nothing to arouse suspicion as to the accuracy of the mileage. He did not examine underneath the vehicle.

Parks then sold the vehicle to plaintiff on 5 January 1982. It gave plaintiff a mileage disclosure statement certifying that the mileage on the vehicle's odometer, 14,485, was the actual mileage of the vehicle. A few days after purchasing the truck, plaintiff noticed strange marks on the truck while cleaning the vehicle. Upon further investigation, he noticed the front and rear tires were of different brands, neither of which were of the original brand. He examined the spare tire, which was of the original brand, and saw that it was worn. He also noticed that the place "where your feet skid" as you get in and out of the truck was also worn. He subsequently discovered that the battery was not an original battery, but a NAPA brand battery, and that the shock absorbers were also NAPA brand. Plaintiff contacted a mechanic, Larry Melvin, who examined the vehicle and observed a large amount of grease and grime underneath the vehicle. Melvin indicated at trial that this grease and grime buildup was an indicator of high mileage.

Plaintiff subsequently learned that Wachovia Bank and Trust Co. was the original owner of the vehicle. Plaintiff contacted Wachovia's fleet manager, Mr. William Davis, who told plaintiff that the truck had more than 100,000 miles on it when it sold the vehicle to defendant Gloria Millner. Plaintiff then called defendant Parks and spoke with Parks' assistant truck manager, Mr. Lewis Cornett. Upon informing Cornett that the truck had more than 100,000 miles on it, plaintiff testified that Cornett remarked that "there was some discrepancy in the mileage statement, the one he received from the prior owner."

Davis of Wachovia Bank and Trust also telephoned Parks and spoke with Mr. Eugene Smith, truck manager for Parks Chevrolet. Davis testified that he asked Smith, "[W]eren't they aware that the truck had over 100,000 miles on it?" to which Smith responded, "[W]e questioned Mr. Millner on that point but he kind of got huffy with us and acted like we were insulting him so we

kind of back (sic) off because we were afraid we would blow the deal."

At the conclusion of the evidence, the jury found that defendant Parks Chevrolet, knowingly and with the intent to defraud, gave a false odometer disclosure statement to plaintiff. The jury absolved all other defendants of liability. The jury also awarded plaintiff damages, which the court trebled pursuant to G.S. 20-348 and 15 U.S.C. 1989. The court also awarded plaintiff attorney fees pursuant to G.S. 20-348 and 15 U.S.C. 1989. Defendant Parks Chevrolet appeals.

Alexander Ralston, Pell & Speckhard, by Stanley E. Speckhard, for plaintiff appellee.

Henson, Henson & Bayliss, by Perry C. Henson, Jr., for defendant appellant Parks Chevrolet, Inc.

JOHNSON, Judge.

[1] Defendant Parks Chevrolet contends that the court erred in denying its motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence and for judgment notwithstanding the verdict because there was insufficient evidence to support a finding that defendant Parks knew the odometer reading was incorrect and that it acted with intent to defraud. We disagree.

This action was tried under G.S. 20-347 & 48 and 15 U.S.C. 1988-89. G.S. 20-347 provides in pertinent part:

> (a) In connection with the transfer of a motor vehicle, the transferor shall deliver to the transferee, prior to execution of any transfer of ownership document, a single written statement which contains the following:
>
> (1) The odometer reading at the time of the transfer;
>
> (2) The date of the transfer;
>
> (3) The transferor's name and current address;
>
> (4) The identity of the vehicle, including its make, model, body type, its vehicle identification number, and the license plate number most recently used on the vehicle;

(5) A statement that the mileage is unknown if the transferor knows the odometer reading differs from the number of miles the vehicle has actually traveled, and that the difference is greater than that caused by odometer calibration error;

(6) A statement describing each known alteration of the odometer reading, including date, person making the alteration, and approximate number of miles removed by the alteration; and

(7) Disclosure of excess mileage when vehicle is known to have exceeded 100,000 miles and the odometer records only five whole-mile digits.

Provided that the certificate of title or other ownership documents shall be used in lieu of the single written statement if the title or ownership document contains the information set forth in subsection (a).

. . .

c. It shall be unlawful for any transferor to violate any rules under this section or to knowingly give a false statement to a transferee in making any disclosure statement by such rules.

G.S. 20-348 provides:

(a) Any person who, with intent to defraud, violates any requirement imposed under this Article shall be liable in an amount equal to the sum of:

(1) Three times the amount of actual damages sustained or one thousand five hundred dollars ($1,500), whichever is the greater; and

(2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

(b) An action to enforce any liability created under subsection (a) of this section may be brought in any court of the trial division of the General Court of Justice of the State of North Carolina within four years from the date on which the liability arises.

The comparable federal statutes, 15 U.S.C. 1988 & 1989, are virtually identical. Because of the similarities between G.S. 20-347 & 48 and 15 U.S.C. 1988 & 1989, we find the following federal cases construing the federal statutes to be instructive.

In *Nieto v. Pence*, 578 F. 2d 640 (5th Cir. 1978), the Court held that although the transferor did not have actual knowledge that the mileage shown on the odometer, 14,000, was incorrect, the dealer should have known that the reading of 14,000 on a ten year old truck was incorrect, and thus was liable under 15 U.S.C. 1988 & 1989. Relying upon the following legislative history of 15 U.S.C. 1988, the Court concluded that a transferor has a duty to disclose that the actual mileage was unknown if, in the exercise of reasonable care, he would have had reason to know that the mileage was other than that recorded by the odometer or the previous owner had certified:

> [Section 1988] makes it a violation of the title for any person "knowingly" to give a false statement to a transferee. This section originally allowed a person to rely completely on the representations of the previous owner. This original provision created a potential loophole, however. For example, a person could have purchased a vehicle knowing that the mileage was false but received a statement from the transferor verifying the odometer reading. Suppose an auto dealer bought a car with a 20,000 mile odometer verification but any mechanic employed by that auto dealer could ascertain that the vehicle had at least 60,000 miles on it. The bill as introduced would have permitted the dealer to resell the vehicle with a 20,000 mile verification. In order to eliminate this potential loophole the test of "knowingly" was incorporated so that the auto dealer with expertise now would have an affirmative duty to mark "true mileage unknown" if, in the exercise of reasonable care, he would have reason to know that the mileage was more than that which the odometer had recorded or which the previous owner had certified. 1972 U. S. Code Cong. & Admin. News pp. 3971-72.

With regard to the question of intent to defraud, the Court looked to decisions of other federal courts construing 15 U.S.C. 1989 and concluded that a transferor who lacked actual knowledge may still be found to have intended to defraud and may be liable for failure

to disclose that the vehicle's mileage is unknown. The Court stated:

> We hold that a transferor who lacked actual knowledge may still be found to have intended to defraud and thus may be civilly liable for a failure to disclose that a vehicle's actual mileage is unknown. A transferor may not close his eyes to the truth. If a transferor reasonably should have known that a vehicle's odometer reading was incorrect, although he did not know to a certainty the transferee would be defrauded, a court may infer that he understood the risk of such an occurrence.

578 F. 2d at 642.

In *Kantorczyk v. New Stanton Auto Auction, Inc.*, 433 F. Supp. 889 (W. D. Pa. 1977), the Court held that the practice of preparing odometer disclosure statements simply on the basis of the odometer reading and then failing to disclose that the actual mileage is unknown showed a reckless disregard for the purpose of the odometer disclosure law and that such recklessness constituted fraudulent intent mandating the imposition of civil liability.

In *Tusa v. Omaha Auto Auction Inc.*, 712 F. 2d 1248 (8th Cir. 1983), an automobile auction company was held liable under 15 U.S.C. 1989, although it did not have actual knowledge that an odometer reading was not the actual mileage of the vehicle. The Court, however, found constructive knowledge and an intent to defraud based upon two factors. First, the Court noted that a mileage figure on a certificate of title in the defendant's chain of title had noticeably been altered. Second, the Court found that the defendant's method of preparing odometer disclosure statements in which the defendant simply filled in the odometer reading on the vehicle on the odometer disclosure statement, which had been signed but left blank by the previous transferor, was sufficient to support a finding of an intent to defraud. The defendant had made no effort to obtain previous odometer disclosure statements and to determine whether the vehicle had been driven more than 100,000 miles. The Court commented that because a buyer could read an odometer just as the defendant did, the defendant was not providing any additional information. The defendant's practice thus showed a complete disregard for the purpose

of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1981 to 1991.

Based upon the foregoing authorities, we hold the evidence in the present case was sufficient to permit a jury to find that defendant Parks Chevrolet, in the exercise of reasonable care, should have known that the mileage was other than that recorded by the odometer and that defendant Parks Chevrolet acted with the intent to defraud. The evidence showed that defendant Parks Chevrolet had some question as to the verity of the odometer mileage, yet all it did to confirm the mileage was to drive the vehicle, examine the interior and compare the mileage on the inspection sticker with the mileage on the odometer. The evidence also showed, however, that any mechanic could ascertain from the grease buildup on the chassis that the vehicle had been driven more than 14,000 or 15,000 miles, that several pieces of equipment, most noticeably the tires, were not of the original brand, and that the truck showed other signs of wear. As the legislative history to 15 U.S.C. 1988 indicates, to allow a dealer with expertise to ignore such indicators of wear would be to eviscerate the purpose of the statute.

[2] Defendant Parks Chevrolet next contends that the court erred in refusing to submit separate issues to the jury as to defendant's knowledge and as to defendant's intent to defraud. We find no error. The court submitted the following issue to the jury:

> Did the Defendant, Parks Chevrolet, Inc., by and through its agents or employees, in connection with the transfer of ownership of the 1979 Chevrolet truck to the Plaintiff, Barry C. Levine, knowingly and with the intent to defraud, give a false odometer disclosure statement to the Plaintiff, Barry C. Levine?

The Court, therefore, required the jury to find both knowledge and an intent to defraud.

Defendant next contends that the court erred in failing to recapitulate the evidence to the extent necessary to explain the application of the law to the evidence. We have examined the court's charge in its entirety and are satisfied that the court adequately recapitulated the evidence and applied the law to the evidence.

[3] Defendant Parks Chevrolet next contends that the court failed to give equal stress to the contentions of the parties when it instructed the jury that defendant Wachovia contended that "the price asked by defendant Wachovia for the vehicle was fair and took into consideration the actual mileage" of the vehicle but refused defendant Parks Chevrolet's request for a similar instruction. This contention has no merit. Defendant Wachovia Bank and Trust Co. contended and offered evidence to show that if offered the vehicle for sale at a price equal to the vehicle's actual wholesale value according to the N.A.D.A. Official Used Car Guide, without profit being a motive. On the other hand, defendant Parks Chevrolet admitted that it was in the business of making a profit and offered no evidence as to book value showing how it arrived at its sale price of $6,195.00. Thus, the parties' contentions were different. Moreover, we have examined the court's charge and find that the court did indeed give equal stress to defendant Parks Chevrolet's contentions.

[4] Defendant Parks Chevrolet's remaining contention is that the court erred in trebling damages and in awarding attorney fees to plaintiff because there was no evidence of intent to defraud. This contention has no merit as we have held for the reasons stated *supra* that there was sufficient evidence of intent to defraud.

For the foregoing reasons, we find

No error.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. GUSTARIVUS WHITAKER

No. 8418SC521

(Filed 16 July 1985)

1. Kidnapping § 1.2; Rape and Allied Offenses § 18.2— kidnapping for the purpose of attempting second degree rape—evidence sufficient

There was no error in the denial of defendant's motion to dismiss the charge of second degree kidnapping for the purpose of attempting second degree rape where the defendant physically forced a taxicab driver to drive to a secluded area, commanded her to pull down her pants, and threatened her

repeatedly; although defendant only verbally expressed that he wanted to perform cunnilingus on her in a vulgar play on words, his statement indicated that he surely intended to use her to gratify his passion in spite of her resistance and did not foreclose all other inferences. G.S. 14-39.

2. **Kidnapping § 1.4— indictment alleging kidnapping for the purpose of attempted second degree rape—not fatally defective**

There was no error in an indictment charging defendant with kidnapping with the underlying felony of attempted second degree rape. While it would have been better practice to charge intent to commit second degree rape, attempted second degree rape is a felony and charging intent to commit attempted second degree rape is not fatally defective. G.S. 14-27.6.

3. **Kidnapping § 1.3— no instruction on false imprisonment—no error**

There was no error in a prosecution for second degree kidnapping and attempted second degree rape in not charging the jury on false imprisonment where all of the evidence tended to establish that defendant restrained, confined, and removed the prosecutrix with the intent to gratify his passion notwithstanding resistance.

Chief Judge HEDRICK dissenting.

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgment entered 12 January 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 March 1985.

Attorney General Edmisten by Assistant Attorney General Michael Rivers Morgan for the State.

Appellate Defender Adam Stein by Assistant Appellate Defenders James A. Wynn, Jr., and Malcolm Ray Hunter, Jr., for defendant appellant.

COZORT, Judge.

Defendant was convicted of second-degree kidnapping and sentenced to a prison term of twenty-four (24) years. He appeals his conviction alleging the trial court should have granted his motion to dismiss the charges against him because the State's evidence was insufficient to prove that he restrained his victim for the purpose of committing the crime of attempted second-degree rape. He also contends the indictment was fatally defective and that the trial court erred by failing to instruct on the lesser included offense of false imprisonment. We find no error.

The State's main witness was Debra Fritz, a Greensboro taxicab driver who testified to the following: At about 2:00 o'clock on

the morning of 20 May 1983, she was approached by the defendant after she had signed off duty and driven her cab to a service station to meet a friend. The defendant asked her to take him to Gatewood Drive, a street nearby. After they got in the cab, the defendant asked her to take him to the Raleigh Street Poolroom instead. The defendant was sitting in the front seat with Ms. Fritz, which was her practice after dusk to keep from being grabbed from behind. She drove to the Raleigh Street Poolroom, which was closed. The defendant then gave Ms. Fritz an address on Tucker Street. Ms. Fritz did not know the way to Tucker Street and began following directions given to her by defendant. At defendant's instruction, she turned down Ola Street, a dead-end street. When she reached the end of the street, the defendant grabbed the radio microphone out of Ms. Fritz' hand and threw it on the other side of the cab. The defendant then grabbed Ms. Fritz by the throat. She began pleading with him not to hurt her. Defendant said, "Shut up. All you women think you're tough. . . . Don't talk; just drive." Ms. Fritz followed the defendant's instructions on which turns to take and ended up in a church parking lot. Defendant directed Ms. Fritz to back the car in beside a church bus and turn the lights out. It had begun pouring rain. Defendant told her to get out of the car. Fearing that she was about to be shot and her cab taken, Ms. Fritz tried to talk defendant into letting her go. Defendant mashed harder on her throat. While trying to move defendant's hand, Ms. Fritz said, "Let's just go and get something to eat and talk about this." Defendant said, "I want to eat you," and told Ms. Fritz to pull her pants down, which she did. Ms. Fritz testified that she thought she was going to be raped there in the churchyard, and she said to defendant, "Let's not do anything like this in the church yard. [*sic*]" Defendant agreed and again began giving directions to Ms. Fritz. He still had her by the neck. She began to make turns different from the defendant's instructions because his directions were towards back streets with few streetlights. Defendant mashed her throat very hard. Defendant told her to turn towards "a real rough area," but Ms. Fritz turned instead towards Wendover Avenue, a well-traveled street. Defendant pulled a sharp object out of his pocket and put it to Ms. Fritz' throat. She "gunned it," causing the defendant's hand to go up so that she could see that the sharp object was a comb. Ms. Fritz mashed the gas pedal all the way to the floor and aimed her car at a car stopped at a traffic light. Defend-

ant grabbed the steering wheel and pulled it to the right. Ms. Fritz' cab knocked down a "No Parking" sign and ran into a telephone pole. She jumped out the door and ran to a bar to call the police, pulling up her pants as she ran. Defendant jumped out the other side and ran away.

[1] Defendant was indicted for attempted second-degree rape and second-degree kidnapping. The jury acquitted defendant of attempted second-degree rape and convicted him of second-degree kidnapping. Defendant's first assignment of error is that the trial court erred by denying his motion to dismiss the charge of second-degree kidnapping because the evidence was insufficient to prove that the defendant restrained Ms. Fritz for the purpose of attempting a second-degree rape.

Upon a motion to dismiss in a criminal action, "all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977); *see also State v. Dover*, 308 N.C. 372, 302 S.E. 2d 232 (1983).

G.S. 14-39, under which defendant was indicted, provides in pertinent part that:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony . . . .

Defendant was charged with unlawfully, willfully and feloniously kidnapping Ms. Fritz by unlawfully confining her, restraining her and removing her from one place to another without her consent for the purpose of facilitating the commission of attempted second-degree rape. "Rape is defined at G.S. 14-27.2(a)(2) and 14-27.3(a)(1) as engaging in vaginal intercourse with another per-

son by force and against the will of the other person. The statutory phrase 'engaging in vaginal intercourse with another person' is expressed in our cases as gratifying one's passion on the person of a woman; 'by force and against the will of the other person' is expressed as notwithstanding her resistance." *State v. Franks*, 74 N.C. App. 661, 662-63, 329 S.E. 2d 717, 718 (1985). Thus, the pivotal question for our determination in this case is whether the evidence is sufficient for a rational trier of fact to find that defendant confined, restrained, and removed Ms. Fritz from one place to another to facilitate the attempted gratification of his passion on her notwithstanding her resistance. We hold that it was.

The testimony of the prosecuting witness clearly supports the necessary element that she was confined, restrained, and removed by defendant. We must now determine whether the State proved the confinement, etc., was with the intent of attempting to rape Ms. Fritz. In *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *aff'd*, 308 N.C. 804, 303 S.E. 2d 822 (1983), this court vacated the defendant's conviction of burglary, holding that there was insufficient evidence that the defendant intended to commit rape at the time he entered the house. The evidence showed the defendant climbed in the bedroom window of the prosecutrix; he told prosecutrix not to scream and that he had a gun; the prosecutrix backed up to the head of her bed, whereupon defendant grabbed her arm; prosecutrix and her child started screaming, and defendant jumped out the window. The Court analyzed many of the recent cases finding the evidence insufficient to prove the intent to rape and many of those finding the evidence sufficient. The Court said the following about the cases where the evidence was sufficient: "In all of those cases, there was some overt manifestation of an intended forcible sexual gratification, an element not shown by the evidence in the case before us." *Id.* at 66, 300 S.E. 2d at 449.

In *State v. Norris*, 65 N.C. App. 336, 309 S.E. 2d 507 (1983), this Court found the evidence sufficient to permit the jury to find the defendant broke into the house of the prosecutrix with the intent to commit rape where the prosecutrix testified that defendant pushed the door open, came in, started kissing her and pushing her toward the bedroom, and that he got her on the floor and began feeling her breasts. When the prosecutrix's small child awoke, the defendant grabbed the child and the woman and start-

ed walking through the house holding both by the arm. The prosecutrix later managed to escape. In upholding the conviction of burglary, the court said: "This testimony concerning defendant's acts bespeaks a nonconsensual sexual purpose and an intended forcible sexual gratification. Therefore, the State has provided a sufficient foundation to permit a trier of fact to infer that defendant intended to commit rape once he broke into the house." *Id.* at 339, 309 S.E. 2d at 509.

In *Franks, supra,* this Court held, citing *State v. Bradshaw,* 27 N.C. App. 485, 219 S.E. 2d 561 (1975), *disc. rev. denied,* 289 N.C. 299, 222 S.E. 2d 699 (1976), that evidence of kidnapping is sufficient if the State proves that defendant at any time during the confinement had the requisite intent to gratify his passion notwithstanding resistance. We recognize that according to Ms. Fritz' testimony, the defendant only verbally expressed that he wanted to perform cunnilingus on her. The defendant's statement that he wanted "to eat" Ms. Fritz was a vulgar play on words, indicating that the defendant surely intended to use her to gratify his passion in spite of her resistance, but not foreclosing all other inferences that he planned to commit cunnilingus alone. The State is entitled to benefit from every reasonable inference arising from the defendant's statements, actions, and the surrounding circumstances, including the fact that the defendant physically forced Ms. Fritz to drive to a secluded area, commanded her to pull down her pants, and threatened her repeatedly. These facts were sufficient evidence from which the jury could reasonably infer that defendant confined and removed the victim for the purpose of facilitating the commission of attempted second-degree rape. The defendant never let go of the prosecutrix at any time. It was only through her quick thinking and courageous actions that she was able to escape without being seriously harmed or without further violation and humiliation by the defendant. These actions by Ms. Fritz, however, do not cancel out the defendant's original underlying intent and make him any less guilty of the crime of kidnapping.

[2] The defendant next argues that the indictment failed to properly charge the defendant with kidnapping because the underlying felony charged therein was "*attempted* second degree rape," rather than simply second-degree rape. Defendant contends it is logically impossible to intend to attempt a rape. This argu-

ment is without merit. While it would have been the better practice for the indictment to simply charge the defendant with the intent to commit second-degree rape, charging intent to commit attempted second-degree rape is not fatally defective. G.S. 14-27.6 specifically provides that an "attempt to commit second-degree rape . . . is a Class H felony." Thus, attempted second-degree rape is a felony with which a defendant can be properly charged, and that charge can therefore properly be the underlying felony in a kidnapping indictment.

[3] Lastly, defendant contends the court erred by refusing to instruct the jury on the lesser included offense of false imprisonment, a misdemeanor. In *State v. Lang*, 58 N.C. App. 117, 293 S.E. 2d 255, *disc. rev. denied*, 306 N.C. 747, 295 S.E. 2d 761 (1982), the Court held defendant was entitled to a new trial where the trial court failed to instruct on false imprisonment when there was evidence from which the jury could conclude that the defendant restrained, confined or removed the prosecutrix for the purpose of fondling her, and not to gratify his passion on her notwithstanding her resistance. We find no such evidence in this case. All of the evidence here tends to establish that the defendant restrained, confined, and removed the prosecutrix with the intent to gratify his passion notwithstanding resistance. That his actions fell short of his intent due to the quick thinking and actions of Ms. Fritz is not evidence of false imprisonment. The Court's summary in *Franks, supra*, at 667, 329 S.E. 2d at 721, is appropriate here:

> While other rape and intent to rape cases may be more egregious on their facts, the uncontradicted evidence here shows that the defendant confined and restrained the prosecuting witness with the intent to have sexual intercourse with her against her will.

No error.

Judge JOHNSON concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

The evidence in this case raises an inference that defendant at most had on his mind committing a sexual offense described in G.S. 14-27.5. He was charged with kidnapping "for the purpose of facilitating the commission of a felony, Attempted Second Degree Rape." While there is evidence that defendant assaulted the victim, I do not believe there is any evidence in this record from which the jury could find that defendant assaulted or kidnapped the victim with the intent to rape her or commit any other felony. In fact, the jury found defendant not guilty of attempted second degree rape. The record is replete with evidence that defendant did not intend to gratify his sexual desires "by force and against the will" of the victim. The evidence tends to show that at one point he desisted, upon the victim's request, from committing a sexual act, and he did not thereafter attempt or even suggest any acts of a sexual nature. We are not so clairvoyant as to say he intended to rape her had not other circumstances intervened that enabled her to escape. *See State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984).

Assuming *arguendo* the evidence is sufficient to require submission of the case to the jury, I am convinced the trial court erred in not submitting the lesser included offense of false imprisonment. *State v. Lang*, 58 N.C. App. 117, 293 S.E. 2d 255, *disc. rev. denied*, 306 N.C. 747, 295 S.E. 2d 761 (1982). I vote to reverse.

PHILLIP NELSON McKNIGHT v. WILLIAM CAGLE

No. 8416DC1107

(Filed 16 July 1985)

1. Deeds § 22— covenant of seisin—property less than stated amount—property within public rights of way

Evidence that the property conveyed did not contain "1.1 acres, more or less" as stated at the conclusion of the metes and bounds description in a warranty deed did not establish a breach of the covenant of seisin. Nor did the fact that a portion of the property conveyed by the deed was within the rights of way of two public roads adjoining the property establish a breach of the covenant of seisin.

2. Deeds § 24— covenant against encumbrances—highway right of way

A right of way or easement for a public highway may constitute an encumbrance sufficient to amount to a breach of the covenant against encumbrances where the purchaser has no actual or constructive knowledge of the encumbrance at the time of the purchase.

3. Deeds § 24.2— covenant against encumbrances—knowledge by purchaser—necessity for findings

Plaintiff's claim for breach of the covenant against encumbrances because the tract conveyed was subject to the rights of way of two public roads must be remanded for findings of fact as to whether plaintiff knew or should have known, at the time of purchase, that the tract was subject to the rights of way of either or both of the state roads.

APPEAL by plaintiff from *McLean, Judge*. Judgment entered 31 May 1984 in District Court, SCOTLAND County. Heard in the Court of Appeals 14 May 1985.

Plaintiff brought this action seeking rescission of a deed and money damages, alleging a breach of the warranties contained in the deed. Defendant answered, admitting the execution of the warranty deed, but denying a breach of the warranties.

Plaintiff moved for summary judgment on the basis of the pleadings, discovery and an affidavit from a land surveyor. The relevant portion of these materials tended to show that on 15 August 1980, plaintiff and defendant entered into a contract, through a realtor, pursuant to which defendant agreed to sell to plaintiff a parcel of property described therein as "NW corner of 1427 and 1407, a triangle track [sic] 165 × 325 × 416" for $2,500.00. The numbers 1427 and 1407 refer to state roads; State Road 1427 is also known as Lee's Mill Road and State Road 1407 is also known as Maxton-Wagram Highway. By deed dated 5 September 1980, defendant conveyed plaintiff the tract of land, which was described as follows:

> This is a triangle track [sic]; a lot of land located on the West side of Lumber River about 1600 feet West of the McGirt's Bridge and particular described as BEGINNING at an iron stake on the South side of Lee's Mill Road 30 feet from center line McIntyre's Corner; thence North 4 degrees 15 minutes East 325 feet to the Maxton and Wagram highway road to a stake 30 feet West of center line; thence along the said road on the West side in a Southeast direction 416 feet

> to a stake; thence North 88 degrees West 165 feet to the BEGINNING, *containing 1.1 acre more or less.* [Emphasis supplied.]

The deed contained the following covenants:

> And the party of the first part does covenant that he is seized of said premises in fee, and has the right to convey the same in fee simple; that the same are free from all encumbrances; and that he will forever warrant and defend the title hereby conveyed against the lawful claims of all persons whomsoever.

There were no exceptions noted in the deed. Subsequent to the sale, a surveyor was employed by plaintiff and his survey revealed that the description did not geometrically close and that a portion of the property was located in the right of way of State Roads 1407 and 1427. The description in the deed, if forced to close, would contain approximately 0.62 acres; only 0.40 acres were not subject to the rights of way for the two state roads.

Plaintiff's motion for summary judgment was denied. The case was tried before the District Court, sitting without a jury. Additional evidence presented by the plaintiff at trial tended to show that plaintiff had not obtained a survey before purchasing the tract, nor had he obtained a title examination or mathematically computed the acreage from the dimensions contained in the contract and deed. He inspected the property with the realtor; all of the land which he observed was included within the description in the deed. The only difference in appearance between the time of his inspection and the time of the survey was that one of the roads had been paved. It is not clear from the evidence which road was unpaved at the time of plaintiff's inspection. Plaintiff had bought the land in order to place his mobile home on it. Approximately eight months after purchasing the property, plaintiff learned that the portion remaining after subtraction of the rights of way was of insufficient size to permit the installation of a well and septic tank.

At the close of the plaintiff's evidence, defendant's motion for involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b) was allowed. The court found facts as provided by G.S. 1A-1, Rule 52(a), and found *inter alia*:

. . .

2. By the terms of this written contract the plaintiff agreed to purchase from the defendant and the defendant agreed to sell to the plaintiff a tract described as a triangular tract, 165 × 325 × 416, NW corner of 1427 and 1407; street address, intersection of 1427 and 1407, Spring Hill Township, Scotland County, North Carolina, at a purchase price of $2,500.00.

3. The terms of the contract required the defendant to convey to the plaintiff the property by general warranty deed at closing. No mention was made in this contract of any warranty by the seller/defendant of the quantity of land to be conveyed. Pursuant to the terms of the contract the land was purchased in gross for a lump sum.

. . .

10. The general warranty deed transferring the property contained no warranty by the defendant as to the amount of acreage described. The land conveyed was described by metes and bounds and with reference to known and locatable points of a permanent character, namely two highways. After the metes and bounds description the deed contained a general reference to the quantity as being 1.1 acres, more or less.

. . .

13. The tract conveyed, a portion of which is subject to the rights-of-way of the State Roads referred to in the deed, contains about six-tenths (.6) or seven-tenths (.7) of an acre, and this amount is not an excessive or gross deficiency in acreage.

The court concluded:

1. Where land is sold and bought for a lump sum, as is the case in the matter at bar, then quantity is not generally the essence of the contract and the parties take the risk of deficiency or excess in the absence of actual fraud or gross deficiency, neither of which were alleged or proven here.

2. There are no implied covenants with respect to title quantity and encumbrances in the sale of real estate and

where, as here, there are no specific warranties as to quantity, a purchaser has no right to complain if there is a discrepancy between the number of acres recited in a clause following the metes and bounds description and the number of acres that is actually contained in the described tract. . . .

3. That based upon the allegations of the complaint and the evidence presented at trial, this plaintiff has no cause of action on the matters complained of herein as to this defendant.

Judgment was entered for defendant. Plaintiff appealed the denial of his motion for summary judgment and the entry of judgment dismissing his claim.

Lumbee River Legal Services, Inc., by William L. Davis, III, for plaintiff appellant.

Johnston and McIlwain, P.A., by Edward H. Johnston, Jr., for defendant appellee.

MARTIN, Judge.

We must determine two questions which arise on the record before us. First, we must determine whether the trial court erred in denying plaintiff's motion for summary judgment. We hold that it did not. Second, we must determine whether the trial court erred by entering a judgment dismissing all of plaintiff's claims at the close of his evidence. Because we find that the trial court properly resolved one of plaintiff's claims against him, but failed to address the other, we affirm in part and reverse in part, remanding for determination of the unresolved issue.

[1] Plaintiff contends that he was entitled to summary judgment in his favor because the uncontroverted evidence before the court, at the hearing on the motion, disclosed that the description in the warranty deed specified that the parcel conveyed contained "1.1 acres, more or less" when in fact the parcel conveyed contained only 0.62 acres, some of which was located in the public right of way. Plaintiff asserts that this evidence establishes, as a matter of law, a breach of the covenant of seisin. We disagree.

The covenant of seisin is a covenant of title and right to convey. *Pridgen v. Long*, 177 N.C. 189, 98 S.E. 451 (1919). Plaintiff did

not allege that defendant had no right to convey the property described in the deed. His contention is simply that the property conveyed did not contain the quantity of land as stated at the conclusion of the metes and bounds description in the deed. Such a showing does not establish a breach of the covenant of seisin.

> In the absence of allegation and evidence tending to correct the deed for mistake, etc., these ordinary covenants in assurance of the title attach to the land conveyed in the deed, and not otherwise. And the authorities apposite are decisive to the effect that where real property is conveyed by metes and bounds *the quantity of land and the obligations of the deed concerning it are in no way affected by the addition of the words "containing so many acres, more or less."* [Citations omitted.]

Evans v. Davis, 186 N.C. 41, 45, 118 S.E. 845, 847 (1923) (emphasis supplied). Plaintiff did not allege a mutual mistake, nor did he allege any misrepresentation by defendant or his real estate agent as to the quantity of land which he was shown. In the absence of allegations and proof of fraudulent misrepresentation as to the quantity of the land to be conveyed, the general rule is:

> "Where the land is sold in bulk for a lump sum, then quantity is not generally of the essence of the contract and the parties take the risk of deficiency or excess, except in cases where there is actual fraud" or gross deficiency.

Queen v. Sisk, 238 N.C. 389, 391, 78 S.E. 2d 152, 154 (1953), *quoting* 8 Thompson, Real Property, Perm. Ed., sec. 4580.

Neither does the fact that a portion of the property conveyed by defendant's deed was within the rights of way of the public roads adjoining the property establish a breach of the covenant of seisin so as to entitle plaintiff to summary judgment in his favor.

> [I]t is generally held that a deed conveying property on which there existed a right of way in the public, conveys the ultimate property in the soil, and therefore there is no breach of the covenant of seisin . . . .

Hawks v. Brindle, 51 N.C. App. 19, 23, 275 S.E. 2d 277, 280 (1981), *quoting Tise v. Whitaker-Harvey Co.*, 144 N.C. 508, 515, 57 S.E. 210, 212 (1907).

Having determined that the trial court did not err in denying plaintiff's motion for summary judgment, we must next determine whether it was error for the court to enter judgment for defendant, pursuant to G.S. 1A-1, Rule 41(b), at the close of plaintiff's evidence. A motion for dismissal pursuant to Rule 41(b), made at the close of plaintiff's evidence in a non-jury trial, not only tests the sufficiency of plaintiff's proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against the plaintiff, even though the plaintiff may have made out a *prima facie* case. *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). As a fact-finder, however, the trial judge must find the facts on all issues raised by the pleadings, and state his conclusions of law based thereon, in order that an appellate court may determine from the record the basis of his decision. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980); *Helms v. Rea, supra.* The findings of fact are conclusive on appeal if supported by competent evidence. *Williams v. Liles*, 31 N.C. App. 345, 229 S.E. 2d 215 (1976).

In the case *sub judice*, the trial judge found, upon supporting evidence, that the lot was sold to plaintiff in gross for a lump sum, that no fraud on the part of defendant was alleged or proven, and that there was no gross deficiency in the actual size of the tract as opposed to that called for in the deed. Upon those findings, the court properly ruled that plaintiff had shown no right to relief by virtue of defendant's alleged breach of the covenant of seisin. That portion of the trial court's judgment is affirmed.

However, plaintiff alleged not only a breach of the covenant of seisin, but a breach of the covenant against encumbrances as well. The evidence showed, and the court found, that a portion of the tract as described in the deed was subject to the rights of way of two state roads; indeed, the first call in the description is located on the opposite side of State Road 1427 (Lee's Mill Road) from the usable portion of the tract. No reservation for either right of way was contained in the deed. Plaintiff testified that although he inspected the property before his purchase, the extent of the right of way was not apparent to him because one of the roads had not been paved at the time of his inspection.

[2] In North Carolina, a right of way or easement for a public highway may constitute an encumbrance sufficient to amount to a breach of the covenant against encumbrances where the purchaser has no actual or constructive knowledge of the encumbrance at the time of the purchase.

> The rule in North Carolina appears to be that a covenantee may not recover for breach of the covenant against encumbrances where the encumbrance he alleges is a public highway or railroad right of way and *either* (1) the covenantee purchased the property with *actual knowledge* that it was subject to the right-of-way or (2) the property was "*obviously and notoriously* subjected at the time to some right of easement or servitude . . . ." [Citation omitted.] In short, the issue is whether the covenantee knew or should have known that the land he bought was subject to a public right-of-way. Once this issue of fact is determined in the affirmative, the covenantee is "conclusively presumed to have purchased with reference to" the right-of-way. [Citation omitted.]

Hawks v. Brindle, supra at 24, 275 S.E. 2d at 281, *quoting Goodman v. Heilig*, 157 N.C. 6, 8-9, 72 S.E. 866, 867 (1911) (original emphasis).

[3] The issue of whether one or both of the highway rights of way over portions of the property constituted an encumbrance sufficient to amount to a breach of defendant's covenant against encumbrances was raised by the pleadings and the evidence. Thus, it was the duty of the trial court to resolve the issue by appropriate findings of fact as to whether plaintiff knew or should have known, at the time of purchase, that the tract was subject to the rights of way of either or both of the state roads. The findings of fact do not address this issue. Accordingly, we must remand this case to the District Court for resolution of plaintiff's claim for breach of the covenant against encumbrances.

In the event that the court, upon proper findings, determines that defendant breached the covenant against encumbrances, plaintiff would be entitled to recover "the difference between the value of the land without the encumbrance and its value as it is conveyed subject to the encumbrance." *Hawks v. Brindle, supra*

at 25, 275 S.E. 2d at 281, *quoting* J. Webster, Real Estate Law in North Carolina, § 191 (1971).

In summary, we affirm the trial court's denial of plaintiff's motion for summary judgment and that portion of the judgment dismissing plaintiff's claim for breach of the covenant of seisin. For the reasons stated, we reverse that portion of the judgment dismissing plaintiff's claim for breach of the covenant against encumbrances and remand the case to the trial court for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

Judges ARNOLD and PARKER concur.

FRANK DEREBERY v. PITT COUNTY FIRE MARSHALL

No. 8410IC1294

(Filed 16 July 1985)

1. Master and Servant § 69— workers' compensation—volunteer fireman—two part-time jobs—principal employment—average weekly wages

A volunteer fireman who worked at two part-time jobs before becoming permanently disabled was entitled to compensation based on the wages earned in the job in which he principally earned his livelihood rather than on his combined average earnings from both jobs, and the evidence supported a finding by the Industrial Commission that the higher paying of his two part-time jobs constituted his principal employment. G.S. 97-2(5).

2. Master and Servant § 69— workers' compensation—other treatment or care—rehabilitative services—residence not included

Statutory provisions permitting compensation for "other treatment or care" and for "rehabilitative services," G.S. 97-25 and G.S. 97-29, do not extend an employer's liability to the furnishing of a residence for an injured employee.

3. Master and Servant § 69— workers' compensation—employer not liable for housing

The Industrial Commission erred in requiring an employer to provide an injured employee confined to a wheelchair with wheelchair accessible housing since the provision of housing is not within the liability of an employer to pay compensation to an injured employee.

Derebery v. Pitt County Fire Marshall

APPEALS by plaintiff and defendant from opinion and award of the North Carolina Industrial Commission filed 21 September 1984. Heard in the Court of Appeals 6 June 1985.

Plaintiff, a volunteer fireman, sustained an injury by accident on 5 March 1983 arising out of and in the course of the performance of his duties. As a result of his injury, plaintiff is permanently and totally disabled, and is entitled to benefits allowed by the Workers' Compensation Act.

At the time of his injury, plaintiff was employed at two part-time jobs. He had worked at the Sonic Drive-In (Sonic) for more than a year preceding his injury, and had begun work at Bill Askew Motors (Askew) in late December 1982 or early January 1983. His average weekly wage from Sonic was $74.41; his average weekly wage from Askew was $87.40. The deputy commissioner found that plaintiff's employment with Askew was the employment in which he principally earned his livelihood. He based the award of weekly compensation, payable for plaintiff's lifetime, upon plaintiff's average weekly wage from his employment with Askew. Plaintiff appealed to the Full Commission, contending that weekly compensation should have been calculated upon his combined average weekly wages from both employments.

At the time of his injury, and prior thereto, plaintiff lived with his parents, who rent the house in which they reside. After his release from the hospital, he resumed living with them. As a result of his injury, plaintiff is confined to a wheelchair, and certain rooms in the house are inaccessible to him. With the exception of a wheelchair ramp constructed free of charge by volunteer firemen, the owner of the house refuses to allow any modifications to accommodate plaintiff's handicap. Plaintiff is capable of caring for himself and desires to live alone. The deputy commissioner found that defendant "should furnish plaintiff with a completely wheelchair accessible place to live." He ordered defendant to furnish plaintiff "with an appropriate place to live in view of his disabled condition," and in addition, that defendant pay for the cost of reasonable medical care. Defendant appealed to the Full Commission from that portion of the award requiring that it provide plaintiff with wheelchair accessible housing.

The Full Commission, with Commissioner Clay dissenting in part, sustained the results reached by the deputy commissioner, adopting his findings of fact, conclusions of law and award as its own. Both plaintiff and defendant appeal.

Blount and White, by Marvin Blount, Jr. and Charles Ellis for plaintiff appellant-appellee.

Teague, Campbell, Dennis & Gorham, by Linda Stephens for defendant appellee-appellant.

MARTIN, Judge.

We are presented with two questions. The first is whether the Industrial Commission correctly calculated plaintiff's weekly compensation benefits. We hold that it did. The second is whether the Commission properly required defendant to furnish plaintiff with a wheelchair accessible residence. We hold that portion of the Commission's opinion and award to be error.

[1] In his appeal, plaintiff assigns error to the manner in which the Industrial Commission determined the amount of weekly compensation to which he is entitled as a result of his injury. Payment of compensation to a volunteer fireman who is injured in the performance of his duties is controlled by G.S. 97-2(5), which provides, in pertinent part, as follows:

> In case of disabling injury or death to a volunteer fireman . . . under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman . . . was earning *in the employment wherein he principally earned his livelihood as of the date of injury.* [Emphasis supplied.]

Plaintiff contends that the Industrial Commission erred in determining that his employment with Askew was his principal employment. He contends that both of his jobs, with Askew and with Sonic, were employments "wherein he principally earned his livelihood."

It is well established that where there is competent evidence before the Industrial Commission to support its findings of fact, those findings are conclusive on appeal. *McLean v. Roadway Express*, 307 N.C. 99, 296 S.E. 2d 456 (1982). The evidence before the

Industrial Commission showed that during 1982, plaintiff earned an average of $333.00 per month from his employment with Sonic. However, after beginning his employment with Askew in late December 1982, he worked consistently longer hours and earned considerably more money at Askew than at Sonic. In January 1983, he earned $379.52 from his employment at Askew, while earning $197.66 at Sonic. In February 1983, his earnings from Askew amounted to $300.52 as compared to $167.84 from Sonic. During the first four days of March 1983, before his injury on 5 March, plaintiff earned $81.63 from Askew and $52.25 from Sonic. This evidence supports the Commission's finding that plaintiff's principal employment on the date of his injury was with Askew.

Plaintiff argues, however, that neither job provided him sufficient income with which to support himself, and that he is entitled to be paid compensation calculated on the basis of his combined average weekly earnings from both of his part-time jobs. While we are sympathetic to plaintiff's situation under the facts of this case, the provisions of G.S. 97-2(5) compel us to reject this argument. In providing the method by which compensation for volunteer firemen is calculated, the General Assembly adopted as the basis for determining compensation the wages earned by the volunteer fireman in his principal employment, rather than permitting a combination of his earnings from multiple employments. *Barnhardt v. Cab Co.*, 266 N.C. 419, 146 S.E. 2d 479 (1966). Based upon its finding that plaintiff's principal employment on the date of his injury was with Askew, the Commission correctly concluded that he was entitled to weekly compensation based on his average weekly wage from that employment.

Defendant appeals from that portion of the Commission's opinion and award which requires defendant to "furnish plaintiff with an appropriate place to live in view of his disabled condition." Defendant contends that the Commission exceeded its authority in requiring that defendant provide plaintiff with housing. We agree.

The evidence before the Commission disclosed that portions of plaintiff's parents' house are inaccessible to him, and that he is capable of living independently and desires to do so. One of his physicians recommended that he obtain a wheelchair accessible apartment. A mobile home called "The Enabler," which is de-

signed to accommodate persons confined to wheelchairs, is available at a cost of approximately $33,000.00. Plaintiff operates an automobile which was equipped with hand controls at defendant's expense. Upon this evidence, the Commission found that "[p]laintiff needs to live alone," and "[d]efendant should furnish plaintiff with a completely wheelchair accessible place to live . . . ." The Commission concluded, upon those findings:

> Defendant shall furnish plaintiff with all reasonable and necessary treatment or care for the well being of plaintiff which includes an appropriate place for plaintiff to live in view of his condition.

Neither the type of residence (mobile home, apartment or permanent house) nor the manner in which it was to be provided (rent-free use or purchase) was specified in the opinion and award.

[2] In ordering defendant to provide plaintiff with housing appropriate to his disability, the Commission relied on the provisions of G.S. 97-25 and G.S. 97-29. G.S. 97-25 provides, in pertinent part, as follows:

> Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief . . . and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer.

G.S. 97-29 applies to cases of total and permanent disability and provides, in pertinent part, that:

> In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services shall be paid for by the employer during the lifetime of the injured employee.

In approving an award allowing payment to a disabled claimant's brother and wife for around-the-clock care, our Supreme Court has held that the provision for "other treatment or care" contained in G.S. 97-29 goes beyond the specifics set forth in the statute. *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E. 2d 157

(1967). However, neither the provision requiring payment for "other treatment or care" nor the provision requiring payment for "rehabilitative services" can be reasonably interpreted to extend the employer's liability to provide a residence for an injured employee. *See Low Splint Coal Co., Inc. v. Bolling*, 224 Va. 400, 297 S.E. 2d 665 (1982) (construction of wheelchair ramp, bathroom facilities and other renovations to accommodate wheelchair held not to come within provisions of workers' compensation statute requiring employer to pay for "other necessary medical attention" and "reasonable and necessary vocational rehabilitation training services"). *Cf. Peace River Electric Corp. v. Choate*, 417 So. 2d 831 (Fla. 1st DCA) (1982), *petition for rev. dismissed*, 429 So. 2d 7 (1983) (court approved award requiring employer to provide claimant with rent-free occupancy of wheelchair accessible modular home, describing the award as "extraordinary relief" due to "unique" circumstances).

[3] While the Workers' Compensation Act is liberally construed to benefit the injured employee, the language of the statute must be followed. Neither the Industrial Commission nor the courts can judicially legislate expanded liability under the guise of liberal statutory construction. *Rorie v. Holly Farms*, 306 N.C. 706, 295 S.E. 2d 458 (1982). The General Assembly has not included the provision of housing within the liability of an employer to pay compensation to an injured employee. The Industrial Commission was, therefore, without authority to require defendant to bear that responsibility. Accordingly, we reverse and vacate that portion of the opinion and award requiring defendant to "furnish plaintiff with a suitable place to live in view of his disabled condition."

Plaintiff's appeal—affirmed.

Defendant's appeal—reversed.

Judges ARNOLD and PARKER concur.

Smock v. Brantley

JANET B. SMOCK, GUARDIAN AD LITEM FOR BRADLEY EDWARD SMOCK A MINOR, AND BRADLEY E. SMOCK v. JULIAN C. BRANTLEY, JR., ROCKY MOUNT OB-GYN ASSOCIATES, P.A., NASH GENERAL HOSPITAL, INC., AND JOHN DOE

No. 847SC1191

(Filed 16 July 1985)

Hospitals § 3.3— medical malpractice—neither attending physician nor resident agent of hospital—summary judgment for hospital proper

Summary judgment was properly granted for defendant hospital in a medical malpractice action where plaintiff was referred to the hospital by an outside agency and assigned to defendant Brantley, one of the private physicians practicing at the hospital, without any expression of preference by plaintiff and according to a schedule worked out by the private physicians and not the hospital; plaintiff became Dr. Brantley's patient; defendant hospital did not bill plaintiff for Dr. Brantley's services; defendant hospital did not supervise Dr. Brantley's activity; Dr. Henley identified himself to plaintiff as a resident from UNC, received his entire salary from UNC, and worked under the attending physician; and there was nothing in the record to suggest that defendant hospital's personnel reviewed, supervised, or controlled Dr. Henley's activities, that defendant hospital established any rules or regulations governing residents or rotation, or that defendant hospital had any control over who would be assigned by UNC or when. A statement by plaintiff's expert that other hospital personnel were negligent was insufficient because it contained only conclusory allegations unsupported by any factual basis and defendant's attending nurses stated in affidavits that they acted within the appropriate standard of care.

APPEAL by plaintiff from *Brown, Frank R., Judge.* Judgment entered 25 June 1984 in Superior Court, NASH County. Heard in the Court of Appeals 16 May 1985.

Plaintiffs brought this action to recover damages for themselves and on behalf of their minor son, Bradley Edward Smock, due to alleged medical negligence. Janet B. Smock became pregnant in April 1977 and chose the county health department for her prenatal care, keeping her regular schedule of appointments there. On 17 January 1978 Mrs. Smock began labor and went to the emergency room of defendant Nash General Hospital, Inc., (defendant Hospital) as she had been instructed to do by health department personnel. She was not treated in the emergency room, but was admitted and went to defendant Hospital's labor and delivery area, where Dr. Douglas Henley was on duty. Dr. Henley was at that time a first year resident in family practice,

who was doing a two month rotation at defendant Hospital pursuant to assignment by his medical school, the University of North Carolina. He was supervised and evaluated by private attending physicians who were members of the medical staff of defendant Hospital.

Dr. Henley did an initial workup and history and called the attending obstetrician, Dr. Julian Brantley, Jr. Dr. Brantley practiced as a member of Rocky Mount OB-GYN Associates, P.A., a private obstetric/gynecological group, whose members were on defendant Hospital's medical staff and rotated as attending physicians at the hospital. Persons who entered defendant Hospital without their own physician were routinely assigned to the care of private attending physicians such as Dr. Brantley. Delivery of babies normally was the responsibility of an attending physician.

Dr. Brantley delivered the baby beginning approximately six hours after plaintiff was admitted. Dr. Henley assisted peripherally in the delivery of the baby, and was in charge of postnatal care. Due to allegedly negligent procedures employed during the delivery and in the course of postnatal care, the child suffered brain damage, resulting in permanent injury and requiring extended hospitalization. Plaintiffs brought this action against Dr. Brantley, Rocky Mount OB-GYN Associates, P.A. and defendant Hospital, alleging negligence during the delivery and postnatally. They alleged that defendant Hospital was liable on grounds of corporate liability and on grounds of *respondeat superior*. From summary judgment dismissing defendant Hospital from the case, plaintiffs appeal.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and Alene M. Mercer, for defendant appellee.

MARTIN, Judge.

The trial judge ordered that denial of an immediate appeal would affect a substantial right of plaintiffs. This was tantamount to a certification that there was no just reason for delay, and we conclude accordingly that the appeal has been effectively certified

and is therefore properly before us. N.C. Gen. Stat. § 1A-1, R. Civ. P. 54(b) (1983).

Plaintiffs admitted during oral argument that the evidence present in the record before us does not present any genuine issue of material fact as to their allegations of corporate negligence by defendant Hospital. We agree. Nor is the question of the sufficiency of plaintiffs' allegations of negligence on the part of Dr. Brantley, Rocky Mount OB-GYN Associates, P.A. or Dr. Henley before us on this appeal. Therefore the only question presented is whether the trial court erred in ruling that defendant was not liable on the theory of *respondeat superior* for the allegedly negligent acts of Doctors Brantley or Henley. For the reasons stated herein, we conclude that the order dismissing the action as to Nash General Hospital, Inc., should be affirmed.

Defendant Hospital's liability, if any, depends upon whether either Dr. Brantley or Dr. Henley acted as its agent. *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). Whether a principal-agent relationship exists is a question of fact for the jury when there is evidence tending to prove it; it is a question of law for the court if only one inference can be drawn from the facts. *Partin v. Power & Light Co.*, 40 N.C. App. 630, 253 S.E. 2d 605, *disc. rev. denied*, 297 N.C. 611, 257 S.E. 2d 219 (1979). The key factor is whether or not the alleged principal has any power or control over the agent. *Id.; Willoughby v. Wilkins, supra.*

We conclude that no genuine issue of material fact exists as to whether or not Dr. Brantley was acting as an agent of defendant Hospital. As a matter of law, he was not. We rely on *Smith v. Duke University*, 219 N.C. 628, 14 S.E. 2d 643 (1941). There, as here, plaintiff was referred to the hospital by an outside agency and assigned to one of the private physicians practicing at the hospital, without any expression of preference by plaintiff. The Supreme Court held that the hospital assumed no liability for the independent professional activity of the attending physician, even though the physician (unlike Dr. Brantley) was on the payroll of the medical school associated with the hospital and maintained an office at the hospital. In *Willoughby v. Wilkins, supra*, and *Rucker v. Hospital*, 20 N.C. App. 650, 202 S.E. 2d 610, *aff'd* 285 N.C. 519, 206 S.E. 2d 196 (1974) we reached the opposite result. In

each of those cases, however, the physician had signed a contract with the hospital agreeing *inter alia* not to maintain a private practice, to accept work as directed by the hospital and according to the policy of the hospital, and accepting salary and vacation from the hospital. *Smith* clearly is the controlling case here; once plaintiff was assigned to Dr. Brantley, according to a schedule worked out by the private physicians and not by defendant Hospital, she became his patient. Defendant Hospital did not bill plaintiff for Dr. Brantley's services and did not supervise his activity. No liability can be imposed upon defendant Hospital based upon negligent treatment rendered by Dr. Brantley.

Therefore any liability of defendant Hospital may be predicated only on the acts of Dr. Henley. This presents an apparently novel question: whether residents assigned by a central medical school to outlying hospitals on a rotating basis are agents of the hospitals to which they are assigned.

It appears that Dr. Henley identified himself to plaintiff as a resident from UNC. He received his entire salary from UNC, and nothing from defendant Hospital. In providing individual patient care, Dr. Henley worked under the supervision of the attending physician in charge of the patient, in this case Dr. Brantley. There is nothing in the record to suggest that defendant Hospital's personnel reviewed, supervised or controlled Dr. Henley's activities, nor does it appear that defendant Hospital established any rules or regulations governing residents on rotation. Defendant Hospital apparently had no control over who would be assigned it by UNC or when. Applying the law set forth in *Smith* and *Willoughby, supra*, we conclude that defendant Hospital did not exercise that control over Dr. Henley necessary to impute to it liability for his acts. *Waynick v. Reardon*, 236 N.C. 116, 72 S.E. 2d 4 (1952), in which a resident was held to be the agent of the hospital, is clearly distinguishable. There the resident received a salary and accommodations from the hospital and was assigned certain duties by it; the resident performed the allegedly negligent surgery without the supervision of an attending physician.

Thus it appears that plaintiff has failed to establish that defendant Hospital has any liability on the theory of *respondeat superior*. Plaintiff attempts to save her case by reliance on her

expert's statement that other "hospital personnel," in addition to Dr. Henley, were negligent. A careful review of the record does not reveal who these other personnel were or what they did or did not do that constituted negligence. Defendant Hospital did introduce affidavits from the attending nurses to the effect that they acted within the appropriate standards of care. It then became incumbent on plaintiff to come forward with some specific facts, as opposed to mere allegations, to establish defendant's liability. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). The affidavit of plaintiff's expert, asserting that there was "inadequate and inappropriate immediate neonatal care of this infant by not only Dr. Henley but hospital personnel" and that the "failure of appropriate attention" was attributable "in part to the hospital," contains only conclusory allegations, unsupported by any factual basis upon which the negligence of defendant Hospital or its personnel could be grounded, and is insufficient to defeat summary judgment. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976).

We conclude that summary judgment was properly entered dismissing defendant Hospital from the case. The order appealed from is

Affirmed.

Judges ARNOLD and PARKER concur.

JOHN MICHAEL HAAS v. REECE KELSO, T/A KELSO'S AUTO ENTERPRISE

No. 8427DC1266

(Filed 16 July 1985)

1. Rules of Civil Procedure § 15.1— permitting amendment of complaint—no abuse of discretion

In an action to recover damages for breach of contract to repair an automobile, the trial court did not abuse its discretion in permitting plaintiff to amend his complaint at the beginning of trial to allege additional damages incurred prior to trial.

2. **Contracts § 29.3; Damages § 6— breach of contract to repair automobile—damages for loss of use**

Damages for loss of use of an automobile were recoverable in an action for breach of contract to repair the automobile where there was evidence that defendant knew plaintiff was employed in another city, that he would be required to drive to work using his wife's car with a bigger engine, and that as a result he would incur additional fuel expense during the time he could not use his own car and would be using his wife's automobile.

3. **Contracts § 28.2— loss of use—instructions requiring breach of contract and negligence**

Defendant was not prejudiced by an instruction placing the burden on plaintiff to show both a breach of contract and negligence on the part of defendant to sustain damages for loss of use of an automobile.

4. **Rules of Civil Procedure § 59— denial of new trial for excessive damages**

The trial court did not abuse its discretion in the denial of defendant's motion for a new trial in an action for breach of contract to repair an automobile on the ground that the amount of the verdict was excessive and unsupported by the evidence. G.S. 1A-1, Rule 59(a)(6).

APPEAL by defendant from *Ramseur, Judge*. Judgment entered 30 August 1984 in District Court, GASTON County. Heard in the Court of Appeals 5 June 1985.

This is a civil action in which plaintiff, John Michael Haas, seeks damages from defendant, Reece Kelso (who is plaintiff's wife's uncle), trading as Kelso's Auto Enterprise, for the alleged breach of a contract to repair an automobile.

The essential facts are:

Plaintiff took his 1970 Volkswagen automobile to defendant's business for repairs sometime during July, 1983. Defendant purportedly agreed to "rebuild the engine" in the automobile for the sum of $611.28 which plaintiff paid 27 August 1983. Plaintiff brought the automobile back to defendant in September, 1983 for a "500 mile checkup" at which time defendant replaced an engine gasket. Plaintiff paid $6.60 for the gasket on 22 September 1983. Plaintiff brought the automobile back to defendant for another "500 mile checkup" early in October, 1983. Plaintiff complained of "knocking" in the engine and defendant installed a cylinder head for $91.53 which plaintiff paid on 12 October 1983. Two weeks later, it became necessary to have the automobile towed to defendant's place of business when a piston "stuck in the engine casing."

Defendant allegedly informed plaintiff that he would try to find a used casing as a replacement from another automobile.

After several attempts, defendant obtained a used casing, placed it in the engine and released the automobile to plaintiff on 26 June 1984. Between October, 1983 and May, 1984, plaintiff and his wife had both contacted defendant concerning the status of the repair work. During this same time period, plaintiff drove his wife's automobile from his home in Gastonia to his workplace in Charlotte, incurring additional fuel expenses of $374.00 due to the fact that the wife's automobile had a bigger engine and was therefore less fuel efficient than plaintiff's automobile. Plaintiff did not actually "demand" return of the automobile until May, 1984.

When plaintiff attempted to drive his automobile home from defendant's place of business on 26 June 1984, the oil pressure warning light came on and the engine began knocking. After contacting defendant, plaintiff had the automobile towed back to defendant's place of business. Defendant examined the automobile and informed plaintiff that he could find nothing wrong, but that he could hear "something knocking." Defendant asked to keep the automobile overnight so he could "listen to it." After keeping the automobile overnight, defendant again informed plaintiff that he could find nothing wrong with the automobile and that plaintiff could get his automobile when he paid the $20.00 towing fee. Plaintiff again attempted to drive his automobile home and again the oil pressure warning light came on and the engine began knocking.

Plaintiff took his automobile to another mechanic who successfully repaired it for $380.00.

This action was originally filed in the Small Claims Division of Gaston County District Court on 12 June 1984. From a judgment for plaintiff, defendant appealed to the District Court. The case came on for trial 27 August 1984 before the Honorable Donald E. Ramseur, Judge presiding, and a jury. At the beginning of the trial, plaintiff moved to amend his complaint to allege additional damages incurred prior to trial. Plaintiff's motion was granted.

The case was submitted to the jury on the issues of breach of contract and damages. The jury found that there was a breach of

contract by defendant and awarded plaintiff $1,109.41 in actual damages and $374.00 in damages for loss of use. The jury also found that defendant was entitled to $310.00 for the reasonable value of automobile "parts furnished and services rendered." Defendant moved to set aside the verdict as being against the greater weight of the evidence and for a new trial. The trial court denied both motions, but remitted $83.41 and entered judgment for plaintiff in the amount of $1,090.00 on 30 August 1984. Defendant appeals.

Basil L. Whitener, for plaintiff-appellee.

Lloyd T. Kelso, by Robert W. Ferguson, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the trial court's granting of plaintiff's motion to amend his complaint. We find no error.

A motion to amend pleadings is addressed to the sound discretion of the trial court. *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588, *cert. denied*, 281 N.C. 758, 191 S.E. 2d 356 (1972); *Willow Mountain Corp. v. Parker*, 37 N.C. App. 718, 247 S.E. 2d 11, *cert. denied*, 295 N.C. 738, 248 S.E. 2d 867 (1978). The trial court's ruling upon a motion to amend pleadings is not reviewable absent a showing of an abuse of discretion. *Smith v. McRary*, 306 N.C. 664, 295 S.E. 2d 444 (1982). Defendant has failed to show an abuse of discretion and there is, accordingly, no error.

II

Defendant next assigns as error the submission of the following issue to the jury on the grounds of insufficient evidence.

> 3. What amount of damages, if any, is the plaintiff entitled to have and recover of the defendant?
>
> . . .
>
> b) For loss of use?

We find no error.

[2] When an action for breach of contract is brought, the damages recoverable are those which may reasonably be supposed to have been in contemplation of the parties at the time they contracted. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Damages for injury that follows the breach in the usual course of events are always recoverable provided that plaintiff proves that the injury actually occurred as a result of the breach. Whether damages are recoverable for injury that does not follow breach of a particular contract in the usual course of events (special damages) depends upon the information communicated at the time of contracting. *Id.* The test is generally one of foreseeability. *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). Accordingly, damages for "loss of use" are recoverable in an action for breach of contract where, as here, there was evidence from which the jury could find that defendant knew plaintiff was employed in Charlotte, that he would be required to drive to work from his home in Gastonia using his wife's Chevrolet Impala and that as a result he would incur additional fuel expense during the time plaintiff could not use his own car and would be driving his wife's automobile. As applied to the facts of this case, we find no error in the trial court's submission of this issue to the jury.

[3] In a related assignment of error, defendant argues that the trial court erred in instructing the jury on loss of use based on defendant's negligence in completing repairs in that negligence was not pleaded or proved.

The trial court instructed the jury:

> So, members of the jury, the Court instructs you that if you find by the greater weight of the evidence that there was a breach of the agreement by the Defendant, Mr. Kelso, *and* that the Defendant negligently failed to correct the defects within a reasonable period of time and that as a proximate result thereof the Plaintiff was damaged on account of the loss of use of his vehicle, and that such damages were reasonably foreseeable and within the contemplation of the parties; then you will award to the Plaintiff such damages for loss of use as you find by the greater weight of the evidence and under the rule which I have stated to you. (Emphasis added.)

Defendant shows no prejudice by this instruction. In fact, by this instruction, plaintiff's burden was increased to show by the greater weight of the evidence both a breach of contract *and* negligence on the part of defendant to sustain damages for loss of use. Accordingly, defendant's assignment of error is overruled.

III

[4] Defendant next assigns as error the trial court's denial of his motion for a new trial pursuant to G.S. 1A-1, Rule 59. Defendant argues that the amount of the verdict was excessive as a matter of law and the evidence insufficient to support it. We find no error.

Under G.S. 1A-1, Rule 59(a)(6), a trial court may grant a new trial to any party on the grounds that damages awarded are inadequate or excessive and which appear to have been given under the influence of passion or prejudice. A motion in this regard is directed to the sound discretion of the trial court. It is established that the trial court's decision will not be disturbed on appeal in the absence of a showing of abuse of discretion. *Setzer v. Dunlap*, 23 N.C. App. 362, 208 S.E. 2d 710 (1974). The same is true for a motion for a new trial on the grounds that the evidence is insufficient to justify the verdict. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). Defendant has failed to show an abuse of discretion in the trial court's denial of his motion for a new trial.

The judgment of the trial court is

Affirmed.

Judges BECTON and PHILLIPS concur.

IN RE: DANIEL JAMES CLARK

No. 8421DC1121

(Filed 16 July 1985)

1. **Parent and Child § 1.5— termination of parental rights—purpose of preliminary hearing**

The sole purpose of the preliminary hearing authorized by G.S. 7A-289.26 in a proceeding to terminate parental rights is to ascertain the name or identity of an unknown parent, not to ascertain his or her whereabouts.

2. **Parent and Child § 1.5; Rules of Civil Procedure § 4.1— termination of parental rights—service by publication—due diligence requirement**

Where the name or identity of respondent parent in a proceeding to terminate parental rights is known but his or her whereabouts are unknown, the petitioner must proceed under G.S. 7A-289.27 and, with regard to service of process by publication, must comply with the requirements of G.S. 1A-1, Rule 4(j1), including the requirement of due diligence.

3. **Parent and Child § 1.5; Rules of Civil Procedure § 4.1— termination of parental rights—service of process by publication—failure to use due diligence**

Service of process by publication on respondent father in a proceeding to terminate parental rights was void where petitioner failed to use due diligence in attempting to locate the father in that petitioner relied solely on information supplied by the mother and failed to check public records which would have revealed the father's address.

APPEAL by petitioner from *Gatto, Judge*. Order entered 14 June 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 14 May 1985.

Petitioner appeals from the granting of respondent's motion to have an order terminating his parental rights set aside.

Meyressa H. Schoonmaker for petitioner-appellant.

Dan S. Johnson for respondent-appellee.

PARKER, Judge.

In October 1982, Stephanie Ann Clark and Christian Paul Lampe began dating. In February 1983, Clark learned she was pregnant and, without revealing this information to Lampe, terminated their relationship. On 25 August 1983, Clark gave birth to Daniel James Clark. That day, Rebecca Lawhon, a child counselor from Family Services, Inc. (hereinafter petitioner), a licensed

child placing agency in Forsyth County, contacted Clark about placing her son for adoption. Clark indicated to Lawhon at that time that Lampe was the father of her child and that he lived with his family in Winston-Salem, although she thought he might have subsequently moved to Florida. On 31 August 1983, Clark surrendered her son to petitioner for adoption pursuant to G.S. 48-9(a)(1).

On 1 December 1983, petitioner filed a petition to terminate Lampe's parental rights. Unable to locate Lampe, petitioner requested a preliminary hearing pursuant to G.S. 7A-289.26. At the hearing, Clark was evasive and indicated she was unsure of the spelling of Lampe's last name. The court concluded that because Lampe's "whereabouts" were unknown, he must be served with notice by publication.

Notice by publication was thereafter completed, and respondent failed to file answer. On 18 January 1984, an Order terminating Lampe's parental rights was entered.

On 2 May 1984, Lampe filed a motion to set aside the termination Order, alleging that on 6 April 1984, he received a letter from petitioner eliciting medical information regarding his son. Lampe alleged that prior to this letter, he had no knowledge that he had a son, or that any legal proceedings were taking place in regard to his son. Lampe alleged that although he was a college student, he had maintained the same permanent home address in Forsyth County for the past six years.

Lampe's motion came on for hearing, and the court concluded that "petitioner did not exercise a diligent effort at the time of the preliminary hearing . . . to locate the father of Daniel James Clark" and "[t]hat the name of the purported father of the minor child was known at the time of the preliminary hearing. . . ." The court granted respondent's motion and set aside the previous termination Order.

The central questions presented on this appeal are (i) whether, prior to using notice by publication, petitioner was required to use due diligence in locating respondent, and (ii) whether in fact petitioner met this requirement. We conclude due diligence is required in all parental rights termination cases before notice by publication can properly be used, and that petitioner failed to

meet this requirement. Accordingly, we affirm the Order which set aside the prior termination Order.

General Statute 7A-289.1, *et seq.*, governs the termination of parental rights. Although this Court has held that these statutes govern the procedure to be used in these cases, this Court has also held that the Rules of Civil Procedure are not to be ignored. *In re Allen*, 58 N.C. App. 322, 293 S.E. 2d 607 (1982).

[1] Petitioner contends that G.S. 7A-289.26 does not contain a due diligence requirement after a preliminary hearing has been held for the purpose of establishing the "identity/whereabouts" of the respondent. We disagree. General Statute 7A-289.26 contains no provision to determine the "whereabouts" of the respondent. Rather, that statute authorizes a preliminary hearing "to ascertain the name or identity of such parent." We reject petitioner's contention that the term "identity" as contemplated by G.S. 7A-289.26 is synonymous with "whereabouts." Nowhere in Black's Law Dictionary, or in Burton's Legal Thesaurus, are these words used interchangeably. In our view, the sole purpose of the preliminary hearing so authorized is to ascertain the name or identity of such parent, not to ascertain his or her whereabouts.

Although the record reveals that Clark was evasive concerning Lampe's whereabouts, it is equally clear that she told everyone involved that the father's name was Christian Paul Lampe. We are not persuaded that the two possible spellings of his last name (*Lamp* or *Lampe*) given by Clark created any genuine doubt about the name or identity of the respondent.

Having determined that G.S. 7A-289.26 contains no provision for serving a known, but unlocatable parent, we must examine G.S. 7A-289.27 and the Rules of Civil Procedure for guidance. General Statute 7A-289.27 provides that "[e]xcept as provided in G.S. 7A-289.26, upon the filing of the petition, the court shall cause a summons to be issued. . . ." This statute further provides that "[s]ervice of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j)." General Statute 1A-1, Rule 4 (j1) states: "A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication." This statute is appropriate only where a civil litigant's whereabouts are unknown, and the due diligence requirement contained therein is clear.

The case of *In re Phillips*, 18 N.C. App. 65, 196 S.E. 2d 59 (1973), although decided under the former termination statute, is factually similar and instructive on this point. In that case, petitioner knew the respondents' names, but not their whereabouts. A preliminary hearing was held, and upon the court's determination "that it was impractical to obtain personal service" upon either parent, service by publication was ordered. The respondent-father subsequently moved to have the termination order set aside based on insufficiency of service of process, which was denied. On appeal, this Court imposed the due diligence requirement of Rule 4(j1) onto that termination statute, even though it contained no such requirement, and held that the termination Order should have been set aside because of petitioner's failure to comply with the publication requirements contained in Rule 4. *Id.* at 70, 196 S.E. 2d at 62.

[2] Although we recognize that former G.S. 7A-288 provided that the parent shall be notified by personal service of the summons and petition or "under the procedures established by Rule 4 of the Rules of Civil Procedure . . . ," G.S. 7A-289.27 also provides for service of the summons "as provided under the procedures established by G.S. 1A-1, Rule 4(j). . . ." We find the reasoning of *Phillips* persuasive since the procedural language contained in the former statute and in current G.S. 7A-289.27 are substantially similar. We conclude, therefore, that where, as here, the "name or identity" of a respondent parent is known, but his or her whereabouts are unknown, that the petitioner in a parental rights termination case must proceed under G.S. 7A-289.27 and must comply with Rule 4(j1) as regards service by publication, and specifically, with the due diligence requirement contained therein.

[3] Next, petitioner asserts that prior to using notice by publication, they exercised due diligence in attempting to ascertain the identity and whereabouts of the respondent father.

As we noted earlier, the trial court concluded as a matter of law that "petitioner did not exercise a diligent effort at the time of the preliminary hearing" in locating Lampe. It is well established that while findings of fact, if supported by competent evidence, are conclusive on appeal, *Matter of Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984), the trial court's conclusions of law arising from these facts are always reviewable *de novo* on ap-

peal. *City v. Engineering Co.*, 68 N.C. App. 676, 316 S.E. 2d 115, *disc. rev. denied*, 312 N.C. 492, 322 S.E. 2d 554 (1984).

In this case, petitioner knew respondent's name and the county in which he resided. The court found as a fact that the Forsyth County telephone directory contained only two listings under the name of "Lampe" during the time of the petition. Petitioner called only one of these numbers and found it to be disconnected. The other listing had belonged to respondent's father since August 1978. The court also found that the petitioner issued a subpoena to Appalachian State University for records relating to Lampe, but that no further check was made in regard to these records until after the termination order was signed.

We find the following findings of fact most persuasive:

> 12. That since 1982, Christian Paul Lampe has had a North Carolina driver's license with the address of 101 Waddington Road, Clemmons, North Carolina; further that Christian Paul Lampe pays personal property taxes in Forsyth County with his address listed as 101 Waddington Road, Clemmons, North Carolina; further, that he is registered to vote in Forsyth County with his address for the draft recorded as 101 Waddington Road, Clemmons, North Carolina; further, at the time of the birth of the child, the movant had enrolled at Elon College and his parents lived at 101 Waddington Road and continue to reside there at this time.
>
> 13. That the petitioner in this matter checked no public records to determine the location and identity of the father of the minor child but instead relied solely on the information supplied by Stephanie Ann Clark.

Petitioner contends that this case is controlled by *Emanuel v. Fellows*, 47 N.C. App. 340, 267 S.E. 2d 368, *disc. rev. denied*, 301 N.C. 87 (1980), in which this Court concluded that "we do not wish to make a restrictive mandatory checklist for what constitutes due diligence . . . . Rather, a case by case analysis is more appropriate." *Id.* at 347, 267 S.E. 2d at 372. We agree with this language, and conclude that under the facts of this particular case, petitioner failed to act with due diligence in attempting to determine respondent's whereabouts. Service by publication is void where the plaintiff did not use due diligence in ascertaining

defendant's address. *Fountain v. Patrick*, 44 N.C. App. 584, 261 S.E. 2d 514 (1980).

In view of our disposition of the first two assignments of error, we need not decide whether petitioner's late filing of the attorney's affidavit was prejudicial to respondent.

The Order appealed from is

Affirmed.

Judges ARNOLD and MARTIN concur.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY v. UNIGARD INDEMNITY COMPANY

No. 8426SC859

(Filed 16 July 1985)

Insurance § 85— coverage of vehicle not described in policy—title not transferred —no coverage

Summary judgment was properly entered for defendant in an action seeking a declaration that defendant's policy covered injuries received in an automobile accident where defendant had issued an automobile liability policy to Tommy Kendrick; Kendrick was driving a 1966 Chevrolet which had been given to him by his father; an accident occurred and Kendrick's passenger recovered damages from plaintiff pursuant to his uninsured motorist's coverage with plaintiff; defendant's policy covered "owned automobiles" and "temporary substitute automobiles"; Kendrick had not received or sought from his father a certificate of title or other writing transferring ownership of the Chevrolet; the vehicles specifically described in the policy were not mechanically disabled and the Chevrolet was not given to Kendrick as a substitute vehicle; and Kendrick did not notify his insurance agent or any representative of defendant that he was driving the Chevrolet or of the accident. G.S. 20-4.01(26), G.S. 20-279.1 to .39.

APPEAL by plaintiff from *Saunders, Chase B., Judge*. Judgment entered 15 June 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 May 1985.

On 24 March 1981 Tommy Lewis Kendrick (Kendrick) was driving a Chevrolet automobile when an accident occurred in which his passenger, Calvin Harrison, was injured. Harrison

sought to recover damages for his injuries from defendant insurance company, which had issued an automobile liability policy to Kendrick. Defendant denied coverage under the policy. Thereafter Harrison recovered $25,000 for his injuries from plaintiff insurance company pursuant to the uninsured motorist provisions of a policy it had issued to him.

Plaintiff then instituted this action seeking a declaration that the policy issued by defendant covered Kendrick's liability in connection with the accident and that therefore plaintiff is entitled to recover from defendant the sum of $25,000 paid on defendant's behalf to Harrison. The trial court concluded that Kendrick was not insured under defendant's policy for his operation of the automobile when the accident occurred, and it therefore entered summary judgment for defendant. Plaintiff appeals.

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

Golding, Crews, Meekins, Gordon & Gray, by Ned A. Stiles, for defendant appellee.

WHICHARD, Judge.

The record shows the following undisputed facts:

Defendant issued a policy of automobile liability insurance to Kendrick, the effective dates of which were 25 September 1980 until 25 March 1981. The automobiles specifically described and referred to in the policy were a 1978 Buick and a 1975 Chrysler. During the period of the policy it was the only automobile liability policy Kendrick had in full force and effect. The policy was issued in this state pursuant to the laws of this state, specifically the Financial Responsibility Act, G.S. 20-279.1 to .39. Several days prior to the date of the accident Kendrick was given a 1966 Chevrolet automobile by his father. The Chevrolet was registered in South Carolina in the father's name and had been sitting in the father's yard. When the father gave the Chevrolet to Kendrick, he gave him the only keys to it. No restrictions were placed on Kendrick's use of the Chevrolet. When Kendrick was given the automobile, he drove it from his father's home in South Carolina to his own residence in this state where he parked it in his yard. Kendrick retained possession of the Chevrolet from the time it

was given to him until the accident and drove it on several occasions during this period.

When Kendrick's father gave him the Chevrolet, he did not deliver to Kendrick a certificate of title or any other writing transferring ownership. The father never executed a certificate of title to Kendrick either before or after the accident, nor did Kendrick attempt to obtain such a certificate. When Kendrick was given the Chevrolet the vehicles specifically described in the policy issued by defendant were in working order and were not mechanically disabled. The Chevrolet was not given to Kendrick as a substitute automobile for either of the vehicles described in the policy. Prior to May 1981, Kendrick did not notify his insurance agent or any representative of defendant that he had been driving the Chevrolet, nor, prior to that date, did he notify or discuss with such persons his accident of 24 March 1981.

The policy issued by defendant provided that defendant would pay all sums which Kendrick became legally obligated to pay as damages because of bodily injury or property damage "arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile." "Owned automobile" is defined in the policy as:

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,

(b) a trailer owned by the named insured,

(c) a private passenger, farm or utility automobile *ownership* of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or

(2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company during the policy period or within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile [.] [Emphasis supplied.]

The policy defines a "temporary substitute automobile" as "any automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction." A "non-owned automobile" is defined in the policy as "an automobile or trailer not owned by or furnished for the regular use of the named insured or any relative, other than a temporary substitute automobile."

Plaintiff contends that the Chevrolet given to Kendrick by his father was an "owned automobile" as defined in section (c) of the policy and that therefore defendant was liable for the damages arising out of Kendrick's operation of the Chevrolet on 24 March 1981. We disagree. Although Kendrick acquired possession of the Chevrolet during the period defendant's policy was in effect, he did not acquire ownership as required to bring it within the definition in section (c).

The word "owner" is defined in G.S. 20-4.01(26), in pertinent part, as "[a] person holding the legal title to a vehicle." This definition applies throughout Chapter 20 of our General Statutes and must be read into every automobile liability insurance policy within the purview of the Financial Responsibility Act, G.S. 20-279.1 to .39, unless the context otherwise requires. *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 623, 298 S.E. 2d 56, 58, 36 A.L.R. 4th 1, 3 (1982), *cert. denied*, 307 N.C. 698, 301 S.E. 2d 101 (1983). Although in *Ohio Casualty*, 59 N.C. App. at 626, 298 S.E. 2d at 59-60, this Court recognized that under certain facts and circumstances the "owner" of a vehicle could be someone other than the holder of legal title, the facts and circumstances here do not justify such a result.

Our Supreme Court has indicated that for purposes of liability insurance coverage, ownership of a motor vehicle which requires registration under the Motor Vehicle Act of 1937 does not pass until transfer of legal title is effected as provided in G.S. 20-72(b). *See Insurance Co. v. Hayes*, 276 N.C. 620, 640, 174 S.E. 2d 511, 524 (1970); *see also Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. at 623, 298 S.E. 2d at 58. Thus, ownership does not pass until

(1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee.

Insurance Co. v. Hayes, 276 N.C. at 640, 174 S.E. 2d at 524.

The record shows that Kendrick did not hold legal title to and thus was not the owner of the Chevrolet prior to the time it was given to him by his father, and that he did not acquire or even attempt to acquire title to, or ownership of, the automobile while defendant's policy was in effect. Thus, the Chevrolet was not an "owned automobile" as defined in section (c) of the policy. Since the Chevrolet was not given to Kendrick as a substitute for one of the owned automobiles described in the policy, it was not a "temporary substitute automobile" as defined in the policy. Since the Chevrolet was not a trailer or a temporary substitute automobile or an automobile described in the policy for which a specific premium was charged, it was not an "owned automobile" as otherwise defined in the policy.

The record further shows that Kendrick was given unrestricted use and possession of the Chevrolet. "Where an insured driver has the unrestricted use and possession of an automobile, the certificate of title for which is retained by another, the car is 'furnished for the regular use of' the insured driver, and thus not covered by the 'non-owned' clause of the policy." *Gaddy v. Insurance Co. and Ramsey v. Insurance Co.*, 32 N.C. App. 714, 717, 233 S.E. 2d 613, 615 (1977); *see also Devine v. Casualty & Surety Co.*, 19 N.C. App. 198, 206, 198 S.E. 2d 471, 477 (1973), *cert. denied*, 284 N.C. 253, 200 S.E. 2d 653 (1973).

We conclude that the Chevrolet operated by Kendrick on 24 March 1981 was neither an "owned automobile" nor a "non-owned automobile" as defined in defendant's policy and that therefore defendant was not liable for damages arising out of its use. Accordingly, we affirm the entry of summary judgment for defendant.

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

GLEN YOUNG AND WIFE, INEZ YOUNG, PETITIONERS v. ARTHUR YOUNG AND WIFE, IRENE YOUNG, AND EDNA KISER, RESPONDENTS v. JAMES D. YOUNG [DECEASED] AND WIFE, PARTHENE S. YOUNG (WIDOW), AND ANTHONY A. BRADLEY AND WIFE, SIDNEY A. BRADLEY, THIRD PARTY DEFENDANTS

No. 8425SC1189

(Filed 16 July 1985)

1. **Boundaries § 9— description of boundaries issue of law—location on the ground issue of fact**

In cases involving boundary line disputes brought under the processioning statutes, the question of what are the boundaries presents a question of law for the court, while the question of where the boundaries are located on the ground is generally a question of fact for the jury.

2. **Boundaries § 3— calls reversed—error**

The trial judge erred by granting summary judgment for respondents in an action to establish a boundary line where a mistake was made in the original survey of a subdivision and the trial court reversed the sequence of calls given in the original commissioner's report even though all the corners were known or could be determined. The fact that the commissioners drew the homeplace in the middle of a lot on the plat while following the calls in sequence places it close to a boundary line does not warrant reversal as a matter of law because the commissioners did not depict the distance from the walls of the homeplace to any boundary line. The fact that every deed entered since confirmation of the report has been described according to the plat does not estop petitioners from arguing that the disputed intersection of boundary lines is at some point other than that shown on the plat because the commissioners drew the plat to illustrate their report, and it adds no points of reference with which to better discern the intent of the commissioners.

3. **Boundaries § 14— denial of motion for survey—no abuse of discretion**

While the better practice is for the court to order a survey in boundary disputes, G.S. 38-4 does not require the court to do so and there was no abuse of discretion in the denial of petitioners' motion for a survey.

APPEAL by petitioners from *Sitton, Judge*. Judgment entered 17 August 1984 in Superior Court, BURKE County. Heard in the Court of Appeals 16 May 1985.

This case involves a boundary line dispute.

The parties' property was originally part of a fifteen-acre tract owned by Delia Young. In 1950, after Delia Young died, the tract was divided into ten lots by a panel of commissioners appointed by Burke County Superior Court. The commissioners prepared a written report giving descriptions of the lots and prepared a plat, which they incorporated into the report. Petitioners own lots 3, 4, and 5 while respondents own lots 1 and 2.

On 4 October 1982, petitioners filed a petition under the processioning statutes to establish a boundary line between lots 2 and 3 with the Clerk of Burke County Superior Court. On 10 August 1983, petitioners moved for the appointment of a surveyor by court order. This motion was apparently denied. The respondents moved to add as parties defendant the owners of the other lots in the subdivision. This was allowed. The original respondents then filed a cross-complaint against the third party defendants for a determination of the boundary lines and in the alternative for an equitable realignment of the boundary lines in the event that the court did not determine that the lines were as established by the 1950 Report of the Commissioners. The respondents also amended their answer to add a further defense of adverse possession based on color of title on 19 August 1983. With the issue of title raised, the case was transferred to the civil issue docket.

In their original petition and on appeal, petitioners contend that the true location of the north-south boundary line between lots 2 and 3, at its southern terminus, is 240 feet west of the southeast corner of respondents' lot 1. Petitioners base their claim on a survey done of lots 1 and 2 according to the description given in the 1950 Report of the Commissioners, subdividing the property. Respondents rely also on the survey, the description given in the 1950 Report, and the plat prepared and incorporated into the Report. Respondents say the Report and plat support location of the southern terminus of the line between lots 2 and 3 at 280 feet west of the southeast corner of lot 1.

Respondents moved for summary judgment on 21 March 1984, requesting the trial court to declare the true boundary line between lots 2 and 3. The trial court accepted respondents' de-

scription and location of the boundary line and granted summary judgment against petitioners. Petitioners appealed.

Mitchell, Teele, Blackwell, Mitchell & Smith, by Thomas G. Smith, for petitioner appellants.

McMurray & McMurray, by John H. McMurray, for respondent appellees.

ARNOLD, Judge.

The primary question presented is whether the trial judge erred in granting summary judgment for respondents on petitioners' petition to establish a boundary line.

Summary judgment is proper only if there is no genuine issue of material fact and respondents are entitled to judgment as a matter of law. *See Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980).

[1] In cases involving boundary line disputes, brought under the processioning statutes, the question of what are the termini or boundaries presents a question of law for the court, while the question of where the boundaries or termini are located on the ground is generally a question of fact for the jury. *Bishop v. Reinhold*, 66 N.C. App. 379, 387, 311 S.E. 2d 298, 303, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 700 (1984); *Combs v. Woodie*, 53 N.C. App. 789, 790, 281 S.E. 2d 705, 706 (1981); *Miller v. Johnson*, 173 N.C. 62, 91 S.E. 593 (1917).

Only where the location of the boundary line or termini is admitted, or evidence is not conflicting, is the location of the line a question of law for the court. *Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E. 2d 603, 606 (1950), *pet. for reh. denied*, 233 N.C. 617, 65 S.E. 2d 144.

[2] In the present case, the parties agree, and the trial court found in its summary judgment order, that the Report of the Commissioners and the plat map incorporated in it govern the description of the boundary line between lots 2 and 3. Petitioners say that when lots 1 and 2 are surveyed according to the written description in the Report, proceeding counterclockwise from the pine stump to the poplar corner and thence according to the calls given, the distance along the southern boundary of lots 1 and 2

between the pine stump and the southern terminus of the line between lots 2 and 3 is only 240 feet.

Respondents contend that the correct boundary between lots 2 and 3 can be found by reversing the written calls and proceeding clockwise from the beginning point, a pine stump, along the southern boundary of lots 1 and 2 to the southern terminus of the boundary between 2 and 3. They argue essentially that the court should not merely follow the written description in the sequence given in the commissioners' Report. Rather, they make a "practical argument," that the plat depicts the Delia Young homeplace as equidistant from the western and eastern boundaries of lot 2 and that if the western boundary is as petitioners contend, 40 feet to the east, it would be on or close to the west wall of the homeplace. The commissioners would not have intended, respondents say, to survey lot 2 so that its western boundary falls on the wall of a house.

Without doubt, a mistake was made in the original survey of the Delia Young subdivision, with the result that the plat and the written Report give the length of the southern line of the entire tract as 40 feet longer than it is on the ground. As the parties' petition and answer indicate, the error was apparently made in the survey of the first call of lot 1, from the pine stump to the poplar corner.

As noted above, what the boundary between lots 2 and 3 is, *i.e.*, how the written Report and the plat should be construed to give a legal description of the boundary, is a question for the trial court. In the present case, the trial court accepted the description of the boundary advocated by the respondents. He described the boundary as follows:

> BEGINNING on a point in South boundary line of the tract of land partitioned in aforesaid special proceeding located North 89° West 280 feet from Southeast corner of Lot 1 marked by a pine tree and iron pipe as shown on said plat and runs thence North 5° West 449 feet to an iron pipe.

As petitioners correctly observe, the trial court's description requires a reversal of the sequence of calls given in the commissioners' Report. A reversal of calls is permissible if a particular corner is unknown and cannot be found by following the direc-

tions in the sequence specified. *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E. 2d 562, 563 (1959). Ordinarily a corner is unknown when a natural monument is missing or an artificial monument is disputed and the description fails to give a course and distance to the corner from an established corner.

In the present case all corners are known or can be determined: all are marked either by a natural monument or can be found by proceeding from a natural monument according to the directions given in the commissioners' Report. Comparison of respondents' Exhibit A and petitioners' Summary Judgment Exhibit 1 indicates that the parties agree on the southeast corner of lot 1, the pine stump, and on the northeast corner of lot 1, the poplar, located N 7° – 33 W from the pine stump. All other corners can be found by proceeding counterclockwise by metes and bounds as provided in the commissioners' Report. In these circumstances, the trial court erred by reversing the calls.

The fact that the commissioners drew the homeplace in the middle of lot 2 on the plat does not warrant reversal of the calls as a matter of law. The commissioners did not depict the distance from the walls of the homeplace to any boundary line and so the homeplace may not serve as a point of reference in determining the description of the line. The location of the house, however, may figure in the location of the line on the ground, which is a question of fact for the jury.

The respondents argue that every deed entered since confirmation of the commissioners' Report has been described according to the plat, and that this somehow estops petitioners from arguing that the disputed boundary line and the southern boundary intersect at some distance from the pine stump other than that shown on the plat. The commissioners' Report and plat, however, both contain the same monuments and measurements, and the same ambiguities. The commissioners drew the plat to illustrate their Report and expressly incorporated it into the Report. Because the plat indicates that the boundary lines can be surveyed in either direction does not mean that the sequence given in the commissioners' Report should be disregarded. The plat adds no points of reference from which we can better discern the intent of the commissioners. The description of the disputed boundary line,

as a matter of law, must be determined by following the directions given in the commissioners' Report.

[3] The petitioners complain that the trial court erred in denying their motion for a court-ordered survey. While the better practice is to order a survey, the pertinent statute, G.S. 38-4, does not require the court to do so, *see Vance v. Pritchard*, 218 N.C. 273, 276, 10 S.E. 2d 725, 726-27 (1940) (discussing predecessor statute, C.S. 364). We find no abuse of discretion in the trial court's denial of the petitioners' motion for a survey.

The trial court's order is reversed and remanded for a new determination of the description of the disputed line and for trial on the issue of location.

Reversed and remanded.

Judges MARTIN and PARKER concur.

EARLYNE W. HAYES, ADMINISTRATRIX OF THE ESTATE OF ROY LEE HAYES, DECEASED v. T. MARCUS BROWNE, ADMINISTRATOR OF ESTATE OF CONRAD JUDE MENTEL, JR. AND DURHAM WEST, INC.

No. 8414SC1136

(Filed 16 July 1985)

Rules of Civil Procedure § 37— *failure to answer interrogatories*—dismissal of action

The trial court had authority to dismiss a dram shop action against a tavern owner for plaintiff's failure to answer interrogatories where plaintiff did not apply for a protective order or an enlargement of time to answer; plaintiff served answers to the interrogatories after defendant filed a motion to dismiss; and plaintiff's failure to answer the interrogatories prejudiced defendant's ability to prepare for trial. Furthermore, the trial court's dismissal of the action did not constitute an abuse of discretion or deny plaintiff due process. G.S. 1A-1, Rule 37(d).

Judge WELLS concurs in the result.

APPEAL by plaintiff from *Bailey, Judge*. Order entered 13 August 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 May 1985.

On 10 September 1982, plaintiff's intestate was working with a road paving crew on Interstate Highway 85 in Durham County. Defendant's intestate had allegedly consumed large amounts of alcoholic beverages at the Iron Duke Lounge operated by defendant, Durham West, Inc. At or about 12:30 a.m., defendant's intestate drove his vehicle into the worksite at a high rate of speed, struck plaintiff's intestate and crushed him to death against a piece of paving equipment.

Plaintiff, Earlyne W. Hayes, administratrix of the estate of Roy Lee Hayes, deceased, filed a wrongful death action against defendant's intestate, Conrad Jude Mentel, Jr., and Durham West, Inc.

On 21 December 1983, counsel for Durham West, Inc. served interrogatories on plaintiff's counsel. Having received no answers to the interrogatories by 25 April 1984, counsel for Durham West wrote a letter to plaintiff's counsel requesting answers to the interrogatories. On 30 july 1984, Durham West, Inc. having received no answers to its interrogatories, filed a motion to dismiss plaintiff's action pursuant to Rules 33 and 37(d) of the North Carolina Rules of Civil Procedure.

On 8 August 1984, in response to Durham West's motion to dismiss, plaintiff answered the interrogatories. Answers to these interrogatories were due on or before 24 January 1984. On 10 August 1984, plaintiff reserved Durham West with answers to interrogatories which had been omitted from the service of plaintiff's answers to interrogatories on 8 August 1984. The action was set for trial in Durham County Superior Court at the 20 August 1984 Civil Session, thereby giving counsel for Durham West approximately ten days to prepare the case for trial.

The trial court granted defendant's motion to dismiss plaintiff's action, and from that order, plaintiff appeals.

Hunter, Hodgman, Green & Donaldson, by Richard M. Green and Arthur J. Donaldson, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey & Theodore B. Smyth, for defendant appellee Durham West, Inc.

JOHNSON, Judge.

At the outset, we note that plaintiff's appeal is from an interlocutory order imposing sanctions for failure to complete discovery. Nevertheless, we choose to exercise our discretion and pass on the merits of plaintiff's appeal from the dismissal of the action. *See, Routh v. Weaver*, 67 N.C. App. 426, 428, 313 S.E. 2d 793, 795 (1984).

Plaintiff's first assignment of error is that the trial court lacked authority to dismiss the action. G.S. 1A-1, Rule 37(d) North Carolina Rules of Civil Procedure provides in pertinent part:

> If a party . . . fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, a judge of the court in which the action is pending . . . on motion and notice may make such orders as may be just including . . . dismissing the action or proceeding or any part thereof. . . .

This Court ruled in *Hammer v. Allison*, 20 N.C. App. 623, 202 S.E. 2d 307, *cert. denied*, 285 N.C. 233, 204 S.E. 2d 23 (1974), that where plaintiff was properly served with interrogatories, but refused to answer them without good cause, and did not serve on defendant objections to any of the interrogatories, or ask for an extension of time to answer, the trial court properly dismissed plaintiff's action.

Plaintiff relies on *Willis v. Duke Power*, 291 N.C. 19, 229 S.E. 2d 191 (1976), wherein the court held that where plaintiff had inadvertently omitted portions of the interrogatories, the court had no authority to dismiss plaintiff's action for failure to serve answers to interrogatories. Two salient features distinguish *Willis* from the case *sub judice*. In *Willis*, the defendant filed timely objections to the interrogatories, and secondly, defendant moved for a protective order. Nothing in the record supports a finding that plaintiff in the case at bar filed motions objecting to the interrogatories, or that motions were filed asking for an enlargement of time within which to complete the interrogatories. Further, plaintiff in the instant case served answers to the interrogatories *after* defendant had filed a motion to dismiss. Plaintiff's reliance on *Willis* is clearly misplaced. Plaintiff also urges this court to follow the reasoning in *White v. Southard*, 236 N.C. 367, 368, 72

S.E. 2d 756-57 (1952), wherein the court held that "when an answer has been filed, whether before or after the time for answering had expired, so long as it remains filed of record, the clerk is without authority to enter a judgment by default." What plaintiff has failed to consider is that the defendant's answer in *White* was sufficient to establish the basis or lack thereof of defendant's liability.

The instant case involves an automobile accident and charges were brought in a dram shop action against a tavern. The very nature of the action evinces a need for defendant Durham West, Inc. to ascertain its liability and the issue of damages through discovery. Plaintiff's failure to comply with the Rules of Discovery (Rule 33) has clearly prejudiced the defendant's ability to prepare for trial. We therefore find no merit in plaintiff's assignment of error on the issue of the court's authority to dismiss the action.

Plaintiff's second assignment of error is that even if the trial court had authority to impose sanctions, the action was an abuse of discretion. Plaintiff urges the court to adhere to the reasoning that "absent a showing of willful, deliberate disregard of the judicial process or the plaintiff's rights, or that the defendant was 'defiant or obdurate,' the severe sanction of default judgment must be set aside." *United States Corp. v. Freeman*, 605 F. 2d 854 (5th Cir. 1975). We reject that reasoning. This Court has addressed the requirement of willful and found that "the language of G.S. 1A-1 Rule 37(d) requires so such finding." *Imports, Inc. v. Credit Union*, 37 N.C. App. 121, 124, 245 S.E. 2d 798, 800 (1978). The 1975 amendment to Rule 37(d) deletes the specific reference to "willful" from the rule. If a non-complying party wishes to avoid court-imposed sanctions for his failure to answer interrogatories, the burden is upon him to show that there is justification for his non-compliance. *Silverthorne v. Coastal Land Co.*, 42 N.C. App. 134, 256 S.E. 2d 397, *cert. denied*, 298 N.C. 300, 259 S.E. 2d 302 (1979). The language of Rule 37(d) as amended specifically provides that a party may not remain silent, but must apply for a protective order or an enlargement of time. *See*, Comment to Rule 37(d) 1975 Amendment. In the instant case, plaintiff failed to exercise either of these alternatives. The imposition of sanctions is in the sound discretion of the trial judge, and we find no evidence to support a finding that the trial judge abused that discretion. Rather, we are presented with a plaintiff who committed dilatory, inconsiderate,

and reprehensible abuse of the discovery process for which it was justly sanctioned. *See, Laing v. Loan Co.*, 46 N.C. App. 67, 264 S.E. 2d 381, *disc. review denied*, 300 N.C. 557, 270 S.E. 2d 109 (1980).

Plaintiff's last assignment of error is that dismissal of the claim denied her due process. We find no merit in this contention. Plaintiff cited no authority which held Rule 37(d) unconstitutional. The trial judge appropriately exercised his discretion in applying the rule to plaintiff's case. We see no evidence which supports a finding that plaintiff was denied due process. Accordingly, we must affirm the decision of the trial court.

Affirmed.

Judge COZORT concurs.

Judge WELLS concurs in the result.

MICHELLE BETH DAVIS, BY HER GUARDIAN AD LITEM, SANDRA DEE DAVIS v. MARYLAND CASUALTY COMPANY, A MARYLAND CORPORATION

No. 8430SC1203

(Filed 16 July 1985)

Insurance § 69— uninsured motorist coverage—separated parents—joint custody—child as resident of father's household

The minor plaintiff was a resident of her father's household so as to come within the uninsured motorist coverage of an automobile insurance policy issued to the father even though the parents were living separately and the mother had custody of the minor plaintiff under a separation agreement where the evidence supported the trial court's determination that the father had such liberal and flexible visitation privileges with the minor plaintiff that he in effect had joint custody of her.

APPEAL by defendant from *Downs, Judge*. Judgment entered 4 October 1984 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 16 May 1985.

Plaintiff instituted this declaratory judgment action to construe an automobile insurance policy issued by defendant to

Virgil Davis, the minor plaintiff's father. The trial court denied defendant's motion for summary judgment and allowed plaintiff's petition for declaratory judgment holding that the minor plaintiff was entitled to coverage under the provisions of the policy. Defendant appealed.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff appellee.

James F. Blue, III, P.A., by Sheila Fellerath for defendant appellant.

MARTIN, Judge.

This appeal concerns a declaratory judgment action to construe an automobile insurance policy. The sole issue is the interpretation of the phrase, "resident of your household," contained in the policy's uninsured motorist coverage. We are persuaded that under the facts of this case, the minor plaintiff is a resident of her father's household, so as to be within the coverage provided by the policy, even though the father lived separately from the mother, who had custody of the minor plaintiff under a separation agreement. Accordingly, we affirm the judgment of the trial court.

The facts of the case are undisputed. Virgil Davis had been issued an automobile insurance policy by Maryland Casualty Company which provided uninsured motorist coverage to the insured "or any family member." "Family member" was defined as meaning "a person related to you by blood, marriage or adoption *who is a resident of your household.*" [Emphasis supplied.] On 3 March 1983, Michelle Beth Davis, the five-year-old daughter of Virgil and Sandra Dee Davis, was struck and injured by a motorcycle, the owner and operator of which was uninsured. On behalf of her daughter, Sandra Dee Davis filed a claim under the uninsured motorists' coverage of Virgil Davis' policy. Maryland Casualty Company, however, denied coverage, asserting that Michelle Beth Davis was not a resident of the same household as her father, Virgil Davis, on the date of the accident.

Virgil Davis and his wife, Sandra Dee Davis, separated in January 1981. Sandra Dee Davis was given custody of Michelle Beth Davis pursuant to a separation agreement. Sandra Dee Davis and the minor plaintiff continued to live in the family

residence while Virgil Davis moved to his grandmother's, later into an apartment, and then into a trailer. Since the time of the separation, Michelle Beth has frequently stayed overnight with her father, as many as two or three nights a week. Although a visitation schedule was provided for in the separation agreement, actual visitation has been more liberal. The minor plaintiff has frequently called her father to arrange additional visitation, and Sandra Dee Davis has permitted the additional visitations whenever the child requested them. The father has made provision for keeping her clothes, personal property, and some of her furniture at his residence. In addition, he has provided support for her, and is obligated by the separation agreement to provide hospitalization coverage for the minor plaintiff and to pay all of her medical and dental expenses. There has been no court decree adjudicating custody of the minor plaintiff. Sandra Dee Davis and Virgil Davis are not divorced. On the basis of these facts the trial court found that "the parents exercised unlimited freedom to have the child with each of them, and in effect, treated their respective contacts with the child as if they had joint custody." The trial court concluded that

> [t]he father, Virgil Davis, had and continues to have such liberal and flexible visitation privileges with the minor plaintiff so as to conclude he essentially had joint custody of the said child, and that the child, on March 3, 1983 was with her father frequently enough on a custodial basis to be a resident of his household . . . .

The insurance policy at issue here provided uninsured motorist coverage to relatives of the named insured only if such relatives were residents of the named insured's household. Insurance policies are construed in accordance with the general rules applicable to other contracts, and the court must interpret them according to the intent of the parties. *Woodell v. Aetna Insurance Co.*, 214 N.C. 496, 199 S.E. 719 (1938). The terms of the policy must be understood in their plain, ordinary, and popular sense. *Grant v. Ins. Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978). If such terms have more than one meaning in ordinary usage, they are to be construed liberally to provide coverage for those who, by any reasonable construction, can be included within the coverage. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966). Terms such as "resident" and "household" can have a

variety of meanings depending upon the facts to which they must be applied. *See, e.g., Barker v. Insurance Co.*, 241 N.C. 397, 85 S.E. 2d 305 (1955); *Fonvielle v. Insurance Co.*, 36 N.C. App. 495, 244 S.E. 2d 736, *disc. rev. allowed*, 295 N.C. 465, 246 S.E. 2d 215 (1978).

Cases interpreting the phrase, "residents of the same household," as used in insurance policies, are legion. *See generally* Annot., 93 A.L.R. 3d 420 (1979) (liability insurance); Annot., 96 A.L.R. 3d 804 (1979) (no-fault and uninsured motorist provisions). These cases can be divided into two categories: those involving clauses that exclude from coverage members of the insured's household, and those that extend coverage to such persons. Applying the general rule that coverage should be provided wherever, by reasonable construction, it can be, courts have restrictively defined "household" in those cases where members of the insured's household are excluded from coverage. On the other hand, where members of an insured's household are provided coverage under the policy, "household" has been broadly interpreted, and members of a family need not actually reside under a common roof to be deemed part of the same household. *See, e.g., Bearden v. Rucker*, 437 So. 2d 1116 (La. 1983); *Wainscott v. Ossenkop*, 633 P. 2d 237 (Alaska 1981); *Hartford Casualty Ins. Co. v. Phillips*, 575 S.W. 2d 62 (Tex. Civ. App. 1978); *Miller v. U.S. Fidel. & Guar. Co.*, 127 N.J. Super 37, 316 A. 2d 51 (1974); *Fidelity General Ins. Co. v. Ripley*, 228 So. 2d 238 (La. App. 1969); *cert. denied*, 255 La. 248, 230 So. 2d 94 (1970); *Aetna Casualty & Surety Co. v. Miller*, 276 F. Supp. 341 (Kansas 1967); *Taylor v. State Farm Mutual Auto. Ins. Co.*, 171 So. 2d 816 (La. App. 1965), *aff'd* 248 La. 246, 178 So. 2d 238 (1965); *Mazzilli v. Accident & Casualty Ins. Co. of Winterthur*, 35 N.J. 1, 170 A. 2d 800 (1961); *Cal-Farm Ins. Co. v. Boisseranc*, 151 Cal. App. 2d 775, 312 P. 2d 401 (1957). As pointed out by this court in *Fonvielle v. Insurance Co., supra* at 500, 244 S.E. 2d at 739, construction of such terms as "resident" and "household" in favor of coverage may lead to "the seemingly anomalous result" of a very narrow definition under one set of circumstances and a very broad definition under another.

Nevertheless, the insurance policy at issue does not define "resident" or "household," and therefore we must determine whether, by any reasonable construction of those terms, coverage may be extended to the minor plaintiff. In North Carolina, the

domicile of an unemancipated minor child follows that of the father, except where the father abandons the child, or custody is awarded to the mother by judicial decree. *Allman v. Register*, 233 N.C. 531, 64 S.E. 2d 861 (1951); *see* Lee, North Carolina Family Law, § 227. Although domicile and residence are not synonymous, domicile is usually considered to be inclusive of residence, and although a person may have only one domicile, he may have more than one residence. 25 Am. Jur. 2d, Domicil, § 4. In addition, it is generally recognized that a person may be a resident of more than one household for insurance purposes. *Travelers Insurance Co. v. Mixon*, 118 Ga. App. 31, 162 S.E. 2d 830 (1968). Thus, it is not required that the minor plaintiff be a resident of one parent's household to the exclusion of the other; she could be a resident of two separate households for purposes of insurance coverage.

Applying these general principles to the case *sub judice*, we believe that the minor plaintiff was as much a resident of her insured father's household as that of her mother. While the father maintained a separate residence from that of the mother, the evidence discloses that there existed between the father and the minor plaintiff a continuing and substantially integrated family relationship. We therefore hold that the trial court correctly concluded that the minor plaintiff, Michelle Beth Davis, was a resident of her insured father's household within the meaning of the insurance policy, and is entitled to coverage thereunder.

Affirmed.

Judges ARNOLD and PARKER concur.

IN THE MATTER OF KENNETH ANDERSON BLACK, ROBERT WADE PILGRIM, JR., BOBBY LEE PILGRIM, ISRAEL MICHAEL PILGRIM, SAMUEL RAY PILGRIM

No. 8429DC1339

(Filed 16 July 1985)

Parent and Child § 2.3— termination of parental rights—child neglect—evidence sufficient

The trial court did not err by terminating respondent's parental rights where a prior adjudication of neglect was not the only evidence relied on by

the court in that there was evidence that the children's home was in a constant state of disarray and uncleanliness; the children's mother often seemed incoherent, tending to stare off and to ignore those around her; their father had stated that he was unwilling to let the children remain in the home because his violent temper made it unsafe and that he would lock and bar the door and starve the children if they were not removed; and respondents had not made improvements in providing a clean and suitable home and in providing appropriate child care when absent during three months of additional time provided by a prior order. G.S. 7A-289.32, G.S. 7A-517(21).

APPEAL by respondent from *Guice, Judge*. Judgment entered 31 October 1984 in District Court, RUTHERFORD County. Heard in the Court of Appeals 7 June 1985.

This is a termination proceeding pursuant to G.S. 7A-289.22 *et seq.* in which petitioner, Rutherford County Department of Social Services, seeks to terminate the parental rights of respondent, Robert Wade Pilgrim, Sr. and his wife, Espey Regina Black Pilgrim, as to their minor children: Robert Wade Pilgrim, Jr., Bobbie Lee Pilgrim, Israel Michael Pilgrim and Samuel Ray Pilgrim. Petitioner also seeks termination of the parental rights of James Childers and Espey Regina Black Pilgrim as to their minor child Kenneth Anderson Black. (The children are referred to hereinafter collectively.)

The essential facts are:

On 4 February 1983 the Rutherford County Department of Social Services (DSS) first became familiar with the five Pilgrim children from complaints received concerning the care and supervision given the children by Mr. and Mrs. Pilgrim. DSS conducted an investigation and began to provide homemaker and social worker services to the household and after the initial contact increased the level of services in order to assure that the children were cared for. DSS then filed a juvenile petition alleging that the children were neglected as a matter of law.

On 24 May 1983, the Honorable Zoro J. Guice, Jr. found the children to be neglected as defined in G.S. 7A-517(21) in that the children were not being given proper supervision and care, and lived in an environment injurious to their health. The court allowed physical custody to remain in Mr. and Mrs. Pilgrim, but placed legal custody in DSS. The court also ordered that DSS provide the Pilgrims with homemaker services on a regular basis.

Respondent Robert Wade Pilgrim, Sr. told DSS on 17 June 1983 that he and his wife could no longer care for the children and asked that DSS take physical custody. Respondent also threatened at that time to confine and starve the children if DSS did not take them. DSS removed the children from the home on that day and has placed them in foster homes. The children continue to visit with Mr. and Mrs. Pilgrim on some weekends.

Investigation by DSS has revealed that the Pilgrim house is generally unkempt and unclean. DSS reports reflect that on weekend visits to the home of Mr. and Mrs. Pilgrim, Kenneth Anderson Black and Robert Wade Pilgrim, Jr. (now ages 11 and 9 respectively) on several occasions attempted sexual intercourse with their sister Bobby Lee Pilgrim, age 8. Mrs. Pilgrim is frequently not at home, has been recently arrested for prostitution and is apparently subject to frequent episodes in which she stares off and is not aware of or attentive to the children around her. Her housekeeping and household sanitation habits are careless and inattentive with dirty dishes on occasion being left out for extended periods and food being served on dirty dishes. Mr. Pilgrim, by his own admission, has a very violent temper which he has difficulty controlling.

At a hearing on 26 September 1983 (order signed 30 September 1983) the Honorable Loto J. Greenlee found that neglect of the children by Mr. and Mrs. Pilgrim was persisting and that it was in the best interest of the children to place both legal and physical custody with DSS. In a subsequent hearing on 28 March 1984 (order signed 30 April 1984) Judge Guice found that Mr. and Mrs. Pilgrim had not responded to the efforts of DSS to improve the home situation to allow the children to return. The court also found that the numerous foster home placements of the children were not in their best interest. The trial court then set forth specific requirements to be met by Mr. and Mrs. Pilgrim within three months if the children were not to be permanently removed from their parents' custody. Among the specific requirements listed were requirements that the parents provide a "suitable and clean" place for the children to live and that the parents arrange for appropriate child care while they are away from home.

After the three-month period had expired, DSS filed a petition for termination of the parental rights of Mr. and Mrs. Pilgrim

and James Childers as to the children. The court found the children to be neglected as defined by G.S. 7A-517(21) and concluded that it would be in the children's best interest to terminate all parental rights. On 29 October 1984 Judge Guice signed an order terminating parental rights and placing legal and physical custody of all five children with DSS.

Respondent Robert Wade Pilgrim, Sr., appeals.

Robert G. Summey, for respondent-appellant.

Walter H. Dalton, for petitioner-appellee.

EAGLES, Judge.

Respondent Robert Wade Pilgrim, Sr. claims that the trial court erred in terminating his parental rights to his children in that the Rutherford County Department of Social Services (DSS) does not allege and evidence does not prove a sufficient basis on which to terminate those rights pursuant to G.S. 7A-289.32. We find no error.

In order to terminate a parent's custody rights to his children a court must find that at least one of the several factors set out in G.S. 7A-289.32 exist. The trial court here found the children to be neglected as defined by G.S. 7A-517(21), enabling the court to order the termination of parental rights pursuant to G.S. 7A-289.32(2). Citing *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984), respondent argues that the trial court improperly relied on the prior adjudication (24 May 1983) that the children were neglected as defined by law. We note, however, that the prior adjudication of neglect was not the only evidence relied upon by the trial court in its termination of parental rights entered 29 October 1984.

Here, the trial court had sufficient evidence upon which to base its order for termination of the parental rights of respondent. This evidence included unrefuted testimony that the Pilgrim home was in a constant state of disarray and uncleanliness and that Mrs. Pilgrim often seemed incoherent, tending to stare off and to ignore those around her. Mr. Pilgrim had stated that he was unwilling to let the children remain in the home because his violent temper made it unsafe for the children to be with him. He

also demanded that the children be removed from the home, threatening to lock and bar the door and starve the children if they were not removed. We note that it is not necessary to find a failure to provide physical necessities to the children to have a finding of neglect. *In re APA*, 59 N.C. App. 322, 296 S.E. 2d 811 (1982). A factor which we consider noteworthy is the lack of improvement in the conditions in the home during the three-month period provided for in the trial court's 28 March 1984 order. The failure of the respondents during the three months additional time allowed to make improvements in providing a "clean and suitable" home for the children and in failing to provide for appropriate child care when the parents were absent is strong supporting evidence for the conclusion that the children are genuinely neglected within the terms of G.S. 7A-517(21).

The termination of parental rights is a matter for the trial court's discretion. *Forsyth County Dept. of Social Services v. Roberts*, 22 N.C. App. 658, 207 S.E. 2d 368 (1974). A ruling based on a trial court's discretion will not be reversed without a showing of manifest abuse of that discretion. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). Respondent shows no abuse of discretion and our examination of the record on appeal likewise discloses upon the facts of the case no abuse of discretion on the part of the trial court in terminating respondent's parental rights.

Affirmed.

Judges BECTON and PHILLIPS concur.

DENNIS JENKINS AND WIFE, RACHEL JENKINS v. MAINTENANCE, INC. AND TYLON O. WILLIAMS AND WIFE, JEAN CLAUDETTE WILLIAMS

No. 8413SC1192

(Filed 16 July 1985)

1. Appeal and Error § 6.2— summary judgment for one defendant—right of appeal

In an action to quiet title to property allegedly conveyed by plaintiffs to the individual defendants as a result of fraud and misrepresentation and then conveyed by the individual defendants to the corporate defendant, an in-

terlocutory order granting summary judgment for the corporate defendant affected a substantial right of plaintiffs and was thus immediately appealable since it precluded plaintiffs from obtaining reformation of the deed and reconveyance of the property. G.S. 1-277; G.S. 7A-27.

2. **Registration § 5.1— forgery of deed—subsequent bona fide purchaser for value without notice**

Although plaintiffs' forecast of evidence showed that the female plaintiff signed the male plaintiff's name to a deed to the individual defendants without his consent, summary judgment was properly entered for the corporate defendant which bought the property from the individual defendants where the corporate defendant's forecast of evidence showed that it was a bona fide purchaser of the property without notice of the defect in the deed from plaintiffs to the individual defendants, and plaintiffs presented no evidence that the corporate defendant had such notice.

APPEAL by plaintiffs from *Farmer, Judge.* Judgment entered 14 July 1984 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 16 May 1985.

Plaintiffs brought this action alleging that they were the fee simple owners, as tenants by the entirety, of a parcel of land containing 11.8 acres. On 18 August 1976 plaintiff Rachel Jenkins, without the consent of her husband, signed her name and her husband's name to a deed conveying 7.5 acres of the 11.8 acres to defendants Tylon O. Williams and Jean Claudette Williams (herein "the Williamses"). Plaintiff Rachel Jenkins believed, due to the misrepresentations of the Williamses, that she was conveying only three acres. As consideration for the deed plaintiffs received a used mobile home. The mobile home had the approximate value of three acres of the property. On 16 March 1979 the Williamses conveyed the property to defendant Maintenance, Inc. (herein "Maintenance"). Both deeds were properly probated and recorded.

After reviewing the pleadings and affidavits, the trial judge entered summary judgment in favor of Maintenance.

Legal Services of the Lower Cape Fear by Lisbon C. Berry, Jr. for plaintiff-appellants.

Frink, Foy, Gainey and Yount by Henry G. Foy for defendant-appellees.

PARKER, Judge.

General Statute 1A-1, Rule 54(b) provides that when multiple parties are involved, the trial court may enter summary judgment "as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." This rule is limited by the language "except as expressly provided by these rules or other statutes." Thus, G.S. 1A-1, Rule 54(b) does not permit appeal if fewer than all claims or parties have been disposed of unless it is provided that "there is no just reason for delay," or when other statutes expressly provide otherwise. *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). The other statutes which affect G.S. 1A-1, Rule 54(b) are G.S. 1-277 and G.S. 7A-27. *Id. Accord, Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Under G.S. 7A-27(d), appeal to this Court lies from an interlocutory order which affects a substantial right, or in effect determines the action and prevents a judgment from which appeal might be taken, or discontinues the action, or grants or refuses a new trial. General Statute 1-277 permits appeal from an interlocutory judicial order which affects a substantial right which will work injury if not corrected before final judgment.

In the instant case the order did not contain the certification that there "is no just reason for delay." Plaintiff's appeal is, therefore, premature unless the order affected a substantial right.

As our Supreme Court observed, "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978). A substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. *Blackwelder v. State Department of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983).

In the instant case, plaintiffs alleged in their complaint:

> 6. Said deed was secured from the Plaintiff Rachael Jenkins by the Defendants Tylon O. Williams and Jean Claudette Williams by fraud, or in the alternative by mutual

mistake, and that the said Plaintiff, Rachael Jenkins, Defendants Tylon O. Williams and wife Jean Claudette Williams had agreed that Rachael Jenkins would only deed approximately 3 acres of land to the Defendants Tylon O. Williams and wife Jean Claudette Williams when in fact said deed, which was prepared by Tylon O. Williams' attorney, called for 7½ acres of land, more or less. The defendants Tylon O. Williams and wife Jean Claudette Williams misled Rachael Jenkins into believing that she was conveying only 3 acres of land, and did so deliberately and intentionally intending to defraud the Plaintiffs, who relied to their detriment on a material misrepresentation of fact.

. . . .

11. By deed dated March 16, 1979, the Defendants Tylon O. Williams and wife Jean Claudette Williams conveyed the aforesaid property by general warranty deed to the Defendant Maintenance, Inc. which deed was recorded April 12, 1979 in Book 422 at Page 484 of the Brunswick County Registry.

Plaintiffs requested a judgment quieting title to the property in the plaintiffs, actual damages of $5,000 and punitive damages of $100,000.

[1] Since Maintenance is the current owner of the property, Maintenance is the only party through whom and from whom plaintiffs could obtain reformation of the deed and reconveyance of the property, a possible remedy in an action premised on fraud and misrepresentation. The summary judgment in favor of Maintenance precluded plaintiffs from electing this remedy, thereby affecting a substantial right. The interlocutory order is, therefore, appealable.

[2] Plaintiffs argue that the trial court erred in granting Maintenance's motion for summary judgment because there was a genuine issue of material fact as to whether the deed from plaintiffs was effective to transfer title to the Williamses. On a motion for summary judgment the moving party has the burden of providing a forecast of his evidence which he has available for presentation at trial. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). The movant's forecast must establish his right to judgment as a matter of law; this will compel the oppo-

nent to produce a forecast of his evidence. *Id.* Plaintiffs' forecast, through their complaint and affidavits, established that their deed to the Williamses was not signed by Dennis Jenkins and was without his consent. Plaintiffs did not, however, allege that Maintenance had knowledge of the alleged defects in the deed from plaintiffs to the Williamses. Maintenance alleged that it was a bona fide purchaser for value and without notice.

A person is an innocent purchaser for value and without notice when he purchases without notice, actual or constructive, of any infirmity, pays valuable consideration, and acts in good faith. *Morehead v. Harris*, 262 N.C. 330, 137 S.E. 2d 174 (1964). In *Morehead*, Daisy Harris bought the entire parcel no. 2 and a 5/6 undivided interest in parcel no. 1, her late husband's property, at a public foreclosure auction. Mrs. Harris continued to live on parcel no. 2, but she deeded part of parcel no. 1 to Grace Construction Company, purporting to convey an unencumbered fee simple interest. Grace Construction Company conveyed this property to defendants. The court explained that when a doweress (a life tenant) purchases property at a sale to satisfy a lien, she cannot hold the property for her exclusive benefit, but has purchased it for the benefit of herself and the remaindermen. Defendants alleged they were innocent purchasers for value, and thus took the title in fee simple absolute, rather than Daisy Harris' life estate. The Court agreed, holding that when there has been a bona fide purchase for valuable consideration, the deficiencies in the apparent fee simple must have been expressly or by reference set out in the muniments of record title, or brought to the notice of the purchaser so as to put him on inquiry. In short, an innocent purchaser takes title free of equities of which he had no actual or constructive notice.

In the instant case Maintenance's forecast showed that it was a bona fide purchaser for value and without notice. Under *Morehead*, Maintenance takes title free of encumbrances of which it had no notice, actual or constructive. This established Maintenance's right to judgment as a matter of law. Plaintiffs then had the burden to produce a forecast of their evidence available for presentation at trial which tended to support their claim. *Cone v. Cone*, 50 N.C. App. 343, 274 S.E. 2d 341, *cert. denied*, 302 N.C. 629, 280 S.E. 2d 440 (1981). As plaintiffs did not contend that Maintenance had notice that the conveyance from plaintiffs to the

Williamses was without the consent of plaintiff Dennis Jenkins, there was no issue as to any material fact, and Maintenance was entitled to judgment as a matter of law.

Affirmed.

Judges ARNOLD and MARTIN concur.

SANYO ELECTRIC, INC. v. ALBRIGHT DISTRIBUTING COMPANY

No. 8426SC981

(Filed 16 July 1985)

Accord and Satisfaction § 1— negotiation of check—summary judgment proper

The trial court properly granted defendant's motion for summary judgment as to the issue of accord and satisfaction where it was uncontradicted that plaintiff negotiated defendant's check which was tendered as full payment of the disputed claim. Even if plaintiff's bank automatically accepted and deposited the check without authority to compromise the claim, plaintiff ratified the bank's action by not refunding the money or in any way repudiating the claim. G.S. 1-540, G.S. 1A-1, Rule 56(c).

APPEAL by plaintiff from *Grist, Judge*. Judgment entered 4 June 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 April 1985.

Plaintiff, a manufacturer and distributor of consumer goods, brought this action to recover $48,662.69 from defendant for kerosene heaters which plaintiff had sold and delivered to defendant on an open account and for which defendant had not paid. Defendant, in its answer, pled the affirmative defense of accord and satisfaction in bar of plaintiff's claim. After both parties submitted affidavits, the trial judge granted defendant's motion for summary judgment as to the accord and satisfaction but left unresolved an issue regarding storage fees. Plaintiff appeals.

Walker, Palmer and Miller, P.A. by Richard M. Koch for plaintiff-appellant.

DeLaney, Millette and McKnight, P.A. by Ernest S. DeLaney for defendant-appellee.

PARKER, Judge.

Although the appeal is interlocutory because the trial judge left unresolved the question of storage fees, we will, in the exercise of our discretion under Rule 2, Rules of Appellate Procedure, consider the merits of plaintiff's appeal.

According to defendant's evidence presented through affidavits, admissions and pleadings, plaintiff solicited defendant to act as sole distributor for kerosene heaters in a geographic area. In the fall of 1982 plaintiff convinced some of defendant's customers to buy kerosene heaters directly from plaintiff. In the winter of 1982 plaintiff agreed to allow defendant a credit of $7,775.70 as damages for the lost sales. John Bumgarner, director of sales for defendant, explained in his affidavit that on 10 January 1983 he spoke to Debbie Valenza, plaintiff's account specialist, and told her that their invoice balance was $83,340.32 but that Sanyo had failed to credit defendant the $7,775.70 damages. He also told Valenza that defendant had an inventory of plaintiff's heaters valued at $44,305.84 in stock. Bumgarner offered to pay $34,693.06 in full and complete settlement of plaintiff's claim, and the heaters in inventory would be returned to plaintiff. Valenza agreed to this settlement offer and told Bumgarner to send a check. On 31 January 1983, H. D. Albright, president of defendant company, sent plaintiff a check for $34,693.06 "in full, final and complete settlement of all amounts owed." The check was sent to Sanyo Electric Inc., P.O. Box 95538, Chicago, Illinois 60694. Plaintiff negotiated the check on 3 February 1983.

Valenza, in her affidavit, said that she never told Bumgarner that Sanyo would accept a partial payment in satisfaction of the whole account, but that any payment defendant made would be credited against the balance of $83,340.32. Valenza also told Bumgarner to send the check to her at plaintiff's New Jersey address, not to the Chicago, Illinois address which was a bank lock box for receipt of payments.

The principles applicable to summary judgment are well established. General Statute 1A-1, Rule 56(c) provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a

matter of law." The moving party has the burden of clearly establishing the lack of any triable issue of fact; his papers are carefully scrutinized while those of the nonmoving party are indulgently regarded. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing that the opposing party either cannot produce evidence to support an essential element of his or her claim or cannot surmount an affirmative defense which would bar the claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981).

As explained by our Supreme Court in *Dobias v. White*, 239 N.C. 409, 80 S.E. 2d 23 (1954), an accord is an agreement in which one of the parties undertakes a performance in satisfaction of a liquidated or disputed claim, arising from tort or contract, and the other party agrees to accept the performance even though it is different from what he considered himself entitled to; satisfaction is the completion or execution of the agreed performance. *See* G.S. 1-540. "Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood." *Prentzas v. Prentzas*, 260 N.C. 101, 104, 131 S.E. 2d 678, 681 (1963).

When there is some indication on a check that it is tendered in full payment of a disputed claim, the cashing of the check is held to be an accord and satisfaction as a matter of law. *Barber v. White*, 46 N.C. App. 110, 264 S.E. 2d 385 (1980). For example, in *Sharpe v. Nationwide Mutual Fire Insurance Co.*, 62 N.C. App. 564, 302 S.E. 2d 893 (1983), plaintiff's house was destroyed by fire, and she filed a claim with defendant insurance company. Defendant sent plaintiff a proof of loss statement, which plaintiff signed and returned, and a draft for $15,531.23 in full payment of all claims. Plaintiff typed on the draft that it was accepted only as partial payment of the claim, and then negotiated the draft. Plaintiff later contended that defendant was liable to her for the entire face amount of her policy. The trial court entered summary judgment for defendant; this Court affirmed, holding that the cashing of a check tendered in full payment of a disputed claim establishes, as a matter of law, an accord and satisfaction.

In the instant case the letter accompanying the check provided, "This check is delivered to you in full, final and complete set-

tlement of all amounts owed to you by Albright Distributing Company." The letter concluded, "In the event you are not agreeable to this check constituting full, final and complete settlement of our account with you, please return this check forthwith." Plaintiff admitted in response to defendant's request for admissions that defendant mailed the letter and that the check was enclosed with the letter. Plaintiff also admitted: "[t]he plaintiff cashed the aforesaid check of the defendant during February of 1983, and the plaintiff has never refunded or offered to refund to the defendant any portion of the $34,693.06." Plaintiff did not deny that the bank in Chicago was its agent, nor did plaintiff assert that the bank deposited the check either with or without authority to compromise the claim.

When the only reasonable inference to be drawn from the materials at the summary judgment hearing is that an accord and satisfaction had been reached, summary judgment is appropriate. *Construction Co. v. Coan*, 30 N.C. App. 731, 228 S.E. 2d 497 (1976). In the instant case we find that it is uncontradicted that plaintiff negotiated defendant's check which was tendered as full payment of the disputed claim. This established an accord and satisfaction as a matter of law. "When the debtor tendered the check to the creditor, the creditor had to take the check on the terms offered by the creditor or not take it at all." *Brown v. Coastal Truckways*, 44 N.C. App. 454, 261 S.E. 2d 266 (1980). Moreover, even if it is assumed, which the record does not support, that the bank automatically accepted and deposited the check without authority to compromise the claim, plaintiff ratified the bank's act by not refunding the money or in any way repudiating the settlement. *See Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980).

As there is no genuine issue of material fact as to the existence of the accord and satisfaction, summary judgment for defendant is appropriate on that issue. Accordingly, summary judgment as to the accord and satisfaction is affirmed, and the case is remanded for determination by the trial court of the storage fees.

Affirmed in part and remanded in part.

Judges WEBB and BECTON concur.

CHAPARRAL SUPPLY v. CHARLES VINCENT BELL

No. 8426DC1092

(Filed 16 July 1985)

1. **Rules of Civil Procedure § 60.2— motion to set aside judgment—insufficient pleading of meritorious defense**

Defendant's assertion in his G.S. 1A-1, Rule 60(b)(1) motion that he is not indebted to plaintiff was an insufficient pleading of a meritorious defense to permit the trial court to set aside a summary judgment for the indebtedness on the ground of excusable neglect.

2. **Rules of Civil Procedure § 60.4— motion to set aside judgment—excusable neglect—conclusiveness of findings**

Findings of fact by the trial court on a motion to set aside a judgment on the ground of excusable neglect are final unless excepted to or contentions are made that the evidence does not support the findings of fact.

Judge BECTON dissenting.

APPEAL by defendant from *Lanning, Judge*. Judgment entered 27 July 1984 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 May 1985.

This is a civil action in which plaintiff, Chaparral Supply, a Florida company dealing in the business of selling office supplies, seeks to recover money allegedly owed on an account by defendant, Charles Vincent Bell.

The essential facts are:

On 28 December 1983, plaintiff filed an unverified complaint with copies of purported invoices attached alleging that defendant ordered office supplies from plaintiff having a value of $1,244.16 on an open account, on or about 4 February 1983, and that defendant was indebted to plaintiff.

Defendant answered in a verified pleading and denied ordering office supplies from plaintiff, having an account with plaintiff and being indebted to plaintiff.

On 28 February 1984, plaintiff filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, accompanied by an affidavit which, in substance, repeated the allegations in the com-

plaint. Attached to the affidavit were copies of invoices that were also attached to the original complaint.

A hearing was held on 2 April 1984 before the Hon. James E. Lanning, Chief District Judge for the Twenty-Sixth Judicial District. Neither defendant nor his counsel of record was present. Summary judgment was entered for plaintiff stating "that there is no genuine issue as to any material fact and that the Plaintiff is entitled to a judgment as a matter of law." Defendant's motion to set aside the judgment pursuant to G.S. 1A-1, Rule 60 was denied. From entry of summary judgment and denial of his Rule 60 motion, defendant appeals.

No brief for plaintiff-appellee.

Marshall McCallum, Jr., for defendant-appellant.

EAGLES, Judge.

I

Defendant purports to assign as error the entry of summary judgment in favor of plaintiff. Our examination of the record reveals that there is no notice of appeal from the trial court's order of summary judgment entered 3 April 1984. Accordingly, defendant's assignment of error relating to the granting of plaintiff's motion for summary judgment is not properly before us. Rule 3, Rules of Appellate Procedure.

II

Defendant next assigns as error the trial court's denial of his motion for relief pursuant to G.S. 1A-1, Rule 60(b)(1) and (6). We find no error.

[1] G.S. 1A-1, Rule 60(b)(1) grants relief from a final judgment by reason of mistake, inadvertence, surprise, or excusable neglect. For a judgment to be set aside, the moving party must show both excusable neglect and a meritorious defense. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *rev. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976). As for the defense, however, the trial court does not hear the facts but determines only whether the movant has pleaded a meritorious defense. *Carolina Bank Inc. v. Northeastern Ins. Finance Co., Inc.*, 25 N.C. App. 211, 212 S.E. 2d 552 (1975). To merely deny an indebtedness and assert the presence of

a meritorious defense is not sufficient. *Holcombe v. Bowman*, 8 N.C. App. 673, 175 S.E. 2d 362 (1970). This is true even when the facts found justify a conclusion that the movant's neglect was excusable. The trial court cannot set aside the judgment unless there is a meritorious defense, a real or substantial defense on the merits. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971).

Here, in addition to pleading "excusable neglect" by virtue of his having not attended the summary judgment hearing, defendant asserts in his G.S. 1A-1, Rule 60(b) motion that he is not indebted to plaintiff and that this denial of indebtedness is a meritorious defense. We disagree.

[2] The trial court found as fact and concluded as law that there was no excusable neglect and that defendant did not have a meritorious defense. Findings of fact by the trial court on a motion to set aside a judgment on the grounds of excusable neglect are final unless excepted to or contentions are made that the evidence does not support the findings of fact. *Menache v. Atlantic Coast Management Corp.*, 43 N.C. App. 733, 260 S.E. 2d 100 (1979), *rev. denied*, 299 N.C. 331, 265 S.E. 2d 396 (1980). Here, there appear of record no exceptions to the trial court's findings of fact nor is there an assignment of error that the evidence does not support the findings of fact.

We hold that the trial court's findings of fact are based upon competent evidence and they support the trial court's conclusions of law.

Affirmed.

Judge PHILLIPS concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that defendant has shown excusable neglect within the meaning of Rule 60(b)(1) of the North Carolina Rules of Civil Procedure, a meritorious defense to plaintiff's motion for summary judgment, and another "reason justifying relief from the op-

eration of the judgment," within the meaning of Rule 60(b)(6), I dissent.

First, the appeal entries which the trial court specifically included in its order denying defendant's motion for relief pursuant to Rule 60 state that defendant appeals from the "signing and entry of the foregoing Order and Judgment." By appealing, defendant excepts to the order and challenges the sufficiency of the findings of fact and conclusions of law which support that order.

Second, defendant's verified motion states that neither he nor his attorney expected to see, or noticed, that the case was calendared for summary judgment hearing within two months of the Answer, and that his attorney did not timely receive a copy of the summary judgment motion because his attorney had relocated his office at the time the summary judgment motion was filed. This constitutes excusable neglect.

Third, I believe defendant's forecast of evidence from several office workers, that none had purchased office supplies from plaintiff, a Florida-based company, and that one of defendant's office workers "had answered a call from a representative of the plaintiff soliciting orders, and had informed said representative that all supplies for the entire office were purchased from a local source," coupled with defendant's argument that follows, constitute a meritorious defense:

> Both [of plaintiff's invoices] are made out in the firm name, 'Bell, King & McCallum,' a name which had not been used for at least four (4) years prior to the commencement of this action. In the unlikely event that the defendant had ordered any supplies from the plaintiff, in February of 1983, he would have had no reason to order any supplies in that firm name, which, the defendant argues, gives further credence to his contention that the plaintiff is one of a legion of insidious sifters of mailing lists or of attorneys' directories (including, apparently, outdated ones) who attempt to solicit sales by telephone.

Finally, I believe the trial court erred in concluding that there "is no other reason justifying relief from the operation of the judgment" pursuant to Rule 60(b)(6). At the time the trial court ruled on defendant's Rule 60 motion, it had before it an af-

fidavit from one of plaintiff's representatives which stated: "[t]hat on or about January 11, 1984, [before the date the summary judgment motion was filed], the plaintiff did receive back from the defendant all of the aforesaid office supplies except one gross (twelve dozen) of the Bic pens." In my view, defendant is entitled to some relief from the judgment that awards plaintiff $1,244.16 for 144 Bic pens, and which does not credit defendant's account in any amount for the items returned to plaintiff.

Based on the foregoing, I cannot concur in the majority's opinion affirming the trial court.

BILLY AND DIANE HOWARD v. SMOKY MOUNTAIN ENTERPRISES, INC.

No. 8428SC899

(Filed 16 July 1985)

Insurance § 145— destruction of house—settlement with insurance company—addition of insurance company as party

In an action arising from a house fire allegedly caused by a defective woodstove and in which plaintiffs' insurer, with whom they had settled, had been joined as a party plaintiff, the trial court did not commit prejudicial error by prohibiting the mention of the insurance company as a party plaintiff during *voir dire*; excluding any reference to the insurance company by name even though it allowed evidence of the existence of insurance, proofs of loss, and the terms of the settlement; preventing defendant from commenting during closing argument on the unnamed insurance company's failure to produce the defective stove at trial; and allowing on redirect examination the terms of plaintiffs' settlement and the basic theory of a subrogation action. G.S. 1A-1, Rule 41, G.S. 1-57.

APPEAL by defendant from *C. Walter Allen, Judge.* Judgment entered 3 May 1983 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 April 1985.

Morris, Golding and Phillips, by Thomas R. Bell, Jr. and James N. Golding, for plaintiff appellees.

Harrell and Leake, by Larry Leake, for defendant appellant.

BECTON, Judge.

On 5 December 1979 the plaintiffs' house and personal belongings were substantially damaged, when a burning log set their house on fire. The plaintiffs, Billy Howard and his wife, Diane, filed this property damage action to recover $127,000 in damages from the Buck Stove dealer, Delta Buck Stoves, Inc. (Delta), and from the woodstove manufacturer, the defendant Smoky Mountain Enterprises, Inc. (Smoky Mountain), alleging that the defective Buck Stove door latch was responsible for the fire damage. The door latch had given way and released the burning log from the woodstove onto the floor.

Pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, the Howards took a voluntary dismissal without prejudice against Delta. In its Answer, the co-defendant, Smoky Mountain, asked the trial court to dismiss the action, based on allegations that the Howards had been fully compensated for their loss by their insurance company, North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau), and were, therefore, no longer the real parties in interest. The Howards had settled with Farm Bureau for $88,000 on a property loss claim for $102,000 that they had submitted to Farm Bureau. Later, Smoky Mountain renewed its motion to dismiss or, in the alternative, to join Farm Bureau as a necessary party plaintiff under Rule 19 of the North Carolina Rules of Civil Procedure. The trial court denied the motion to dismiss and instead ordered the joinder of Farm Bureau as a party plaintiff. However, in its order the trial court prohibited any reference to Farm Bureau as a party plaintiff during jury *voir dire*. Moreover, it specifically deferred ruling on the admissibility of the existence and terms of the settlement between the Howards and Farm Bureau.

Shortly after the trial began, the trial court allowed the Howards' motion to amend their Complaint to allege: (1) that Smoky Mountain, rather than Delta, sold them the defective Buck Stove, and (2) that this was a subrogation action. From a jury verdict awarding the Howards $110,000 in damages, Smoky Mountain appeals.

Smoky Mountain brings forward several assignments of error, attacking the trial court's evidentiary rulings and the suffi-

ciency of the evidence. After reviewing the record, we conclude that it is only necessary to address some of the contested evidentiary rulings. We find no error in this trial.

I

The trial court prohibited Smoky Mountain from mentioning during jury *voir dire* that Farm Bureau was a party plaintiff; it excluded any reference to Farm Bureau by name on cross-examination, although it allowed evidence of the existence of insurance, the proofs of loss and the terms of the settlement agreement; and it prevented Smoky Mountain from commenting during closing argument on the unnamed insurance company's (Farm Bureau's) failure to produce the defective stove at trial.

We agree with Smoky Mountain that Farm Bureau's identity was admissible, once Farm Bureau was joined as a party plaintiff; however, we fail to find any prejudicial error. Moreover, none of Smoky Mountain's proposed jury *voir dire* questions regarding the insurance company's identity, are included in the record.

Because all the details of the Howards' insurance settlement negotiations with Farm Bureau, except for Farm Bureau's name, were elicited and admitted on cross-examination, we likewise find no prejudicial error in the trial court's decision to exclude any reference to the insurance company by name on cross-examination.

Further, there was insufficient evidence to support Smoky Mountain's proposed closing argument that the unnamed insurance company (Farm Bureau) was responsible for the absence of the woodstove at trial. Significantly, Smoky Mountain was permitted to *suggest* complicity: "Where is the stove? Why isn't it here? . . . I don't know what that stove might have told us. . . . But it seems odd to me that you and those fellows helping you did not keep that stove."

Finally, we conclude that since the Howards, as the real parties in interest, could properly have prosecuted this action alone, N.C. Gen. Stat. Sec. 1-57 (1983), there was no prejudicial error in excluding Farm Bureau's name. Farm Bureau was not a Rule 19 necessary party plaintiff, although the trial court ordered Farm Bureau's joinder on Smoky Mountain's Rule 19 motion. An insurance company is only a necessary party plaintiff when it has

compensated the insured for the insured's entire loss. *Shambley v. Jobe-Blackley Plumbing and Heating Co.*, 264 N.C. 456, 142 S.E. 2d 18 (1965); *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231 (1952); N.C. Gen. Stat. Sec. 1A-1, Rule 19 and cases cited (1983) (continued applicability of prior case law distinguishing between necessary and proper parties). *See also* Annot., 13 A.L.R. 3d 229 (1967). In *Shambley* the Court held that an insured who has been fully compensated for its property damage by an insurance company is not the real party in interest in a property damage action to recover *the same amount*. The insurance company's *complete* payment to the insured eliminates the insured as the real party in interest in the action to recover for the loss and substitutes the compensating insurance company in its place. *Id.* However, the Howards have not been fully compensated by Farm Bureau. In their Complaint, they sought $127,000 in damages—$39,000 more than their settlement with Farm Bureau and $25,000 more than the original claim submitted to Farm Bureau. They were, therefore, real parties in interest at the time of trial. Admittedly, Farm Bureau had an appreciable interest in the action. As the *Burgess* Court held, it is not error to join, as a proper party plaintiff to the action, an insurance company that has partially paid the insured for the insured's loss, N.C. Gen. Stat. Sec. 1A-1, Rule 20 (1983) (permissive joinder), but the insurance company's presence in the action is not required. *See* Annot., 13 A.L.R. 3d 140 (1967). Absent joinder, the insured acts as trustee for the insurance company's share of the proceeds in the action. *Burgess.*

Smoky Mountain contends that the trial court erred in allowing the Howards to "elaborate at great length about this cause being a subrogated action, and as to why the [Howards] settled with their insurance carrier for a sum substantially less than the limits of their policy." We are not persuaded.

After ruling that Smoky Mountain could cross-examine the Howards on their insurance settlement with Farm Bureau, the trial court allowed the Howards to amend their Complaint to allege that this was a subrogation action. In doing so, the trial court was apparently trying to counter any inferences from cross-examination that the Howards were only entitled to the settlement amount or that they were seeking a double recovery. The Howards were thus properly permitted to explain on re-direct the terms of their settlement with Farm Bureau, and the basic theory

of a subrogation action—the reimbursement of the insurance company for any paid claims from the damages awarded in the action.

II

We summarily dispose of Smoky Mountain's remaining assignments of error. They are without merit.

No error.

Judges WEBB and PARKER concur.

ELIZABETH BARNSLEY WHITE, BY HER GUARDIAN AD LITEM, SUZANNE LEWIS BROWN v. DAVID EAGLE WHITE, JR.

SUZANNE LEWIS BROWN v. DAVID EAGLE WHITE, JR.

No. 8410DC751

(Filed 16 July 1985)

Limitation of Actions § 4— conversion—accrual of cause of action—locks changed on doors after separation

The trial court erred by ruling that the three year statute of limitations began to run in an action for conversion of former marital property when the parties separated in July of 1979 where there was no evidence that plaintiff manifestly intended to abandon property left at the former marital home or that defendant exercised unauthorized dominion over it to her exclusion until later in September, when defendant changed the locks on the residence after plaintiff asserted her continuing interest in the property and her desire to recover it at some future time. G.S. 1-52.

APPEAL by plaintiffs from *Cashwell, Judge*. Judgment entered 24 February 1984 in District Court, WAKE County. Heard in the Court of Appeals 12 March 1985.

Hunter, Wharton & Howell by John V. Hunter, III, for plaintiff appellants.

Jack P. Gulley for defendant appellee.

COZORT, Judge.

Defendant and plaintiff Suzanne Lewis Brown separated on 18 July 1979 after seventeen years of marriage. Their divorce was granted in October of 1980. Sometime after 10 September 1979, the plaintiff returned to their former residence to remove some personal property, but found that the defendant had changed the locks on the house, preventing her from obtaining her property inside. Plaintiff filed two actions for conversion on 17 August 1982 for herself and on behalf of her minor daughter. These actions were later consolidated for trial. The defendant responded that the plaintiffs' actions were barred by G.S. 1-52, the three-year statute of limitations. At trial, the court agreed with the defendant and ruled that because the statute of limitations began to run at the time the parties separated in July of 1979, plaintiff Brown's action was barred. On appeal this plaintiff contends that the statute did not begin to run until the locks were actually changed in September of 1979. We agree with the plaintiff's contention and reverse the trial court's dismissal. The facts follow.

David White and Suzanne White (now Brown) were married in 1962 and had two children. On 18 July 1979, they separated and plaintiff Brown moved with one child from their marital residence. She returned to the house on 10 September 1979 and removed some of her personal property. She explained to the defendant that since she did not have room for all of her things in her apartment, she was leaving some of her things in the house. Plaintiff Brown later visited the defendant at work and complained that if he was not going to take care of her property, she would have it stored elsewhere. According to plaintiff Brown, the defendant responded that he would see her in hell first. When plaintiff Brown again returned to the house later in September or possibly early October, she discovered the locks on the house had been changed.

Defendant has admitted in his brief and at oral argument that the statute of limitations was tolled in the action by his minor daughter. Thus, the sole issue for our consideration is whether the statute of limitations for the claims of plaintiff Brown began running at the date of her separation from defendant (18 July 1979), or whether it commenced at the time she was

denied access to the property at issue sometime in September 1979.

G.S. 1-52(4) provides a statute of limitations of three years for an action "for taking, detaining, converting, or injuring any goods or chattels, including action for their specific recovery." The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues. *F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E. 2d 693, *disc. rev. denied*, 297 N.C. 176, 254 S.E. 2d 39 (1979).

The Supreme Court of North Carolina has defined conversion as

> the unauthorized assumption and exercise of the right of ownership over the goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.

Spinks v. Taylor and Richardson v. Taylor Co., 303 N.C. 256, 264, 278 S.E. 2d 501, 506 (1981). This court has noted that there can be no conversion until some act is done that is a denial or violation of the owner's dominion over or rights in the property. *Gallimore v. Sink*, 27 N.C. App. 65, 218 S.E. 2d 181 (1975).

In the case *sub judice*, plaintiff is claiming property she owned prior to her marriage to defendant and property acquired by them during their marriage. Thus, for a long time, the property had been situated on real property jointly owned by the parties. When the parties separated and plaintiff moved to a smaller apartment with limited storage space, defendant retained lawful possession of the goods at the marital residence. At the time of separation (18 July 1979), there was no evidence that she manifestly intended to abandon the property or that defendant exercised unauthorized dominion over it to her exclusion. Those acts occurred later in September when, after plaintiff asserted her continuing interest in the remaining property and her desire to remove it at some future time, defendant changed the locks on the residence.

In *Hoch v. Young*, 63 N.C. App. 480, 305 S.E. 2d 201, *disc. rev. denied*, 309 N.C. 632, 308 S.E. 2d 715 (1983), this Court upheld a jury finding that the statute of limitations did not commence until the defendant refused to return the property in question:

"Where there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort."

Id. at 483, 305 S.E. 2d at 203, citing Prosser, *The Law of Torts* Sec. 15 (4th ed. 1971). On the record before us, the plaintiff's demand and the defendant's wrongful refusal did not occur until after 10 September 1979. Thus, we hold her 17 August 1982 action for conversion was not barred by G.S. 1-52, the three-year statute of limitations. The trial court's dismissal of the plaintiff's action is therefore

Reversed.

Judges ARNOLD and PHILLIPS concur.

ASHEVILLE MALL, INC. v. F. W. WOOLWORTH COMPANY

No. 8428SC1114

(Filed 16 July 1985)

Evidence § 32.7; Landlord and Tenant § 6.1— ambiguous lease—admissibility of parol evidence

A lease agreement was ambiguous as to whether the north wall was included in the demised premises and whether the lessee had the right to make alterations to the wall, and the trial court erred in refusing to admit into evidence the original lease agreement containing certain language crossed out and plaintiff's parol testimony concerning negotiations of the parties.

APPEAL by plaintiff from *Allen, Judge*. Judgment entered 24 May 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 May 1985.

Plaintiff brought this action seeking to enjoin defendant-lessee from tearing down a partition wall (the "north wall"), and installing a lunch counter. Defendant answered, alleging that the lease permitted such construction. At the conclusion of the evidence, the trial judge submitted the following issue to the jury: "Did Asheville Mall, Inc., lease to F. W. Woolworth Company the front or north wall of the Woolworth store and Harvest House

Restaurant located in the Asheville Mall?" The jury responded "Yes," and the trial judge denied plaintiff's request for a permanent injunction.

Riddle, Kelly and Cagle by E. Glenn Kelly for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A. by Larry McDevitt for defendant-appellee.

PARKER, Judge.

The issue before us is whether the trial judge erred in refusing to admit parol evidence offered by plaintiff to explain the terms of the lease. The question to be determined in the trial court was whether the north wall was included in defendant's lease. The relevant sections of the contract are as follows:

Tenant's Right to Make Alterations

ART. 8. The Landlord agrees that the Tenant may at its own expense, from time to time during the term hereof, make such alterations, additions and changes, structural or otherwise, in and to the demised premises as it finds necessary or convenient for its purposes [and may build on any vacant land included within the demised premises, and may demolish any buildings on the demised premises occupied solely by the Tenant provided it proceeds with all reasonable diligence to erect a new building or buildings thereon of at least equal value to that demolished. The Landlord agrees that the Tenant may from time to time during the term hereof remove walls and connect the demised premises with other premises owned or controlled by the Tenant.] The Tenant agrees that [any building erected by it and] all alterations, additions and changes made by it will be erected or made in a first-class workmanlike manner, anything in this lease to the contrary notwithstanding the Landlord and Tenant agree that the Tenant shall have neither the right nor the obligation at the end of the term of this lease or any extension thereof to remove the same or to change such structure or restore the premises to the condition in which they were originally. The Landlord agrees that when necessary the Tenant may at all reasonable times enter any part of the building

of which the demised premises are a part with mechanics, tools and materials to make such alterations, additions and changes. The Landlord agrees to use its best efforts to procure for this Tenant the right of entry for such purposes. (Bracketed portions were crossed out on the original contract.)

DEMISED PREMISES

The demised premises consist of a one-story building (with land thereunder) having irregular dimensions of 120 feet of mall frontage width by a depth of 300 feet and containing approximately 47,152 square feet to be erected within the Entire Premises described below at the approximate location shown on the drawing attached hereto and made a part hereof.

The intention of the parties to a contract must be determined from the language of the contract, the purpose and subject matter of the contract, and the situation of the parties at the time the contract was executed. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975). When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, *Brokers, Inc. v. High Point City Board of Education*, 33 N.C. App. 24, 234 S.E. 2d 56, *review denied*, 293 N.C. 159, 236 S.E. 2d 702 (1977), and the court cannot look beyond the terms of the contract to determine the intentions of the parties. *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E. 2d 377 (1981).

In the instant case the trial judge ruled that he did not consider the lease ambiguous and that he would not permit plaintiff to offer parol evidence of the negotiations of the parties. The record is unclear as to whether this ruling was at the bench or in the hearing of the jury. The trial judge also did not permit plaintiff to introduce the original executed lease, but permitted only a copy with the stricken language blanked or blacked out so that the stricken language was not legible. (In the original the stricken language was still legible.) Thereafter, a lawyer was permitted to testify as an expert witness for defendant as to the interpretation of certain language in the contract, particularly the meaning of the word "building" as used in the description of the demised premises. The trial judge did not, however, construe the contract,

but instead allowed the jury to determine its construction. By sending the contract to the jury the trial judge treated the contract as though it was ambiguous. Only when an agreement is ambiguous, is it for the jury to determine the parties' intent. *Silver v. North Carolina Board of Transportation*, 47 N.C. App. 261, 267 S.E. 2d 49 (1980).

An issue similar to that in this case was addressed by our Supreme Court in *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). In *Root*, the plaintiffs, the lessors, entered into a lease agreement with defendant lessee for a five year period. At the time the agreement was entered into the building to be leased had not yet been constructed. The lease was renewed for an additional five year period. The following year, after the lessee had been in possession for six years, an agent of the lessors noticed that the lessee was using the basement of the building. The lessors demanded additional payment for use of the basement area, and the lessee refused to pay. The issue before the Supreme Court was whether the basement was included in the written lease agreement. The Court observed that the general rule is that when a written contract is introduced into evidence, its terms may not be contradicted by parol evidence, and it is presumed that all prior negotiations are merged into the written contract. When there is a latent ambiguity in the contract, *i.e.*, when the words of the instrument are intelligible but leave uncertain the identification of the property, parol evidence is admissible to aid in determining the intention of the parties. The Court held that the uncertainty as to whether the basement was included in the lease constituted a latent ambiguity; parol evidence was, therefore, admissible to show the intention of the parties, and the case should have been submitted to the jury.

In the instant case the trial judge was correct in submitting the issue to the jury because the language of the contract is not clear and unambiguous as to whether the north wall is included in the demised premises and whether the lessee has the right to make alterations to the wall. However, under *Root*, parol evidence should have been admitted to aid the jury in determining the intention of the parties. The trial judge erred in refusing to admit into evidence the original lease agreement and plaintiff's parol testimony as to the parties' negotiations.

New trial.

Judges ARNOLD and MARTIN concur.

GAIL CABLE (BARHAM) v. JAMES MICHAEL CABLE

No. 8414DC1052

(Filed 16 July 1985)

Divorce and Alimony § 30— equitable distribution—lot owned separately—house built with marital funds—equity marital property

The trial court erred in an action for divorce and equitable distribution by concluding that plaintiff had no interest in defendant's equity in the marital home and lot where defendant had purchased the lot free of encumbrances while single and the parties had built as much of their house as they could, subcontracting out the rest, and made payments on the construction loan during their marriage. G.S. 50-20(c)(8) is a distribution factor which is not applicable at the classification stage.

APPEAL by plaintiff from *LaBarre, Judge*. Judgment entered 17 May 1984 in District Court, DURHAM County. Heard in the Court of Appeals 9 May 1985.

This is a civil action wherein plaintiff sought an absolute divorce and an equitable distribution of the marital property. The following facts are undisputed. On 1 July 1974, the defendant acquired, while single and in his name only, a 2.3 acre tract of land. Defendant acquired this lot free of any encumbrances. On 14 March 1975, the defendant in his name alone entered into a loan transaction for $27,000.00 for the sole purpose of financing the construction of a home on this lot. On 18 May 1975, the parties were married. As of the date of the marriage, the loan amount was available for use by the builder, but no amount had been withdrawn. Prior to the marriage date, the lot had been graded and landscaped, and a well and a foundation for the house had been installed. The parties built as much of the house as they could, and subcontracted out what they could not do. Their home was completed on this lot in December 1975.

Both parties worked full-time during the course of the marriage, and their earnings were combined to pay the family's ex-

penses, including approximately 75 payments of $227.00 toward the repayment of this loan. The parties separated on 21 May 1981, owing a $25,300.00 balance on the construction loan.

The parties were divorced, and they stipulated as to the distribution of all property, except the lot and house involved herein, and an adjoining lot, which was purchased by the parties as tenants by the entirety on 16 January 1981. (This lot is not a subject of dispute on this appeal.) After making findings of fact, the court entered the following pertinent conclusions of law:

> 1. The Court concludes that an equal division of the marital property would be inequitable.
>
> 2. That the 2.3 acre tract of land on which the house was located was prior to and at the time of the marriage the separate property of the defendant.
>
> 3. That the proceeds from the construction loan . . . are a separate property of the defendant which was acquired in exchange of the defendant's separate property, and is therefore, the defendant's separate property, and the defendant's separate obligation.
>
> 4. That the plaintiff is not entitled to any of the defendant's equity in the 2.3 acre tract of land or the improvements located thereon.
>
> 5. That the vacant lot acquired by the parties on January 16, 1981 . . . is a marital asset, and said asset is equitably divided by having the title to said property transferred to the defendant upon the defendant's payment to the plaintiff of the sum of Four Thousand Dollars ($4,000.00), and the defendant assuming all outstanding indebtedness owed on said tract of land. . . .

The court thereafter ordered that "[t]he plaintiff shall have as his sole and separate property the 2.3 acre tract of land referred to above with all improvements thereon." Plaintiff appealed.

Maxwell, Freeman, Beason & Morano, P.A., by Robert A. Beason and Mark R. Morano for plaintiff-appellant.

Clayton, Myrick & McClanahan by Robert D. McClanahan for defendant-appellee.

PARKER, Judge.

In her sole assignment of error on appeal, plaintiff contends the trial court erred in deciding that the parties' homeplace was not marital property. Plaintiff does not contend that the 2.3 acre lot itself is not defendant's separate property. Rather, she contends that because she made substantial contributions to the improvement of defendant's separate property, that the improvement (the house itself) is marital property. Defendant counters this argument by asserting that under the language of G.S. 50-20(c)(8), the trial judge can consider any improvements made by the plaintiff upon defendant's separate property, and can award her a greater share of other marital assets because of these improvements, but that plaintiff's improvements on the lot do not change the status of this property or any improvements made thereon as the separate property of defendant. Defendant argues that a declaration that improvements made to separate property during the course of the marriage become marital property would render G.S. 50-20(c)(8) meaningless. We reject defendant's contention in this regard, and accordingly vacate the judgment from which this appeal was taken.

This Court, in *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260, *disc. rev. denied*, 313 N.C. 612 (1985), addressed a similar issue. In *Wade*, the plaintiff husband owned land which was titled solely in his name prior to the marriage. A house was constructed on this land during the marriage with marital funds. The husband asserted that since the unimproved real property was acquired by him prior to the marriage, it would be considered separate in character. Therefore, any improvements to his land, such as the house, merely constituted an increase in the value of the property and must also be considered separate as mandated by G.S. 50-20(b)(2) which provides "[t]he increase in value of separate property . . . shall be considered separate property."

In rejecting this argument, this Court noted the remedial nature of G.S. 50-20 and held that this provision referred only to "passive" appreciation, such as inflation, and not to "active" appreciation resulting from contributions, monetary or otherwise, by one or both of the spouses. After noting that the house and land are one asset, the Court held that "the real property concerned herein must be characterized as part separate and part

marital," with the land being considered separate property, and the house, which was constructed during the marriage with marital funds, being considered marital property. *Id.* at 381-382, 325 S.E. 2d at 269.

Therefore, based on *Wade, supra,* and the decision of this Court in *Turner v. Turner*, 64 N.C. App. 342, 307 S.E. 2d 407 (1983), which held that equity which accrued during a marriage in a house purchased by the husband prior to the marriage could be marital property, we hold the trial court erred as a matter of law in concluding that plaintiff had no interest in defendant's equity in the house and lot.

In applying the Equitable Distribution Statute, the trial judge must follow a three step procedure, *i.e.*, (i) classification, (ii) evaluation and (iii) distribution. By treating the house and lot as separate property solely because the house built with marital funds was built on land acquired by defendant prior to the marriage, the court erred in classifying the property. Classification must be according to the statutory definitions of separate property and marital property. General Statute 50-20(c)(8) relied on by defendant is a distribution factor. Distribution factors are not applicable at the classification stage. Before the distribution factor argued by defendant can be considered, the property must be properly classified and its net value properly determined. *Turner, supra.*

Accordingly, the judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges ARNOLD and MARTIN concur.

DEPARTMENT OF TRANSPORTATION v. ALETHA FULLER; JOHNNIE FULLER, JR. AND WIFE, IF ANY, MRS. JOHNNIE FULLER, JR.; CHARLES EDWARD FULLER; KENNETH MAPPS AND WIFE, MRS. KENNETH MAPPS; COUNTY OF BUNCOMBE; CITY OF ASHEVILLE; AND PETER L. RODA, TRUSTEE

No. 8428SC1008

(Filed 16 July 1985)

1. **Parent and Child § 1.1— rights of illegitimate child in condemned property— presumption of legitimacy not overcome**

The findings and conclusions did not support the judgment that Cynthia Steward, as the illegitimate daughter of Johnny Fuller, was the owner of a one-third undivided interest in property which had been owned by Johnny Fuller and which was the subject of a condemnation action by the Department of Transportation where the undisputed evidence showed that Cynthia Steward's mother was married to Ernest Steward when Cynthia was born. There was no finding that Ernest Steward could not have been the father of Cynthia Steward and evidence that Ernest had been hospitalized for tuberculosis the year before Cynthia was born was insufficient to rebut the presumption of legitimacy because he was allowed to go home on weekends. Rule 10(a), Rules of App. Procedure.

2. **Bastards § 13— illegitimate child—father and mother did not later marry— G.S. 49-12 erroneously applied**

In an action to determine whether an allegedly illegitimate child had an interest in the proceeds of a settlement in a condemnation action, the trial court erred by applying G.S. 49-12 without a finding that the child's father and mother had married after the birth of the child.

APPEAL by defendant from *Allen, Judge*. Judgment entered 25 June 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 7 May 1985.

The Department of Transportation began condemnation proceedings in March 1981 on property owned by Johnny Fuller, who died intestate on 22 July 1979. Johnny and Aletha Fuller were married in 1945; they separated in 1968 and were divorced in 1969. Two sons, Johnny Fuller, Jr. and Charles Fuller, were born of the marriage. The sons assigned their interests in their father's condemned property to defendant Aletha Fuller. Pursuant to a consent judgment entered on 3 July 1981, the Department of Transportation paid Aletha Fuller $23,000.

On 1 February 1984 Violeatha and Cynthia Steward, claiming to be the illegitimate daughters of Johnny Fuller, requested a hearing to determine what rights, if any, they had in the condemned property. After a hearing on 14 March 1984, Cynthia and Violeatha Steward were each adjudged the owners of a one-fourth undivided interest in the property. On rehearing, Cynthia Steward was adjudged the owner of a one-third undivided interest in the property. From this judgment filed 26 June 1984, defendant Aletha Fuller appeals.

Long, Howell, Parker and Payne, P.A. by Ronald K. Payne for plaintiff-appellee.

Jack W. Westall, Jr., P.A. by Kathy G. Lindsey for defendant-appellant.

PARKER, Judge.

Defendant Aletha Fuller did not take exception to any of the trial judge's findings of fact; therefore, the sole question raised on this appeal is whether the trial judge's findings of fact and conclusions of law support the judgment. Rule 10(a), Rules of Appellate Procedure.

The trial judge made the following findings of fact, in pertinent part:

> 5. That the property condemned in the original Complaint filed by the Department of Transportation in the above captioned matter was owned by one Johnny Fuller, Sr. at the time of his death on July 22, 1979. That at the time of Johnny Fuller, Sr.'s death, he was divorced from Aletha Fuller, . . .
>
> . . . .
>
> 9. That the said Johnny Fuller, Sr. and Rachel Steward lived together representing themselves to be husband and wife to the general public and Cynthia Steward and Violetha Steward lived in the same household.
>
> 10. That Johnny Fuller, Sr. acknowledged to neighbors and friends that he was the father of Cynthia Steward.
>
> 11. That Johnny Fuller, Sr. named Cynthia Steward as the beneficiary of his North Carolina Teachers and State Em-

ployees Retirement Benefits, by a document dated November 20, 1973, and in said designation of beneficiary form, named Cynthia Steward as his daughter. That said designation of beneficiary form was acknowledged by a notary public.

. . . .

13. That Johnny Fuller, Sr. died intestate on or about the 22nd day of July 1979, subsequent to the death of Rachel Steward.

14. That at the time of his death, Johnny Fuller, Sr., was the owner in fee simple of the property described in the original Complaint filed by the Department of Transportation in this matter.

. . . .

NOW, THEREFORE, BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT ENTERS THE FOLLOWING CONCLUSIONS OF LAW:

1. That Johnny Fuller, Sr. owned, in fee simple, the property described in the original Complaint filed by the Department of Transportation in this matter.

2. That Cynthia Steward is the daughter of the said Johnny Fuller, Sr., who was born out of wedlock.

3. That Johnny Fuller, Sr. died intestate on or about July 22, 1979, leaving surviving him his heirs at law, two sons, Johnny Fuller, Jr. and Charles E. Fuller, and one daughter, Cynthia Steward.

4. That by virtue of being the daughter of Johnny Fuller, Sr., having survived said Johnny Fuller, Sr., said Johnny Fuller, Sr. having died intestate, and pursuant to North Carolina General Statutes, Section 49-12, said Cynthia Steward is the owner of a one-third undivided interest in and to the property described in the Complaint previously filed by the Department of Transportation in this matter.

. . . .

7. That Cynthia Steward is entitled to be compensated for her interest in the property described in the Complaint

filed by the Department of Transportation and condemned by the Department of Transportation.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That Cynthia Steward is the owner of a one-third undivided interest in and to the property described in the Complaint previously filed by the Department of Transportation in this matter.

2. That Cynthia Steward is entitled to compensation for the taking of her interest in said property and may institute such actions as are appropriate to get her just compensation.

3. That Violetha Steward is not entitled to compensation and owns no interest in the subject property.

[1] We agree with defendant that the findings of fact and conclusions of law do not support the judgment, and the trial judge erred in adjudging Cynthia Steward the owner of a one-third undivided interest in the property.

When a child is born in wedlock, the law presumes that the child is legitimate; this presumption can only be rebutted by facts and circumstances which show that the husband could not have been the father. *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968). Such proof may be made by showing that the husband was impotent, or that he did not have access to his wife during the time period when conception must have occurred. *Id.; Wake County Child Support Enforcement v. Matthews*, 36 N.C. App. 316, 244 S.E. 2d 191 (1978).

In the instant case the undisputed evidence showed that at the time Cynthia Steward was born 19 December 1955, her mother, Rachel Steward, was married to Ernest Steward. There was no finding of fact that Rachel Steward's husband, Ernest, could not have been the father of Cynthia Steward. There was evidence that Ernest Steward had been hospitalized for tuberculosis the year before Cynthia Steward was born, but he was allowed to go home on weekends. This evidence is insufficient to prove lack of access by Ernest Steward. As the presumption of legitimacy was not rebutted, the trial judge erred in concluding that Johnny Fuller was the father of Cynthia Steward.

[2] Although not necessary to our holding in this case, we note that the trial judge also erred in his application of G.S. 49-12. This statute provides in pertinent part:

> When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate and the child shall be entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock.

This statute clearly requires marriage between the mother of the child born out of wedlock and its reputed father. The trial judge, however, did not find that Rachel Steward and Johnny Fuller were married, and on the record before this court there is no evidence to support such finding. Therefore, reliance on G.S. 49-12 was erroneous.

For the reasons stated above, the judgment of the trial court is vacated.

Vacated and remanded.

Judges ARNOLD and MARTIN concur.

IN THE MATTER OF ROBERT FRANKLIN HOWETT, JUVENILE

No. 858DC241

(Filed 16 July 1985)

1. Infants § 19— juvenile proceeding—standard of proof

Under G.S. 7A-631, juvenile respondents are entitled to have the evidence presented in their hearing evaluated by the same standards as apply in criminal trials against adults.

2. Infants § 18— delinquency adjudication—attempted rape—insufficient evidence

The evidence was insufficient to support an adjudication of delinquency on the ground of an attempt to carnally know a minor female by force and against her will where it tended to show that, although respondent juvenile tried to remove the minor female's shorts, he stopped when she simply spread her legs

to prevent her shorts from sliding off and left when the minor female told him to stop and that her mother would be home soon.

APPEAL by juvenile from *Goodman, Judge*. Order entered 2 October 1984 in District Court, WAYNE County. Heard in the Court of Appeals 24 June 1985.

Juvenile petition was filed on 21 August 1984 alleging that respondent was a delinquent juvenile, as defined in G.S. 7A-517 (12), in that "on or about the 11th day of August 1984, the juvenile did unlawfully willfully and feloniously attempt to ravish and carnally know [the minor female] by force and against her will in violation of G.S. 14-27.3 and 14-27.6."

At the hearing the minor female testified that she was fourteen years old and had known respondent for four years. On 11 August 1984 respondent came to her house, followed her inside and carried her to her bedroom. The minor female struggled and asked respondent to put her down. Respondent threw her on the bed, started to unbutton her blouse, pulled up her bra and unsuccessfully tried to pull her shorts off. She resisted him by "spreading [her] legs a little bit . . . ." Respondent then removed his own shorts and rubbed against her. When the minor female told him to stop, he pulled his shorts up and left.

Respondent testified that he had neither tried to pull the minor female's shorts down, nor removed his own shorts.

The juvenile court entered an order adjudicating respondent delinquent, placed him on probation for twelve months, ordered him not to see the minor female, and ordered him to spend two weekends in juvenile detention.

Attorney General Thornburg by Assistant Attorney General David Gordon for the State.

Michael A. Ellis for respondent.

PARKER, Judge.

Respondent contends that the juvenile court erred in denying his motion to dismiss for insufficiency of evidence.

[1] Under G.S. 7A-631 of our Juvenile Code, juvenile respondents are entitled to have the evidence presented in their hearing

evaluated by the same standards as apply in criminal trials against adults. *In re Meaut*, 51 N.C. App. 153, 275 S.E. 2d 200 (1981). To support a conviction there must be substantial evidence of every 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. *Id.* Second degree rape is engaging in vaginal intercourse with another person by force and against the will of the other person. G.S. 14-27.3(a)(1). "By force and against the will of the other person" is defined as notwithstanding her resistance. *State v. Franks*, -- N.C. App. ---, 329 S.E. 2d 717 (1985), *citing State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963). In *Gammons*, the defendant, a preacher, lured the victim into a bedroom in his house by telling her that they must pray together. Defendant's wife was in the house at the time. Defendant laid his hands on the victim's head and started praying; then he pushed the victim on the bed and got on top of her. He told her that she would be healed if he had sexual intercourse with her. Defendant put his hand up the victim's dress and tried to remove her underwear. She started crying and told him "No, I don't believe no such mess as that." When the victim felt defendant's body touch hers, she told him that she would scream. Defendant then got up, unlocked the door and let her go. The court explained that to convict the defendant on the charge of assault with intent to commit rape the State must prove that defendant committed an assault and that he "intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part." 260 N.C. at 755, 133 S.E. 2d at 651. The court noted that defendant did not threaten to do violence to the victim if she did not yield to his demands and that when she threatened to scream he immediately stopped and released her; this conduct, the court held, was not sufficient to show an intention to overcome the victim's resistance by force in order to have sexual intercourse.

[2] Similarly, in the instant case, respondent tried to remove the minor female's shorts, and stopped when she simply spread her legs to prevent her shorts from sliding off. When the minor female told him to stop and that her mother would be home soon, respondent got up and left. In our view, this evidence is not sufficient as a matter of law to support the essential finding that

respondent intended to have sexual intercourse with the minor female notwithstanding her resistance. Accordingly, the adjudication order is

Reversed.

Chief Judge HEDRICK and Judge ARNOLD concur.

SARA JO BUFF v. GLENN PAUL CARTER

No. 8520DC202

(Filed 16 July 1985)

Parent and Child § 7.3; Divorce and Alimony § 24.9— support obligation—failure to make findings as to child's needs and parents' ability to pay

The trial court erred by awarding plaintiff an arrearage in child support and medical expenses and prospective child support and medical expenses without the required specific findings as to the relative estates, earnings, conditions, and accustomed standard of living of the parents and the child. G.S. 50-13.4(c).

APPEAL by defendant from *Honeycutt, Judge.* Judgment entered 5 October 1984 in District Court, UNION County. Heard in the Court of Appeals 24 June 1985.

Plaintiff filed suit seeking child support from defendant whom she claimed was the father of her child. From a judgment awarding plaintiff child support, arrearages and expenses incidental to this suit, defendant appeals.

Mary I. Murrill for plaintiff appellee.

Charles D. Humphries for defendant appellant.

ARNOLD, Judge.

The dispositive issue in this appeal is whether the trial court made findings of fact sufficient to support its judgment ordering defendant to pay prospective child support and arrearages. We hold that it did not.

In *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980), our Supreme Court set out what conclusions of law and findings of fact a trial judge must make in order to warrant an order compelling a party to share in the financial responsibility of child support. Applying G.S. 50-13.4(c), the court stated that:

> [A]n order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents.

Coble, 300 N.C. at 712, 268 S.E. 2d at 189; *see also Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E. 2d 466, 469 (1978).

The trial court must make specific factual findings to support not only an award of future support but also to support an award of reimbursement for past support of the child, *see Hicks v. Hicks*, 34 N.C. App. 128, 130, 237 S.E. 2d 307, 309 (1977). When a trial court is faced with calculating a retroactive child support award, it must consider, among other things, whether what was actually expended was "reasonably necessary" for the child's support, *Tidwell v. Booker*, 290 N.C. 98, 116, 225 S.E. 2d 816, 827, and the defendant's ability to pay during the time for which reimbursement is sought, *Hicks*, 34 N.C. App. at 130, 237 S.E. 2d at 309; *Stanley v. Stanley*, 51 N.C. App. 172, 181-83, 275 S.E. 2d 546, 552-53, *disc. rev. denied* 303 N.C. 182, 280 S.E. 2d 454 (1981).

In the present case, the trial judge awarded plaintiff an "arrearage in child support and medical expenses" of $8,500. Further, the trial judge awarded prospective child support of $225 per month plus medical insurance coverage and the payment of fifty percent of medical and dental expenses incurred by the child, which are not reimbursable by insurance.

In support of this award the trial judge made the following factual findings (in pertinent part):

> VI. That the Defendant is an able-bodied person, capable of employment and being employed, who has had a continual

obligation to support his minor child and who has willfully failed and refused to do so to date, his arrearage in child support and medical expenses being $8,500.00.

VII. That the minor child is a healthy, normal child and, at the present time, the child has needs, which the Court finds as reasonable, of in excess of $500.00 per month.

VIII. That both Plaintiff and Defendant are primarily liable for the support of the child and at the present time, with the Plaintiff being the custodial parent, a fair and reasonable sum for the Defendant to pay for the health and maintenance of the child, having due regard to the circumstances of the parties and the child as required by G.S. 50-13.3 [sic] (b) and (c), is $225.00, plus medical insurance coverage and the payment of fifty percent (50%) of all medical and dental expenses incurred for the benefit of the minor child which are not reimbursable by the medical insurance maintained for this purpose, and the Defendant has the means to pay said sums.

The trial judge has clearly failed to make the specific findings as to relative estates, earnings, conditions, and accustomed standard of living of the parents and the child required to support its award of reimbursement and of prospective child support.

Defendant objects to the trial judge's requirement that he pay the lump sum of $8,500 plus incidental expenses (totalling $9,325.50) within sixty days of the entry of the order. Defendant argues that his financial statement shows that he is unable to pay this amount within so short a time. Since we have remanded for new findings supporting the child support order, and since the lump sum and monthly amount may, as a result, be adjusted, we see no need at this time to address this contention. We note, however, that under G.S. 50-13.4(e) the trial judge has broad discretion in determining the manner of payment, and his order will be upheld unless there is an abuse of discretion. *See Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E. 2d 642, 644 (1978); Lee, 3 North Carolina Family Law § 229 (4th ed. 1981).

We note also that the judge's order calls an "arrearage" the amount of past child support and medical expenses that defendant has failed to pay. This implies that at some time in the past an

order for support was entered and that defendant is "in arrears" in payments under it. Plaintiff's suit is technically not one for payments in arrears under an order already entered; it seeks for the first time an order for reimbursement of defendant's share of reasonably necessary expenditures made in the past for support of the child.

Vacated and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

JAMES ERBY ROBERTS v. CAROLINA TABLES OF HICKORY AND THE HOME INSURANCE COMPANY

No. 8410IC1248

(Filed 16 July 1985)

Master and Servant § 69— workers' compensation—conclusiveness of compensation agreement

A Form 21 compensation agreement signed by the parties and approved by the Industrial Commission was binding on the parties where the Commission found that the agreement was not obtained by fraud, misrepresentation, undue influence or mutual mistake, and a hearing commissioner erred in finding that plaintiff's average weekly wage was an amount greater than that stated in the compensation agreement. G.S. 97-17.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award entered 25 September 1984. Heard in the Court of Appeals 16 May 1985.

This appeal arises out of a compensable injury by accident which occurred on 2 November 1981 while plaintiff was employed by defendant Carolina Tables of Hickory. Plaintiff was born in 1941 and had completed high school. He had been working for defendant employer for approximately seven weeks prior to the accident. Plaintiff was an alcoholic, was diabetic and had high blood pressure. He had been taking Tylenol III, Valium, blood pressure medicine and insulin.

The parties stipulated as to the following facts:

STIPULATIONS

1. At the time of the alleged injury by accident, the parties were subject to and bound by the provisions of the North Carolina Workers' Compensation Act.

2. The employment relationship existed between the plaintiff and defendant employer.

3. Home Insurance Company was the compensation carrier on the risk at such time.

4. On 2 November 1981 plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer. Defendants admitted liability therefore, and the parties entered into a Form 21 Agreement, approved by the Commission on 7 December 1981, whereby plaintiff was paid compensation for temporary total disability at a compensation rate of $160.00 per week for the period 10 November 1981 to 12 January 1982.

On 7 June 1982 and 10 June 1982 a hearing was held before Deputy Commissioner Stephens on the issue of additional medical treatment at defendant's expense. Plaintiff's weekly compensation and the Form 21 Agreement were not at issue. Plaintiff was awarded $160.00 per week, as specified in the Form 21 Agreement. On 17 November 1983 a hearing was held before Commissioner Vance. Commissioner Vance found plaintiff's average weekly wage to be $297.69 and awarded plaintiff compensation at $198.47 per week. Defendant appealed contending that Commissioner Vance erred in finding that plaintiff's average weekly wage was $297.69 rather than $240.00 which was the average weekly wage agreed upon in the Form 21 Agreement. The Full Commission, in a hearing held on 20 August 1984, found the Form 21 Agreement to be binding and amended the award of Commissioner Vance by, *inter alia*, substituting $160.00 for $198.47.

Plaintiff appeals from the Full Commission's opinion and award on the grounds that the Full Commission erred in amending his average weekly wage to $240.00 from $297.69.

Randy D. Duncan for plaintiff-appellant.

Hedrick, Eatman, Gardner and Kincheloe by Scott M. Stevenson and John F. Morris for defendant-appellee.

PARKER, Judge.

The sole issue before us is whether the Form 21 Agreement signed by plaintiff and approved by the Industrial Commission was binding.

An agreement for compensation, when approved by the Commission, is binding on the parties. *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E. 2d 355 (1976). The agreement must be "in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, [and it] shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents." G.S. 97-82.

General Statute 97-17 prohibits the parties to such agreement from denying the truth of the matters therein set forth "unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake. . . ." The essential elements of fraud are a knowing misrepresentation of an existing fact, made with intent to deceive, which the other party reasonably relies on to his detriment. *Briggs v. Mid-State Oil Co.*, 53 N.C. App. 203, 280 S.E. 2d 501 (1981). Pursuant to G.S. 97-17 the Form 21 Agreement, signed by plaintiff and approved by the Commission, is binding unless the Commission finds that there has been error due to fraud, misrepresentation, undue influence or mutual mistake. In this case the Commission found that the agreement did not have such error and was binding.

The findings of the Commission are conclusive on appeal when supported by competent evidence, even though there may be evidence that could support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). The Commission may accept or reject the testimony of a witness, in whole or in part, solely on the basis of whether it believes the witness. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). After carefully reviewing the record, we find that the Commission's finding was supported by competent evidence. One of the Commission's findings of fact was in pertinent part:

> 7. Since plaintiff's injury, he has had a very bad memory. He has become irritated towards his family, never smiles, and seems to be in a daze. He accuses his family of

hiding things from him. Before going to work, plaintiff's wife must write down each day what medicine he should take and at what time of day. He cannot remember the multiplication table since the accident.

On cross-examination plaintiff said that he did not remember signing a paper which stated that his average weekly wage was $240.00; subsequently, he said that he had not signed any forms; finally, he said he had signed the form after reading it, that the form provided for an average weekly wage of $240.00, and that an employee of the insurance company told him to sign the paper and the carrier would evaluate and send him the rest of what he was supposed to receive.

Defendant's credibility was for the Commission to determine. We find that the evidence supports the Commission's finding that the agreement was not obtained by fraud, misrepresentation, undue influence or mutual mistake and, therefore, was binding on the parties.

Affirmed.

Judges ARNOLD and MARTIN concur.

JERRY LEE CHEEK v. ANNIE LAURIE FELDER HIGGINS

No. 8418SC1010

(Filed 16 July 1985)

Venue § 7; Rules of Civil Procedure § 12— motion for change of venue—not timely filed

The trial court erred by granting defendant's motion to change venue from Randolph to Guilford County where plaintiff's complaint was filed on 11 August 1982, defendant filed her answer on 31 August 1982, and defendant's motion to change venue was not filed until 11 April 1984. The time for making a written demand is before the time for filing answer expires, the defendant who files an answer to the merits before raising an objection to venue waives the right, and the burden is on defendant to conduct an investigation to determine if venue is proper before the time for filing expires. G.S. 1-83, G.S. 1A-1, Rule 12(b)(3).

Cheek v. Higgins

APPEAL by plaintiff from *DeRamus, Judge*. Ordered entered 14 May 1984 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 4 June 1985.

This is an action filed 11 August 1982 in Randolph County arising out of an automobile accident which occurred 19 April 1978 in Guilford County. (Plaintiff had voluntarily dismissed a previous action also filed in Randolph County.) When the case came on for trial 11 April 1984, the trial judge noted that the costs of the original action had not been paid and ordered the case continued for thirty days pursuant to Rule 41(d), N.C. Rules of Civil Procedure, for plaintiff to pay the unpaid costs subject to dismissal if the costs were not paid. On 14 May 1984 the case came on for further hearing on the Rule 41(d) motion and on defendant's motion to change venue filed 11 April 1984.

The trial judge found that the costs had been paid and ruled that the action should not be dismissed. The court heard evidence on the motion to change venue and found as facts that (i) plaintiff was a resident of Guilford County, (ii) plaintiff was not a citizen and resident of Randolph County at the time the complaint was filed, (iii) defendant was a citizen and resident of Guilford County, and (iv) the accident occurred in Guilford County. Based on these facts, the trial judge concluded that Guilford County was the county in which venue lies and ordered the action transferred to Guilford County.

Plaintiff appealed from the entry of this Order.

Ottway Burton for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts by Joseph W. Moss and David A. Senter for defendant-appellees.

PARKER, Judge.

Plaintiff assigns as error the trial court's granting of defendant's motion to change venue pursuant to G.S. 1-83 and Rule 12(b)(3) of the N.C. Rules of Civil Procedure.

General Statute 1-83 provides:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the

time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

(1) When the county designated for that purpose is not the proper one.

Under applicable case law when the venue where the action was filed is not the proper one, the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the case to the proper venue. If, however, the motion in writing is not made within the time prescribed by statute, defendant waives his right to object to venue. *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E. 2d 464 (1975). In this case plaintiff's complaint was filed 11 August 1982. Defendant filed her answer 31 August 1982. Defendant's motion to change venue was not filed until 11 April 1984. The language of the statute is clear that the time for making the written demand is before the time for filing answer expires. Moreover, our Supreme Court, interpreting this statute, has explicitly stated that the defendant who files answer to the merits before raising his objection to venue, waives the right. *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E. 2d 54 (1952); *See also Miller v. Miller*, 38 N.C. App. 95, 247 S.E. 2d 278 (1978).

Defendant's motion in the case at bar was not made in apt time. Therefore, we hold that defendant has waived her right and the trial court erred in granting defendant's motion to change venue. Defendant argues that her motion was made as soon as she discovered that plaintiff was not a resident of Guilford County. Defendant cannot, however, prevail on this argument for the reason that the plain language of the statute puts the burden on defendant to conduct an investigation to determine if venue is proper before the time for filing answer expires.

For the foregoing reasons, the 14 May 1984 Order is reversed with direction that the case be transferred from Guilford County to Randolph County for trial. Any purported appeal from the 11 April 1984 Order is dismissed.

Reversed.

Judges ARNOLD and MARTIN concur.

STATE OF NORTH CAROLINA v. WENDELL MASON

No. 853SC100

(Filed 16 July 1985)

1. **Criminal Law § 60— fingerprint evidence—corroboration of identification**

Fingerprint evidence is admissible to corroborate the prosecuting witness's identification of defendant as the perpetrator of the crime charged.

2. **Criminal Law § 60— time of impression of fingerprints—jury question**

Ordinarily, the question of whether fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury and is not a question of law to be determined by the court prior to the admission of the fingerprint evidence.

3. **Automobiles and Other Vehicles § 134; Larceny § 8— automobile larceny—necessity for instruction on unauthorized use**

The trial court in an automobile larceny case erred in failing to instruct the jury on the lesser included offense of unauthorized use where the evidence showed that the victim's car was found within five blocks of her office and that defendant was staying within two blocks of the victim's office, since the jury could have reasonably concluded that defendant did not intend to deprive the victim of her car permanently.

APPEAL by defendant from *Winberry, Judge.* Judgment entered 18 October 1984 in Superior Court, CRAVEN County. Heard in the Court of Appeals 24 June 1985.

Defendant was charged in a proper bill of indictment with robbery with a dangerous weapon, felonious larceny and attempted rape. On a jury verdict of guilty to all counts, the court sentenced defendant to terms of 40 years for robbery with a dangerous weapon, 10 years for felonious larceny and 20 years for attempted rape, the sentences to run concurrently. From entry of judgment defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Claude W. Harris, for the State.

Bill Barker for defendant appellant.

ARNOLD, Judge.

[1, 2] Defendant argues on appeal that the trial court erred when it admitted evidence of fingerprint identification in the absence of sufficient evidence to show that the fingerprints could only have been placed on the victim's vehicle at the time of the crime. Fingerprint evidence is admissible to corroborate the prosecuting witness's identification of defendant as the perpetrator of the charged crime. *State v. Banks*, 295 N.C. 399, 412, 245 S.E. 2d 743, 751-52 (1978). Ordinarily, the question of whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury and is not a question of law to be determined by the court prior to the admission of fingerprint evidence. *State v. Irick*, 291 N.C. 480, 489, 231 S.E. 2d 833, 839 (1977).

Further, the State does not rely primarily on the fingerprint evidence for identification of the defendant as the assailant. Both the victim and her assistant identified defendant. We find no reversible error in the trial judge's admission of the fingerprint evidence.

[3] Defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of unauthorized use of an automobile. Defendant objected to the trial court's instructions before the jury retired to consider its verdict, as required by Rule 10(b)(2), Rules of Appellate Procedure. The trial judge must charge on a lesser included offense only when there is evidence which would support a conviction of the lesser crime. *State v. Bell*, 228 N.C. 659, 663, 46 S.E. 2d 834, 837 (1948). The evidence shows that the victim's car was found within five blocks of her office. The defendant was staying in the same vicinity, within two blocks of the victim's office. The jury could have reasonably concluded that the defendant did not intend to deprive the victim of her car permanently. The requested charge on the lesser included offense of unauthorized use of a motor vehicle should have been given.

Reversed as to the larceny charge, and remanded for new trial.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FRANKLIN DELANO DENNING

No. 8513SC108

(Filed 16 July 1985)

Automobiles and Other Vehicles § 130— sentencing under Safe Roads Act—aggravating factors

Although defendant made a compelling argument that the sentencing scheme of the Safe Roads Act may deprive certain persons of their right to a jury trial by allowing the trial judge in the sentencing phase to find a defendant guilty of aggravating factors which are separate criminal offenses and to increase punishment based on those "convictions," defendant lacked standing in this case because the trial judge found one grossly aggravating factor: that defendant had a prior conviction for a similar offense within seven years. G.S. 20-138.1, G.S. 20-179, Art. I, § 13, North Carolina Constitution.

APPEAL by defendant from *Clark, Judge*. Judgment entered 8 October 1984 in Superior Court, BLADEN County. Heard in the Court of Appeals 24 June 1985.

Defendant was charged with driving while impaired. Defendant filed, pursuant to G.S. 15A-954(a)(1), a motion to dismiss the charges against him on the grounds that G.S. 20-138.1 is unconstitutional on its face. This motion was denied. Defendant was tried before a jury. From a judgment imposing the Level Two punishment, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Hulse & Hulse, by Herbert B. Hulse, for defendant appellant.

ARNOLD, Judge.

Defendant was convicted of driving while impaired and was sentenced to punishment at "Level Two" under the North Carolina Safe Roads Act of 1983. On appeal, he challenges the constitutionality of the Safe Roads Act, G.S. 20-138.1, -179. In particular, he claims that the method of sentencing and punishment provided for by the Act deprives him of his right to trial by jury. Defendant argues (1) that the Safe Roads Act provides for enhanced sentences when the trial judge finds certain aggravating factors, and (2) that these aggravating factors are essentially criminal offenses or elements of offenses which should be alleged in a

criminal pleading and considered by a jury. In short, defendant complains that under the Act a trial judge can "convict" him during the sentencing phase of crimes which ordinarily would be tried by a jury, and then rely on those "convictions" to deprive him of liberty and property.

We agree that a statute which circumvents a defendant's right to jury trial by allowing a trial judge in the sentencing phase of the trial of the crime charged to find the defendant guilty of other criminal offenses (for which he has not been previously tried) and, accordingly, to increase punishment for the original crime because of those other "convictions," would arguably violate our state constitution, *see* article I, section 13, N.C. Const.; *see also State v. Lewis*, 274 N.C. 438, 442, 164 S.E. 2d 177, 180 (1968); *State v. Williams*, 295 N.C. 655, 674, 249 S.E. 2d 709, 722 (1978); *State v. Moss*, 47 N.C. 66 (1854); *State v. Holt*, 90 N.C. 749, 751-53 (1884). In this case, although defendant has made a compelling argument about the extent to which the sentencing scheme of the Safe Roads Act may deprive certain persons of their right to jury trial, he has failed to show how he was directly and personally injured by the Act.

The record shows that defendant was given "Level Two" punishment. Defendant has failed to include in the record evidence of what aggravating or grossly aggravating factors led to his being subjected to this level of punishment. We take notice that the trial judge found one grossly aggravating factor: that defendant had a prior conviction for a similar offense within seven years. We do not find that a trial judge's increasing punishment after a finding of this factor in any way deprives the defendant of his right to jury trial. Further, although defendant's jury trial argument might have been more successfully lodged if he had been found "guilty" in the sentencing phase of other aggravating factors, such as reckless and dangerous driving, or passing a stopped school bus, which are separate criminal offenses, and for which one accused of them should be formally charged and tried, he does not now have standing to attack those portions of the statute as he was not injured directly by them. *See Canteen Service v. Johnson, Comr. of Revenue*, 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962).

Defendant's other constitutional challenges have been addressed in *State v. Rose*, 312 N.C. 441, 323 S.E. 2d 339 (1984), and *State v. Howress*, 312 N.C. 454, 323 S.E. 2d 335 (1984).

The denial of defendant's motion to dismiss is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

BRENDA K. ANDERSON, EMPLOYEE-PLAINTIFF v. SHONEY'S OF MORGANTON, EMPLOYER-DEFENDANT AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8510IC6

(Filed 16 July 1985)

Master and Servant § 74— scarred breast—compensation for disfigurement—erroneous

The Industrial Commission erred by awarding plaintiff compensation for serious disfigurement affecting her future earning capacity where hot water had spilled onto her chest in the course of her employment, she had two scars on top of her breast, the scars were not visible when plaintiff was dressed, she would have to wear a "real skimpy" bathing suit for them to be seen, she would not want the type of job where the scars might show, and she had returned to her former job without a reduction in pay.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission filed 13 August 1984. Heard in the Court of Appeals 24 June 1985.

Plaintiff was injured in the course of her employment when hot water spilled onto her chest and ran into her bra, burning her breast. Following surgery, she had two scars on the top of her breast. The scars were not visible when plaintiff was dressed; she would have to wear a "real skimpy" bathing suit for them to be seen. Plaintiff testified that she had never desired to take a job which would require exposing her breasts. Since the accident plaintiff returned to her job. The Commission awarded compensation for serious disfigurement affecting plaintiff's future earning capacity. Defendants appeal.

Hedrick, Eatman, Gardner & Kincheloe, by Martha W. Surles, for defendant appellants.

No brief for plaintiff appellee.

ARNOLD, Judge.

Defendants contend, and we agree, that this case is controlled by *Liles v. Charles Lee Byrd Logging Co.*, 309 N.C. 150, 305 S.E. 2d 523 (1983). There the Supreme Court held that to support an award of compensation, there must be not only a showing of serious disfigurement but also some rational connection or nexus between the disfigurement and the various factors outlined (such as age, training, experience, and adaptability) to support a presumption of diminished earning capacity. We find no such nexus. It is readily apparent that plaintiff's scars are not visible during her normal employment, and plaintiff has affirmatively testified that she would not want the type of job where the scars might show. The fact that she has returned to her former job without reduction in pay or apparent incident, while not necessarily probative, bears our conclusion out. On the authority of *Liles*, we conclude that the Commission's award was erroneous as a matter of law and must be

Reversed.

Judges WEBB and PARKER concur.

IN THE MATTER OF: LARRY ANTHONY JOHNSON

No. 8527DC314

(Filed 16 July 1985)

Infants § 20— adjudication of delinquency—necessity for stating standard of proof

The trial court erred in adjudicating respondent a delinquent child without affirmatively stating that the allegation of the juvenile petition had been proved beyond a reasonable doubt.

APPEAL by respondent from *Carpenter, Judge.* Order entered 19 November 1984 in District Court, GASTON County. Heard in the Court of Appeals 24 June 1985.

Respondent Larry Anthony Johnson was adjudicated a delinquent child upon a finding by the trial court that he committed the offense of malicious damage to personal property. He was placed on supervised probation for twelve months. From this Order, respondent appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Debra K. Gilchrist, for the State.

Stephen C. Brown for respondent.

ARNOLD, Judge.

By his sole assignment of error, respondent contends that the trial court erred in that it failed to affirmatively state that the allegation of the juvenile petition had been proved beyond a reasonable doubt. He argues that the trial judge's failure to state the standard of proof used in making the determination of delinquency constitutes reversible error. We agree.

G.S. 7A-637 states in relevant part that, "If the judge finds that the allegations in the petition have been proved as provided in G.S. § 7A-635 [beyond a reasonable doubt], he shall so state." The failure of the trial judge to follow the clear mandate of the statute is error. *In re Wade*, 67 N.C. App. 708, 313 S.E. 2d 862 (1984).

The decision of the trial court is

Reversed and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JAMES BERTRAN JONES

No. 851SC232

(Filed 16 July 1985)

Automobiles and Other Vehicles § 126.2— breathalyzer results—not required to be expressed as grams per milliliters of blood or liters of breath

Testimony that defendant had an alcohol concentration of .11 did not have to be excluded in a prosecution for driving while impaired because it was not

expressed in terms of grams per milliliters of blood or liters of breath. There is no such requirement in the Motor Vehicle Code, the courts have not interpreted G.S. 20-138.1 as requiring such specificity, and both the chemical analyst and the trial judge defined "alcohol concentration" so that it was completely clear to the jury.

APPEAL by defendant from *Small, Judge.* Judgment entered 21 September 1984 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 24 June 1985.

Defendant was charged and convicted in district court of the offense of driving while impaired in violation of G.S. 20-138.1. He appealed to superior court for a trial *de novo.* In superior court, the jury returned a verdict finding defendant guilty as charged. From the judgment entered on the verdict, defendant appealed.

Attorney General Lacy H. Thornburg by Assistant Attorney General Jane P. Gray for the State.

D. Keith Teague for defendant-appellant.

PARKER, Judge.

Defendant contends the trial court committed prejudicial error by admitting into evidence the results of a breathalyzer test showing that defendant had an alcohol concentration of .11 because the results were not stated or recorded in terms of grams of alcohol per 100 milliliters of blood or per 210 liters of breath. He argues that because the test result was expressed simply as .11, and not as a quantity of alcohol per unit of blood or breath, it was irrelevant and should have been excluded. We find this argument meritless.

General Statute 20-138.1 provides that "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: . . . (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more." There is no requirement in the statute or elsewhere in our Motor Vehicle Code, Chapter 20 of our General Statutes, that a person's alcohol concentration be expressed in terms of grams per milliliters of blood or liters of breath, nor have our courts interpreted G.S. 20-138.1 as requiring such specificity. *See, e.g., State v. Shuping,* 312 N.C. 421, 323 S.E. 2d 350

(1984); *State v. Howren*, 312 N.C. 454, 323 S.E. 2d 335 (1984). Moreover, both the chemical analyst who testified about the test results and the trial court defined the term "alcohol concentration" for the jury so that it was completely clear what was meant by the term. Accordingly, we find no error in the admission of the test results.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 JULY 1985

BYRUM IMPLEMENT & TRUCK v. MILLER No. 841SC1024	Chowan (83CVS146) (83CVS161)	Affirmed in part; vacated and remanded in part
CALLAHAN v. SMITH No. 8529SC116	Rutherford (82CVS0527)	Affirmed
DUPREE v. DUPREE No. 8410DC1056	Wake (82CVD5664)	Reversed
ELLIOTT v. GILCREST No. 8512SC186	Cumberland (83CVS125)	No Error
FORD v. FORD DIST. No. 8410IC1074	Industrial Commission (I-2358)	Affirmed
GELL v. MANUEL No. 8529SC206	Henderson (82CVS776)	No Error
IN RE KEY No. 8521DC313	Forsyth (80J315) (80J316)	Affirmed
JEFFERSON v. JEFFERSON No. 8426DC1284	Mecklenburg (83CVD5734)	Affirmed
LEWIS v. BLUNT No. 842SC1130	Beaufort (83CVS308)	Affirmed
STATE v. BRYSON No. 8525SC81	Catawba (83CRS9061)	No Error
STATE v. CRADDOCK No. 8511SC286	Harnett (83CRS7335)	No Error
STATE v. FEARRINGTON No. 8518SC139	Guilford (83CRS48646) (83CRS48647)	No Error
STATE v. McNAIR No. 8512SC248	Cumberland (84CRS18028)	No Error
STATE v. MASON No. 858SC105	Lenoir (84CRS4955) (84CRS4956) (84CRS4957) (84CRS4958) (84CRS4959)	Affirmed
STATE v. MULL No. 8527SC160	Lincoln (84CRS4705)	No Error

STATE v. SMITH No. 859SC78	Granville (84CRS2318)	Affirmed
STATE v. WATERS No. 855SC101	New Hanover (83CRS20553)	No Error
TAR HEEL SPORTSMAN v. Q DATA CORP. No. 8520SC140	Stanly (83CVS287)	Affirmed
TATE v. GARDNER No. 8419DC1015	Rowan (83CVD741)	Affirmed in part, dismissed in part

PETER T. LEARY AND WIFE, DORIS W. LEARY, AND MARYLAND CASUALTY COMPANY v. NANTAHALA POWER AND LIGHT COMPANY

No. 8430SC1178

(Filed 6 August 1985)

1. **Bills of Discovery § 6; Rules of Civil Procedure § 37— failure to comply with discovery order—evidence admitted—no error**

The trial court did not err in an action for damages from a fire allegedly caused by a falling tree limb striking an electric service drop conductor by admitting into evidence photographs which had not been produced for inspection before trial in violation of a discovery order. The photographs were admitted only for the purpose of illustrating a plaintiff's testimony, and there was no indication that the photographs were used or even viewed by plaintiff's expert witness on value.

2. **Bills of Discovery § 6; Rules of Civil Procedure § 37— failure to comply with discovery order—evidence admitted—no abuse of discretion**

The trial court did not abuse its discretion by admitting into evidence photographs and sections of an electrical service mast not produced as required by a discovery order in an action for damages allegedly caused by a tree limb falling on power lines where defendant had been made aware through discovery that a metallurgical examination of the service mast had been conducted and that a metallurgist had been retained as an expert witness by plaintiffs, defendant had been furnished with a copy of a report compiled by an engineering firm employed by the plaintiffs which contained a number of photographs of the service mast and referred to the metallographical examination and findings, the trial court offered defendant a recess so that it might employ its own metallurgist, and defendant declined the recess but submitted the materials to a metallurgist who testified for defendant at trial. G.S. 1A-1, Rule 36(b)(2).

3. **Trial § 18.1— evidence excluded ex mero motu—no error**

The trial court did not err in an action for damages from a tree limb falling on a power line when it sustained its own objection to defendant's attempt to ask a metallurgist about the temperatures he would expect to find in a house fire. The evidence involved lay outside the field of the witness's expertise and his preparation for trial.

4. **Evidence § 47.1— expert testimony based on hearsay—basis of opinion explained—no error**

In an action arising from the burning of a cabin after a tree limb fell on a power line, the trial court did not err by permitting plaintiffs' expert on the cause of fires to eliminate accidental fire, arson or household electrical current inside the cabin as causes of the fire. Although the witness eliminated accidental fire based on hearsay information that no one had been in the cabin, he qualified his opinion by stating that it was based on information provided to him and he admitted that he had no way of knowing whether anyone had broken into the cabin. No exception appeared in the record to testimony re-

garding household electrical current or arson. G.S. 8-58.12; Rule 10(2), N. C. Appellate Procedure.

5. Evidence § 56— expert testimony as to value of antiques destroyed in fire—no error

The trial court did not err in an action arising from the burning of a cabin after a tree limb fell across power lines by allowing plaintiffs' expert to give his opinion of the value of antiques in the cabin even though he had never seen the plaintiffs' antiques. The witness testified to extensive experience as a collector and dealer in antiques; he had some knowledge of the kinds of antiques in plaintiffs' inventory, having sold items to plaintiffs and having been present at antique shows and sales where they displayed various items; he had been furnished a list prepared by plaintiffs more than a month prior to trial and had reviewed descriptions and values contained therein; and those descriptions and values had already been admitted into evidence through the testimony of a plaintiff.

6. Appeal and Error § 49; Evidence § 55— expert testimony excluded—witness not qualified—substantially similar testimony admitted

There was no prejudicial error in the exclusion of testimony from defendants' expert on design of electrical service systems to residential customers concerning the effects upon various components of electrical systems of being struck by lightning or falling tree limbs where the record did not indicate that the witness possessed any special training, experience, or knowledge which would render him qualified to express an opinion; moreover, substantially the same evidence was admitted through the testimony of defendants' electrical engineering expert.

7. Appeal and Error § 50.2— lapsus linguae—no prejudicial error

In an action arising from a tree limb falling across a power line, there was no prejudice from the trial judge's *lapsus linguae* in instructing the jury that they could accept a witness's testimony only for the purpose of illustrating his testimony where the judge immediately corrected the instruction by telling the jury that they were not to consider an exhibit as an experiment, but only as an illustration.

8. Appeal and Error § 49— exclusion of expert testimony—substantially similar testimony admitted—no error

In an action arising from a tree limb falling across a power line, there was no prejudicial error in the exclusion of testimony from defendant's expert concerning the weakest part of an electrical distribution system where the same witness presented other testimony with substantially the same meaning.

9. Trial § 11— Supreme Court opinion read to jury—no error

The trial court did not err by permitting plaintiffs' counsel to read from a Supreme Court decision during jury argument where the case was not so dissimilar as to be irrelevant *per se*, the arguments were not included in the record, and the trial judge gave a cautionary instruction which corrected any impropriety which may have occurred.

10. Judgments § 55— prejudgment interest on total damage award—$200,000 deductible—error

In an action in which a cabin burned after a tree limb fell across a power line, the trial court erred by awarding prejudgment interest on a portion of a damage award not covered by liability insurance due to a $200,000 deductible. G.S. 24-5.

11. Rules of Civil Procedure § 59— damages improperly reduced ex mero motu over plaintiffs' objection

In an action arising from the burning of a cabin after a tree limb fell across power lines, the trial court erred by reducing damages for the cabin from $45,000 to $35,000 because the insurance company had sought only $35,000, its subrogation interest, but there was evidence supporting the jury's verdict and plaintiffs objected to a reduction in the verdict. G.S. 1A-1, Rule 59.

12. Costs § 3— costs taxed by clerk and reduced by court—no error

In an action arising from a tree limb falling across power lines, the trial court, in the exercise of its supervisory powers, had jurisdiction to review the clerk's order approving and taxing costs. G.S. 1-277 applies only to appeals from the clerk in proceedings in which the clerk had original jurisdiction. G.S. 6-7.

APPEAL by defendant and cross appeal by plaintiffs from judgment and order of *Burroughs, Judge*. Judgment entered 6 March 1984 and order entered 18 July 1984 in Superior Court, SWAIN County. Heard in the Court of Appeals 4 June 1985.

Plaintiffs Peter Leary and wife Doris Leary owned a log cabin located on four acres of land at the intersection of U. S. Highway 129 and N. C. Highway 29 in Swain County. They planned to turn the cabin into an antique shop and stored a substantial inventory of antique furniture, pottery, paintings and other furnishings in the cabin, as well as items of their personal belongings. The cabin was insured by plaintiff Maryland Casualty Company in the amount of $35,000.00; the contents of the cabin were not insured. On 12 February 1981 the cabin and its contents were completely destroyed by fire. Maryland Casualty Company paid the Learys the full amount of the coverage provided by the insurance policy. Plaintiffs Leary and Maryland Casualty Company then filed this action against defendant Power Company alleging that the fire had been caused when a tree limb fell and struck defendant's electric service drop conductor which ran from defendant's utility pole to a galvanized steel service mast on the cabin. Plaintiffs alleged that defendant had been negligent in failing to remove tree limbs overhanging the service drop despite

knowledge that the limbs were rotten and might fall, and that defendant had improperly installed the service drop to the cabin. As a result, plaintiffs alleged, when the tree limb fell the "hot" wires disconnected from the masthead and came into contact with the service mast, causing an electrical arcing which spattered molten metal particles onto the cabin's wood shingled roof and started the fire. Plaintiffs Leary sought $210,000.00 in damages and Maryland Casualty Company sought $35,000.00, the extent of its payment for the loss of the cabin.

Defendant Power Company answered, denying the material allegations of the complaint and asserting that plaintiffs Leary were contributorily negligent in failing to remove the dead tree limbs. The jury answered the issues of negligence and contributory negligence in plaintiffs' favor and awarded as damages $45,000.00 for the loss of the cabin and $175,000.00 for the loss of personal property. The trial court, *ex mero motu*, reduced the verdict for damages to the cabin to the sum of $35,000.00, over objection of the plaintiffs. The court then entered judgment for plaintiffs in the amount of $210,000.00, with interest from the date plaintiffs filed their complaint. Defendant thereafter filed a motion to amend the judgment, alleging that because its liability insurance coverage was subject to a $200,000.00 deductible provision, only $10,000.00 of the judgment was covered by liability insurance and subject to prejudgment interest. The motion was denied. The clerk taxed costs against defendant in the amount of $13,843.71 including expert witness fees in excess of $11,500.00. Upon objection by defendant and review by the trial court, the court sustained certain of defendant's objections and approved costs totalling $4,756.35. Defendant appeals and plaintiffs Leary cross-appeal.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Philip J. Smith and Allan R. Tarleton, for plaintiffs appellees-appellants Leary.

Lentz, Ball & Kelley, P.A., by Ervin L. Ball, Jr., for plaintiff appellee Maryland Casualty Company.

Morris, Golding and Phillips, by James N. Golding and William C. Morris, III, for defendant appellant-appellee.

MARTIN, Judge.

By its appeal, defendant Power Company assigns error to various of the court's rulings at trial, and to its award of prejudgment interest. By their cross appeal, plaintiffs assign error to the court's entry of judgment for an amount less than the jury verdict, and to post-trial rulings with regard to costs. We find no prejudicial error in the trial or in the court's ruling as to costs, but conclude that the court erred in awarding prejudgment interest on that portion of the judgment not covered by liability insurance, and in reducing, *ex mero motu*, the jury's verdict. Accordingly, we remand for entry of judgment consistent with this opinion.

TRIAL

[1] Defendant's first and second assignments of error relate to the admission into evidence of certain photographs and items of physical evidence. Defendant contends that these exhibits should not have been admitted because plaintiffs had not produced them for inspection before trial in violation of a discovery order. The discovery order, entered approximately eighteen months before trial, compelled plaintiffs to produce, among other things, "all photographs taken of the site of the fire before or after the fire" as well as "photographs which will form a basis for the factual contentions and/or opinions of Plaintiffs' expert witness(es)." The order also required plaintiffs to produce all items of physical evidence taken from the site of the fire which plaintiffs intended to introduce into evidence or which would form the basis for the opinion of an expert witness.

In response to the discovery order, plaintiffs apparently produced a number of photographs, but did not include among them certain photographs, taken before the fire, of various antiques which plaintiffs claimed had been destroyed in the fire. At trial, during the direct examination of plaintiff Peter Leary, these photographs were offered into evidence. Upon defendant's objection, the trial court ruled that the photographs would be admitted for purposes of illustrating Peter Leary's testimony, but could not be used by plaintiffs' expert witness since they had not been produced as required by the discovery order. The photographs were obviously competent to illustrate Leary's testimony as to the antiques which had been destroyed. The record before us contains

no indication that the photographs were used, or even viewed, by plaintiffs' expert witness as to value. We discern no abuse of the trial court's discretion in permitting the admission of the photographs into evidence for illustrative purposes.

[2] Defendant also objected to the introduction into evidence of sections of the service mast and photographs of certain portions of it, all of which were used by Dr. James Magor, a metallurgist called by plaintiffs, to illustrate his testimony as to his findings upon a metallurgical examination of the service mast. Defendant contends that neither the photographs nor the sections of the mast had been produced as required by the discovery order and that the appropriate sanction for noncompliance would have been the exclusion of this evidence. Defendant further asserts that had it known of these exhibits and that a metallurgical examination had been conducted, it could have obtained its own metallurgist to examine the service mast.

While exclusion of the evidence would have been a permissible sanction, authorized by G.S. 1A-1, Rule 37(b)(2), for noncompliance with the discovery order, it was not mandatory. In addition to those sanctions specified by Rule 37(b)(2), the rule authorizes the court, upon failure to comply with a discovery order, to "make such orders with regard to the failure as are just." Necessarily, then, the imposition of sanctions is within the sound discretion of the trial judge. *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 697-98 (1984).

The record before us indicates that defendant had been made aware, through discovery, that a metallurgical examination of the service mast had been conducted and that a metallurgist had been retained as an expert witness by plaintiffs. Apparently, defendants elected not to depose the metallurgist. In addition, defendant had been furnished a copy of a report compiled by Research Engineers, Inc., an engineering firm employed by plaintiffs, which contained a number of photographs of the service mast and referred to the metallographical examination and findings. Upon learning of defendant's objection to the exhibits, the trial court conducted a hearing and offered to recess the trial in order that defendant might employ its own metallurgist. Defendant declined the offer for a recess and elected to continue with the trial. Defendant did,

however, submit the materials to a metallurgist for examination, and defendant's metallurgist testified at the trial. Thus, while we do not approve the non-production of the exhibits, we cannot say that their admission into evidence prejudiced the defendant, nor can we say that the trial court's offer to grant defendant a recess rather than impose the sanction of exclusion of the evidence was unjust or amounted to an abuse of discretion. These assignments of error are overruled.

[3] During defendant's cross-examination of Dr. Magor, who had been accepted by the court as an expert in the field of metallurgy, defendant attempted to ask the witness what temperatures he would expect to find in a house fire. The court, *ex mero motu*, sustained its own objection, stating that Dr. Magor was not qualified to answer the question. Defendant contends the court's action in sustaining its own objection prevented it from testing Dr. Magor's knowledge of the subject matter of his testimony and amounted to an expression of opinion prejudicial to defendant. We find no merit in these contentions. As long as the court maintains impartiality, it may, of its own motion, exclude incompetent or inadmissible evidence. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960). The evidence involved lay outside the field of Dr. Magor's expertise. metallurgy, and his preparation for trial, which consisted solely of laboratory examination of the service mast.

[4] Another of plaintiffs' witnesses, Fred L. Rapp, was accepted by the court as an expert in the fields of electrical engineering and the cause and origin of fires. During his testimony on direct examination, he negated incendiarism, accidental fire, spontaneous ignition and electrical fire inside the house as causes of the fire that destroyed the Leary's cabin. His elimination of accidental fire was based on information which had been furnished him that no one had been in the cabin. Defendant objected and now assigns the admission of this testimony as error, contending that there was no evidence from any of plaintiffs' witnesses that they had been in or near the cabin during the week and therefore the property had been unprotected and could have been entered by trespassers. We do not believe the admission of this testimony prejudiced defendant. Mr. Rapp qualified his opinion by stating that it was based on information provided him, and he admitted on cross-examination that he had no way of knowing whether or

not someone had broken into the cabin before the fire occurred. The hearsay nature of the information relied upon by Mr. Rapp does not render his opinion inadmissible, *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), nor is there any requirement that such opinion be elicited through the use of a hypothetical question. N.C.G.S. § 8-58.12. Defendant also attempts, under this assignment of error, to assert similar challenges to the admission of Mr. Rapp's testimony negativing household electrical current inside the cabin or arson as causes of the fire. However, no exception appears in the record as to this testimony and, therefore, defendant's arguments are not properly presented for our review. Rule 10(a), N.C. App. Proc. This assignment of error is overruled.

[5] Defendant also assigns error to the admission of testimony by Gilbert Hollifield, an expert in the field of antiques and collectibles. Defendant contends that Mr. Hollifield, having never seen the plaintiffs' antiques, was not competent to give his opinion as to their value.

During the testimony of plaintiff Peter Leary, plaintiffs introduced into evidence a listing of all of the contents of the cabin, which had been prepared by Mr. and Mrs. Leary after the fire. The list contained a description of each item and its value in Leary's opinion. Leary testified that the fair market value of all of the items destroyed by the fire aggregated approximately $190,000.00. When Mr. Hollifield testified, he was permitted to testify, over objection, that he had reviewed the list prepared by the Learys and in his opinion the aggregate value of the listed items reflected their fair market value as of the date of the fire. He admitted that he had not seen the antiques and that the value of such items would vary significantly depending on their condition.

Generally, a witness qualified by experience, information and observation may give an opinion as to the value of specific property. 1 H. Brandis, *North Carolina Evidence* § 128 (1982). To establish an adequate foundation to place a valuation into evidence, it must be shown that the witness (1) is familiar with the property upon which he places a value and (2) has sufficient knowledge or experience as to enable him to place such a value. *Britt v. Smith*, 6 N.C. App. 117, 169 S.E. 2d 482 (1969). While knowledge or familiarity based on personal observation is certain-

ly the more usual and preferred method of qualifying an expert witness as to value, it is not the only method. *Hartford Acc. & Indem. v. Dikomey Mfg.*, 409 A. 2d 1076 (D.C. 1979). Where property has been lost or destroyed, an expert witness may testify as to its value based on a description of the property furnished by others. *See Haynes v. Glenn*, 197 Va. 746, 91 S.E. 2d 433 (1956), *Dixon v. Millhorn*, 55 Ohio App. 193, 9 N.E. 2d 183 (1936), *Fidelity Storage Co. v. Foster*, 51 F. 2d 439 (D.C. Cir. 1931). Mr. Hollifield testified to extensive experience as a collector and dealer in antiques. He had some knowledge of the kinds of antiques in plaintiffs' inventory, having sold items to them and having been present at antique shows and sales where plaintiffs displayed various items. He had been furnished the list prepared by plaintiffs more than a month prior to trial and had reviewed the descriptions and values contained thereon, which descriptions and values had already been admitted into evidence through the testimony of Peter Leary. The record provided a sufficient foundation for Mr. Hollifield to render his opinion as to value; the fact that in forming his opinion he relied on the Learys' description of the items, rather than his own observation of them, affected only the weight to be given his testimony by the jury and not its admissibility.

Defendant also assigns error to the exclusion of certain evidence which it sought to offer through the testimony of its area manager, J. R. Marr, and its electrical engineering expert, Harold Nash. We have examined defendant's contentions carefully and conclude that no prejudice resulted from the rulings complained of.

[6] Defendant tendered Mr. Marr as an expert witness in the "operation and maintenance of electrical distribution systems." Upon voir dire, the evidence established that Mr. Marr had a college degree in education and had taught school before becoming employed by defendant as a meter reader. Although he began a course of instruction for training as a lineman, he did not complete the course. His duties as area manager for defendant included talking with prospective residential customers, obtaining rights-of-way for provision of service to their homes, determining the location of the power poles, scheduling line crews and specifying the materials to be used in providing electrical service systems to the residences. The record does not disclose that Mr.

Marr had received any training in the field of electrical engineering. The trial court accepted Mr. Marr as an expert in "design of electrical service systems to residential customers." Thereafter, defendant sought to elicit testimony from Mr. Marr concerning the effects upon various components of electrical systems of being struck by lightning or falling tree limbs. The court refused to permit him to answer these questions. The record does not indicate that Mr. Marr possessed any special training, experience or knowledge which would render him qualified to express an opinion as to the effect of such stimuli on an electrical distribution system, therefore it was not error to exclude his answers. *State v. Puckett*, 54 N.C. App. 576, 284 S.E. 2d 326 (1981). Moreover, even assuming, *arguendo*, that he was qualified to answer the questions, defendant has suffered no prejudice because substantially the same evidence was admitted through the testimony of defendant's electrical engineering expert, Harold Nash. "Where evidence of similar import to that which was improperly excluded is admitted at other times in the trial, the exclusion will not be held to be prejudicial error." *State v. Smith*, 294 N.C. 365, 377, 241 S.E. 2d 674, 681 (1978).

[7] Defendant also complains that the trial court limited the effect of Mr. Marr's testimony by an improper instruction given in connection with his use of an exhibit. Mr. Marr had prepared a representational model of a residential power service hook-up from a transformer pole to a house, similar to the service that existed at the Leary cabin on the date of the fire. Mr. Marr sought to use the exhibit to explain his testimony concerning the effect of tension on the lines at the service masthead if struck by a falling object. The court instructed the jury: "You can accept this *testimony* for the purpose of illustrating Mr. Marr's testimony if you find it illustrates his testimony and for that limited purpose alone." (Emphasis supplied.) However, before the witness answered, the court immediately corrected the instruction by telling the jury that they were not to accept the exhibit "as any type of experiment. You are simply to accept this as illustrating Mr. Marr's testimony. It's not an experiment. It's just an illustration." Considered contextually, it is apparent that the instructions limited the jury's consideration of the *exhibit*, rather than Mr. Marr's *testimony*, to illustrative purposes. The court's *lapsus linguae* in referring to "testimony," rather than the exhibit, in the initial in-

structions was simply an inadvertence, promptly corrected, and could not have affected the outcome of the trial. *See Barnes v. House*, 253 N.C. 444, 117 S.E. 2d 265 (1960); *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E. 2d 855 (1980).

[8] During the direct examination of Mr. Nash, he was asked to identify the weakest part of an electrical distribution system such as the one providing service to the Learys' cabin. The plaintiffs objected and the objection was sustained. The record reflects that Mr. Nash would have answered, "[t]he wire holder on the transformer end." Defendant sought to introduce this evidence in support of its theory that the line, upon being struck by a tree limb, would break, if at all, at the transformer rather than at the masthead on the cabin. While we believe that the evidence was competent and that Mr. Nash was qualified to express his opinion in response to the question, we perceive no prejudice in the ruling. Other evidence showed that several months preceding the fire, another tree limb had fallen on the wire and pulled the line loose from the transformer, but not the masthead. Mr. Nash was permitted to testify that the earlier limb had created a greater force on the line than the one which fell in February 1981. He also testified that after the fire in February, the wire was still attached to, and had not been pulled loose from, the transformer. This led him to the conclusion that since the earlier limb had not exerted sufficient force to break the line at the masthead, neither did the limb which allegedly struck the line before the fire. This evidence had substantially the same meaning as that which was excluded, i.e., that the wire would break from the transformer before such force as would cause it to break at the masthead could be applied. Thus, the exclusion of Mr. Nash's answer as to the weakest part of the system was harmless error. *See Terrell v. Insurance Co.*, 269 N.C. 259, 152 S.E. 2d 196 (1967) (other evidence "with substantially the same meaning" allowed); *Delp v. Delp*, 53 N.C. App. 72, 280 S.E. 2d 27 ("essence of testimony" presented to jury), *disc. rev. denied*, 304 N.C. 194, 285 S.E. 2d 97 (1981).

[9] Defendant also assigns error to the court's refusal to instruct the jury to disregard a portion of plaintiffs' jury argument. During his jury argument, Mr. Ball, counsel for Maryland Casualty Company, read from the Supreme Court's decision in *Snow v. Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979). Defense counsel objected on the grounds that the case was not similar to the pres-

ent case. *Snow* is not so dissimilar to the present case as to be irrelevant *per se*; moreover, the arguments were not included in the record, and we are therefore unable to determine what portions of the Supreme Court's opinion in *Snow* were read, or whether it was improperly argued to the jury. In any event, the trial court, before permitting Mr. Ball to proceed with his argument, gave the following instruction:

> Members of the jury, the attorney is allowed to read to you cases that have been decided by appellate courts, and I'll caution you to remember that the factual situation in the case he may read to you may be different than the factual situation in this particular case, and what he is going to read to you is a position that our Supreme Court has taken in the case that he had before him there.

This instruction corrected any impropriety which may have occurred in connection with counsel's reading from *Snow*. *See Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967) (reviewing cases). This assignment of error is overruled.

In its final assignment of error directed to the conduct of the trial itself, defendant argues that the court erred in denying its motions for directed verdict and judgment notwithstanding the verdict, because a cumulation of all of the foregoing alleged errors amounted to a denial of a fair trial. Having addressed each issue raised by defendant and having concluded that defendant has failed to demonstrate prejudicial error with regard to any of them, we deem the argument to be without merit and overrule this assignment of error.

POST-TRIAL

[10] Defendant's principal post-trial assignments of error are directed to the court's award of prejudgment interest on the principal amount of the judgment. Defendant first asserts that G.S. 24-5 is unconstitutional. This issue has been recently and definitively decided against defendant by the North Carolina Supreme Court. *See Lowe v. Tarble*, 312 N.C. 467, 323 S.E. 2d 19 (1984), *aff'd on rehearing*, 313 N.C. 460, 329 S.E. 2d 648 (1985); *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984). Defendant further contends, however, that the trial court erred in applying the provisions of G.S. 24-5 to that portion of the damage award which was not covered by liability insurance. We agree.

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.* [Emphasis supplied.]

In *R-Anell Homes v. Alexander & Alexander*, 62 N.C. App. 653, 303 S.E. 2d 573 (1983), this court held that an insured defendant which defended the suit on its own because plaintiff's claim did not exceed the deductible amount of its liability policy was not liable for prejudgment interest. We pointed out that plaintiff's claim was not, therefore, covered by liability insurance and said "there is no logical reason to distinguish between claims against an uninsured defendant and an insured defendant defending a claim which falls short of the deductible amount of the insurance policy." *Id.* at 661, 303 S.E. 2d at 578. In *Powe v. Odell, supra*, the Supreme Court recognized "fundamental differences" between self-insurers and liability insurance companies, and reasoned that the legislative provision for prejudgment interest achieved a legitimate policy goal, i.e., providing an incentive for liability insurance companies to speed up the resolution of claims, rather than delay resolution in order to maximize the return of investment on loss reserves required by statute.

In this case, defendant's liability policy provided for a $200,000.00 deductible. To the extent of its deductible, defendant was a self-insurer and the first $200,000.00 of the judgment for compensatory damages awarded to plaintiffs was not covered by liability insurance. Under the provisions of G.S. 24-5, the portion of judgments for compensatory damages which are not covered by liability insurance bear interest from the time of the verdict rather than from the time the action is instituted. The award of

prejudgment interest on the first $200,000.00 of the judgment must be set aside.

We have also considered defendant's contention that it was entitled to a stay of execution by reason of plaintiffs' cross appeal. G.S. 1-289 and G.S. 1A-1, Rule 62(d) govern stays of execution of money judgments. Upon compliance with these statutes by defendant, execution of the judgment was stayed. This assignment of error is overruled.

[11] By cross appeal, plaintiffs assign error to the court's reduction, *ex mero motu*, of the jury verdict for damages to the cabin. This assignment is well taken.

In its judgment, the court ordered that $10,000.00 of the verdict for damage to the cabin be remitted "because it exceeded the amount prayed for" by Maryland Casualty Company. While Maryland Casualty Company sought recovery for only $35,000.00, its subrogation interest, plaintiffs Leary sought recovery for damages to the cabin as well as to its contents in the total sum of $210,000.00. The plaintiffs presented evidence tending to show that the fair market value of the cabin before the fire was $45,000.00 and that it had no value after the fire. Such evidence supported the jury's verdict that the plaintiffs were entitled to recover $45,000.00 for damage to the cabin.

Under G.S. 1A-1, Rule 59, and prior North Carolina law, a trial judge may reduce the verdict in his own motion in the event of excessive damages, as long as the party in whose favor the verdict was rendered does not object. *Redevelopment Comm. v. Holman*, 30 N.C. App. 395, 226 S.E. 2d 848, *disc. rev. denied*, 290 N.C. 778, 229 S.E. 2d 33 (1976). Without the assent of the party in whose favor the verdict was rendered, however, the court has no authority to reduce the verdict and enter judgment for the reduced amount. *Brown v. Griffin*, 263 N.C. 61, 138 S.E. 2d 823 (1964). Plaintiffs objected to a reduction in the verdict. Consequently, the court erred in reducing it. The Learys were entitled to the remaining $10,000.00 over and above the insurer's subrogation interest.

[12] Plaintiffs also assign error to the court's order sustaining defendant's objections to various costs taxed by the clerk. Plaintiffs contend that the trial judge had no jurisdiction to review the

clerk's order approving and taxing those costs requested by plaintiffs because defendant did not comply with the provisions of G.S. 1-272 in seeking review of that order. We find no merit in this assignment of error.

The provisions of G.S. 1-272 apply only to appeals from the clerk in proceedings in which the clerk has original jurisdiction. *Moody v. Howell*, 229 N.C. 198, 49 S.E. 2d 233 (1948). Taxation of costs is not a proceeding in which the clerk has original jurisdiction. G.S. 6-7 provides that "[t]he clerk of superior court shall enter in the case file, after judgment, the costs allowed by law"; however, the act of the clerk in taxing the costs is ministerial and is subject to revision by the trial judge. *Young v. Connelly*, 112 N.C. 646, 17 S.E. 424 (1893). The trial judge has supervisory power over the action of the clerk in taxing the costs. *Cureton v. Garrison*, 111 N.C. 271, 16 S.E. 338 (1892); *In re Smith*, 105 N.C. 167, 10 S.E. 982 (1890). In some instances, the judge must authorize the amount of the fees to be taxed as a part of the costs. *See*, e.g. G.S. 7A-314(d) (compensation for expert witness to be set by court); G.S. 7A-314(f) (compensation for interpreter to be set by court). G.S. 6-19.1, G.S. 6-19.2, G.S. 6-21.1 (allowance of attorney fees in certain cases). We hold that the court, in the exercise of its supervisory powers, had jurisdiction to review the clerk's order setting the costs.

Aside from their argument that the court had no authority to adjust the costs allowed by the clerk, plaintiffs have not assigned error to any specific item of costs disallowed by the court. Defendant attempts to argue that the court erred in not reducing the costs further, but has failed to preserve the matter for review by appropriate exceptions and assignments of error. Accordingly, we decline to disturb the trial court's order relating to costs.

In summary, we find no error in the trial of this cause, but remand for entry of judgment in the full amount of the verdict, bearing interest on the first $200,000.00 from the time of verdict, and on the balance of the judgment from the time this action was instituted.

No error in the trial; remanded for entry of judgment in accordance with this opinion.

Judges ARNOLD and PARKER concur.

ROSS M. OLIVE AND WIFE, NANCY M. OLIVE v. GREAT AMERICAN INSURANCE COMPANY

No. 8410SC1343

(Filed 6 August 1985)

1. **Appeal and Error § 6— partial summary judgment—right of immediate appeal**

In an action to recover for breach of a fire insurance contract, tortious breach of contract and punitive damages, the trial court's entry of partial summary judgment for defendant on the tortious breach of contract and punitive damages claims was immediately appealable because plaintiffs have a substantial right to have all of their factually related claims tried before the same judge and jury.

2. **Damages § 11.1; Insurance § 113— refusal to settle insurance claim—tortious breach of contract—punitive damages—insufficient forecast of evidence**

The trial court properly entered summary judgment for defendant insurer on plaintiffs' claims for tortious breach of a fire insurance contract and punitive damages based upon defendant's refusal to settle plaintiffs' insurance claim where the forecast of evidence showed that the policy is subject to more than one reasonable interpretation and that defendant promptly and consistently denied plaintiffs' insurance claim based on an interpretation of the policy that is neither strained nor fanciful.

APPEAL by plaintiffs from *Bailey, Judge*. Judgment entered 18 September 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 5 June 1985.

This is a civil action in which plaintiffs seek proceeds under an insurance policy issued by defendant and compensatory and punitive damages allegedly arising from defendant's tortious breach of the insurance contract.

Plaintiffs own a tract of land near Apex in rural Wake County. The land was conveyed to them as tenants by the entirety in 1971. A residential structure more than 100 years old was located on the land and was occupied by plaintiffs and their children as their principal residence. The residence was insured by Nationwide Insurance Co. The limits of liability under the policy were $30,000 on the structure and $15,000 on the contents. In 1981 plaintiffs began building a new house on the same property as the old house but separate and apart from it. When the new house was partially completed, plaintiffs applied to defendant Great American Insurance Company for a homeowners insurance policy on the new house. The policy was issued on 8 October 1981 and

was effective that same day. The policy contained the following pertinent provisions:

[Declaration]

DEDUCTIBLE $100 IN CASE OF A LOSS UNDER SECTION I, WE COVER ONLY THAT PART OF THE LOSS OVER THE DEDUCTIBLE STATED.

	LIMITS
A. DWELLING	$90,000.
B. OTHER STRUCTURES	$ 9,000.
C. PERSONAL PROPERTY	$45,000.
D. LOSS OF USE	$18,000.

[Policy]

DEFINITIONS

Throughout this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household, and "we", "us" and "our" refer to the Company providing this insurance. In addition, certain words and phrases are defined as follows:

. . .

4. "insured location" means:

a. the residence premises;

b. the part of any other premises, other structures, and grounds, used by you as a residence and which is shown in the Declarations or which is acquired by you during the policy period for your use as a residence;

c. any premises used by you in connection with the premises included in 4a or 4b;

d. any part of a premises not owned by any insured but where any insured is temporarily residing;

e. vacant land owned by or rented to any insured other than farm land;

f. land owned by or rented to any insured on which a one or two family dwelling is being constructed as a residence for any insured;

. . .

8. "residence premises" means the one or two family dwelling, other structures, and grounds or that part of any other building where you reside and which is shown as the "residence premises" in the Declarations.

COVERAGES

We cover:

a. the dwelling on the residence premises shown in the Declarations used principally as a private residence, including structures attached to the dwelling;

. . .

We cover:

a. other structures on the residence premises separated from the dwelling by clear space. Structures connected to the dwelling by only a fence, utility line or similar connection are considered to be other structures;

. . .

We cover personal property on the residence premises:

a. owned or used by any insured;

. . .

We cover personal property away from the residence premises anywhere in the world:

a. owned or used by any insured;

. . .

Our liability for personal property away from the residence premises is an additional amount of insurance:

a. not more than 10% of the limit of liability on Coverage C;

b. not less than $1,000.

. . .

The limit of liability for Coverage D is the total limit for all the following coverages. No deductible applies to this coverage.

1. Additional Living Expense. If a loss covered under this Section makes the residence premises uninhabitable, we cover any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living. Payment shall be for the shortest time required to repair or replace the premises or, if you permanently relocate, the shortest time required for your household to settle elsewhere. This period of time is not limited by expiration of this policy.

. . .

CONDITIONS

. . .

2. Your Duties After Loss. In case of a loss to which this insurance may apply, you shall see that the following duties are performed:

a. give immediate notice to us or our agent, and in case of theft also to the police.

. . .

c. prepare an inventory of damaged personal property showing in detail, the quantity, description, actual cash value and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory;

d. as often as we reasonably require:

(1) exhibit the damaged property;

(2) provide us with records and documents we request and permit us to make copies; and,

(3) submit to examination under oath and subscribe the same.

e. submit to us, within 60 days after we request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) the time and cause of loss;

(2) interest of the insured and all others in the property involved and all encumbrances on the property;

(3) other insurance which may cover the loss;

(4) changes in title or occupancy of the property during the term of the policy;

(5) specifications of any damaged building and detailed estimates for repair of the damage;

(6) an inventory of damaged personal property described in 2.c;

(7) receipts for additional living expenses incurred and records supporting the fair rental value loss;

(8) evidence or affidavit supporting a claim stating the amount and cause of loss.

On 25 October 1981, plaintiffs' old house, which was still occupied by them as their principal residence, was destroyed by fire. Most of plaintiffs' personal property, which was contained in the old house, was also destroyed. In addition, two large trees on plaintiffs' property were damaged by the fire. Plaintiffs promptly notified defendant's agent, James Herndon, who visited the property the next day. Herndon indicated that he "wasn't sure" whether the loss was covered under plaintiffs' policy with Great American and, after checking with the Company, informed plaintiffs that their claim would be denied.

Plaintiffs' loss was covered under their policy with Nationwide, which paid plaintiffs' claim up to the limits of the policy. On 11 December 1981, plaintiffs filed a claim with Great American for the contents of the old house. By letter dated 5 January 1982, that claim was denied. On 16 August 1982, plaintiffs filed another claim with Great American for the contents, the dwelling, additional living expenses, fire department services and damage to trees. This claim was accompanied by a complete inventory of losses and damages and was prepared on the advice of defend-

ant's agent Herndon. Plaintiffs thereafter had several discussions with Herndon and Warren Wright, also an agent of defendant, during which a settlement figure of $55,834.00 was proposed. This proposed settlement was subject to approval by defendant's office in Cincinnati. On 10 September 1982, the Cincinnati office refused to approve the settlement, denying that the losses claimed were covered under the policy. Defendant indicated that it would seek a declaratory judgment and, on 28 September 1982, confirmed by letter its refusal of the proposed settlement.

In addition to damages from the fire itself, plaintiffs allege that they suffered the following incidental damages: While plaintiffs were attempting to obtain settlement of their claim, they were unable to live either in the burned out old house or in the partially constructed new house. From 25 October 1981 until the new home was completed in late 1982, plaintiffs and their family lived with friends and family, in a storage building, in a camper, and finally in the basement of the unfinished new house. As a result of the fire and their living arrangements, plaintiffs incurred additional expenses for driving, eating out and laundry of $1,740.00. Additionally, plaintiff Nancy Olive injured her back escaping from the fire and her recovery was slowed by the unusual living conditions. Plaintiff Ross Olive was forced to use three and a half weeks of accumulated vacation time to pursue settlement of the claim.

On 30 March 1984, plaintiffs filed their complaint asserting three claims for relief. First, plaintiffs allege that defendant breached the insurance contract by refusing to pay plaintiffs for their claimed losses. Second, plaintiffs claim that defendant's refusal to cover the claimed losses and its manner of handling the claim amounted to a violation of the covenant of good faith and constituted a tortious breach of contract. Defendants sought compensatory damages for these first two claims. In their third claim for relief, plaintiffs alleged, "Defendant's actions have been wilful and oppressive and a misuse of power and authority tantamount to outrageous conduct and in reckless and wanton disregard of the plaintiffs' rights under the declaration and policy." Plaintiffs sought $200,000 in punitive damages on the basis of this third claim for relief.

Defendant answered, denying any breach of contract and denying that any alleged breach was tortious or that plaintiffs were

entitled to any damages. Defendant further responded particu ly that the losses claimed by plaintiffs were not covered un the policy issued by Great American or, alternatively, that tl liability under the policy was limited by its terms.

After both sides had engaged in some discovery, plaint moved for partial summary judgment on the first issue. This tion was denied. Defendant thereafter moved for summary ju ment as to all claims, but subsequently withdrew its motion v respect to the first claim. On 18 September 1984, the court tered summary judgment for defendant on plaintiffs' second third claims. Plaintiffs appealed.

Holleman and Stam, by Paul Stam, Jr., for plaintiff-ap lants.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, Ronald C. Dilthey and Sanford W. Thompson, IV, for defend appellee.

EAGLES, Judge.

[1] The first question that we consider is whether plaintiffs' peal from the trial court's entry of partial summary judgmen premature. We hold that it is not. In *Oestreicher v. American tional Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), the plainti complaint alleged three claims for relief. The first was for bre of contract; the second was for punitive damages based on breach of contract; and the third was for anticipatory breach the same contract. In reversing this court, our Supreme Co held that a plaintiff had a substantial right to have all of his tually related claims tried before the same judge and jury that an immediate appeal lies from an order allowing summ judgment on fewer than all of the claims. We think that *treicher* is controlling and that plaintiffs here are entitled to immediate appeal.

[2] In their second argument, plaintiffs contend that the t court erred in granting summary judgment for defendant as plaintiffs' second and third claims for relief. They argue that material in the record before the trial court presents an issue material fact and that defendant was not entitled to summ judgment as a matter of law. In support of this argument, pl tiffs rely heavily on this court's recent opinions in *Dailey v.*

tegon Ins. Corp., 57 N.C. App. 346, 291 S.E. 2d 331 (1982) (*Dailey I*) and *Payne v. N.C. Farm Bureau Mutual Ins. Co.*, 67 N.C. App. 692, 313 S.E. 2d 912 (1984). Both of those cases, like the present one, involved a failure by the defendant insurance companies to settle the loss claims of plaintiffs. In their complaints, those plaintiffs alleged that the failure of the defendant insurance companies to settle their claims was in bad faith, amounting to a tortious breach of contract and entitling plaintiffs to punitive damages. In each case, the claims of bad faith and punitive damages were dismissed by the trial court on defendant's motions to dismiss under G.S. 1A-1, Rule 12(b)(6). We reversed the trial court in each case, holding that plaintiffs had alleged facts which, if true, would establish a tortious breach of contract entitling plaintiffs to claim punitive damages.

Although plaintiffs here have pleaded the same claims pleaded in *Dailey I* and *Payne*, a different question is presented because plaintiffs' appeal is from an order allowing summary judgment for defendant. The issue here is not whether, as in *Dailey I* and *Payne*, plaintiffs have sufficiently alleged a claim for relief but whether, based on the pleadings, affidavits, depositions and other material submitted in support of and in opposition to the motion, there is an issue of material fact as to the claims that would require them to be submitted to a jury. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E. 2d 897 (1981). We hold that no issue of material fact has been shown to exist here and that the trial court properly allowed defendant's motion for summary judgment.

Plaintiffs devote considerable energy and space in their brief to arguments that are more appropriate to their breach of contract claim: whether and to what extent the policy issued by defendant covers the losses claimed by them. That issue was not adjudicated below and is not before us now; it remains a question of fact for the jury. In our consideration here of whether plaintiffs' allegations as to the second and third claims are supported sufficiently to withstand defendant's summary judgment motion, however, we assume that plaintiffs have established their breach of contract claim. The question that we must answer then is whether on the basis of the materials before the court, a jury could find that the assumed breach of contract was under cir-

cumstances which amount to a tort and, if so, whether those circumstances could warrant an award of punitive damages.

Plaintiffs' forecast of the evidence tends to show that they dealt with two local agents of defendant Great American Insurance Company. One of the agents, Herndon, was on the scene the day after the fire, placed plaintiffs' claim by telephone and promptly communicated to plaintiffs that it would be denied. Plaintiffs nevertheless submitted a claim of loss to defendant that was promptly denied. With the help of agent Herndon, plaintiffs submitted yet another claim to defendant that was denied. After further investigation and negotiations with plaintiffs, agents Wright and Herndon proposed a settlement conditioned on approval from the home office. The home office rejected the proposed settlement.

Plaintiffs' argument that this is evidence of bad faith appears to be premised almost entirely on their contentions that defendant has not interpreted the policy correctly. Plaintiffs in their brief concede (1) that the new house was the dwelling intended to be covered under the policy and (2) that the old house was an "other structure" as defined by the policy. Plaintiffs contend that the old house was nevertheless part of the "residence premises" and that its destruction by a "covered peril," i.e., fire, entitles them to the full coverage provided in the policy for personal property loss, loss of use, and additional coverages. Plaintiffs argue that defendant's continued denial of coverage, despite the clear language of the policy, and the conduct of agents Herndon and Wright amounts to a bad faith breach of contract under circumstances of such rudeness, oppression and disregard for their rights that plaintiffs are not only entitled to compensatory damages for the tortious breach but also to punitive or exemplary damages for defendant's "outrageous conduct."

Defendant contends that the issue of coverage is not involved in this appeal and does not argue it. In their response below, however, their denial of coverage was based on two theories: (1) that the claimed personal property losses did not occur in connection with the destruction of the "residence premises" and (2) that the personal property damaged in the fire was specifically covered by other insurance.

While the issue is not before us, it seems clear from the record that the trial court properly determined that the interpretation of the policy was a question of fact for the jury and properly denied plaintiffs' motion for summary judgment on that issue. Defendant argues that, because the trial court denied defendant's summary judgment motion and determined that the question of coverage was for the jury, the claim was clearly the basis of an honest disagreement between the parties and that plaintiffs' claim of tortious breach and punitive damages were required to be dismissed. Though we have rejected plaintiffs' argument and hold for defendant here, we do not agree with defendant's argument. Though we express no opinion as to the propriety of defendant's denial of plaintiffs' claim, we think that the policy is clearly open to more than one reasonable interpretation, especially in view of plaintiffs' particular living situation at the time of the fire. Further, we do not think that the actions of defendant or defendant's agents in dealing with plaintiff evidenced any bad faith on the part of defendant that would support a claim of tortious breach of contract should the jury in fact decide that the contract was breached. Necessarily, there can be no claim for punitive damages if there has been no tort committed. It appears that defendant here promptly and consistently denied plaintiffs' insurance claim based on an interpretation that is neither strained nor fanciful, regardless of whether it is correct. Further, while defendant's agents may have provided plaintiffs with inaccurate advice, they did so apparently in good faith, with the desire to be helpful and perform their duties, not with the intent to injure plaintiffs or with a disregard for plaintiffs' unfortunate predicament.

It is instructive to compare the facts of this case with the fact situation in the recent case of *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 331 S.E. 2d 148 (1985) (*Dailey II*) which involved the post-verdict appeal in the trial resulting from the *Dailey I* remand. In *Dailey II* plaintiff produced evidence that defendant and defendant's agent conducted an investigation into the origin of a fire that destroyed plaintiffs' house while plaintiff was out of town. Arson was the suspected cause of the fire but plaintiff had been cleared of suspicion by local law enforcement officials. Nevertheless, defendant's agent conducted his investigation as if plaintiff were a suspect, implicating plaintiff to his neighbors and

in the community as the arsonist and otherwise creating ill will toward plaintiff. There was evidence that the agent offered money to people to implicate plaintiff in the fire. The evidence in that case further shows that defendant delayed the investigation of the fire, even though its potential liability was immediately clear; that defendant caused plaintiff to incur substantial expense and inconvenience; that its investigation of the claim was not conducted in a reasonable manner; and that it proposed a settlement that was patently unreasonable and unfair. The jury in that case found that defendant had acted in bad faith and awarded punitive damages to plaintiff. The trial judge entered judgment n.o.v. for defendant on the tortious breach and punitive damages claims because, in his opinion, their claims were not recognized in North Carolina law. On appeal, this court reversed the trial court, holding that the claims were recognized in our law and that plaintiff was entitled to an award if the jury found that he had proved his allegations.

While it is not clear what minimum proof would be sufficient to require that the issues of tortious breach of contract and punitive damages be submitted to the jury, the distinction between *Dailey II* and the instant case is that here plaintiffs simply did not meet their burden. The record before us and before the trial court contains nothing that supports plaintiffs' allegations. While we are not reluctant to allow the pleading of such claims, *see Dailey I* and *Payne v. N.C. Farm Bureau Mutual Ins. Co.*, both *supra*, or recovery on those claims when warranted, *see Dailey II, supra*, we approach these issues with caution. As our Supreme Court noted in *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976), exposing insurers to "liabilities beyond those called for in the insurance contract . . . except for the most extreme circumstances, would . . . be detrimental to the consuming public whose insurance premiums would surely be increased to cover them." *Id.* at 116, 229 S.E. 2d at 303.

Lest we be misunderstood, we emphasize again that the trial court's determination of plaintiffs' summary judgment motion on the first claim did not influence our determination of the propriety of its rulings on the second and third claims.

For the reasons stated above, the judgment of the Superior Court is affirmed and the cause remanded for trial on the issue of liability.

Affirmed and remanded.

Judges BECTON and PHILLIPS concur.

L. HARVEY AND SON COMPANY, T/A ONSLOW IMPLEMENT COMPANY v. JERRY E. JARMAN AND WIFE, EDNA L. JARMAN (ALSO KNOWN AS POLLY JARMAN) v. JARVIS BROWN

No. 848SC1087

(Filed 6 August 1985)

1. Appeal and Error § 42— presumption of regularity of trial proceedings

There is a presumption in favor of regularity and correctness in proceedings in the trial court, and the burden is on the appellant to show error.

2. Agriculture § 9— defective fertilizer—breach of implied and express warranties—insufficient evidence

The trial court properly directed a verdict for plaintiff on defendants' counterclaim for breach of implied warranty of fertilizer where the evidence showed that defendants never complied with the prerequisites of G.S. 106-662(e)(4) for bringing a suit based on defective fertilizer. Furthermore, the trial court properly directed a verdict for plaintiff on defendants' counterclaim for breach of express warranty of fitness of the fertilizer for use on a corn crop where no evidence was produced at trial indicating that the fertilizer was not suitable for corn.

3. Rules of Civil Procedure § 50; Trial § 31— directed verdict without motion therefor

A trial judge has the authority to direct a verdict for a party even though such party has not made a motion for a directed verdict. However, trial judges should use such authority sparingly in view of the low evidentiary threshold necessary to take a case to the jury and the detailed procedure outlined in G.S. 1A-1, Rule 50, which presumes the use of a motion before a verdict is directed.

4. Bills and Notes § 20— action on note—prima facie case

Plaintiff made out a *prima facie* case for recovery on a promissory note where plaintiff introduced the note into evidence and defendants stipulated that their signatures on the note were genuine.

5. Bills and Notes § 4— promissory note—alleged defective goods—consideration

A note given for the purchase of fertilizer was properly supported by a valid consideration where the amount of fertilizer purchased was delivered and applied although defendants claimed the fertilizer was defective.

6. Bills and Notes § 20— promissory note—failure to state annual percentage rate

Recovery on a promissory note was not precluded because it did not state an annual percentage rate where the trial court limited interest on the note to the legal rate of eight percent.

7. Husband and Wife § 3.1— promissory note—agency of husband for wife

A note executed by defendants for the purchase of fertilizer was not void as to defendant wife on the ground that she had not purchased any supplies from plaintiff where the evidence showed that defendants were engaged in farming together, that defendant wife shared in any money made in the farming operation, and that defendant husband was acting as his wife's agent in purchasing farm supplies and establishing an account with plaintiff.

8. Attorneys at Law § 7.4— promissory note—provision for attorney fees—failure to give notice

The trial court erred in awarding attorney fees to plaintiff in an action on a promissory note containing a provision for attorney fees where no notice of plaintiff's intention to collect attorney fees was ever mailed to defendant makers as G.S. 6-21.2(5) requires.

APPEAL by defendants from *Barefoot, Judge.* Judgment entered 6 June 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 10 May 1985.

Barnes, Braswell & Haithcock, P.A., by Henson P. Barnes, and Perry, Perry & Perry, by Warren S. Perry, for plaintiff appellee.

Lee, Hancock, Lasitter and King, by John W. King, Jr., for defendant appellants.

BECTON, Judge.

I

Plaintiff, L. Harvey and Son Company (Harvey), filed this suit to recover on a promissory note given for the purchase of fertilizer, executed by defendants Jerry Jarman (Jarman or Mr. Jarman) and Edna Jarman (Mrs. Jarman), plus interest and attorney's fees. The Jarmans' Answer included a number of affirmative defenses and counterclaims. The Jarmans also filed a third-party Complaint against Jarvis Brown, alleging that Brown was personally liable to them for breach of an express warranty on the fertilizer, if in making the warranty, Brown exceeded the scope of his agency relationship with Harvey.

An order was entered dismissing the Jarmans' first counterclaim, and the Jarmans' motion for a change of venue was denied. The Jarmans moved for summary judgment on the note, which was also denied. However, their alternative motion for partial summary judgment on the issue of interest on the note was allowed.

When the case came on for trial, Harvey introduced the note into evidence and rested. After the Jarmans had put on their evidence, the record reflects a discussion between the trial judge and counsel concerning the dismissal of one or more of the Jarmans' counterclaims, with the trial judge reserving his ruling on the motion to dismiss. Harvey put on rebuttal evidence. The trial judge then allowed the motion to dismiss all of the Jarmans' counterclaims, and also directed a verdict in favor of Harvey on the note.

Judgment was entered, awarding Harvey the amount of the note plus interest and attorney's fees. The Jarmans appeal, contending that (1) it was error to dismiss all of the Jarmans' counterclaims, when no motion was made to dismiss their warranty counterclaims, (2) it was error to direct a verdict for Harvey on the note when Harvey had not moved for a directed verdict, and (3) it was error to award attorney's fees. We conclude that it was not error for the trial judge to dismiss the counterclaims, nor was it error to direct a verdict in Harvey's favor on the note. The trial court did, however, err in awarding attorney's fees, and the judgment is to be modified accordingly.

II

Factual Background

Jerry Jarman and Edna Jarman, husband and wife, are farmers. In the spring of 1980, Jerry Jarman purchased liquid fertilizer for that year's corn crop and other farm supplies from Harvey. He testified that he spoke with two of Harvey's employees, A. W. Turner and Jarvis Brown, concerning the purchase of fertilizer. Jarman testified that both Turner and Brown told him that the recommended liquid fertilizer, "Super Kic," would work as well as dry fertilizer, and that Turner recommended an application of "Super Kic" at a concentration 400 pounds per acre. Jarman testified that he purchased the recommended

amount of "Super Kic" from Harvey, and that in early April 1980, Turner, using company equipment, applied the liquid fertilizer. Jarman testified that Turner applied "Super Kic" liquid fertilizer to 201 of the 373 acres of corn Jarman planted that year. He testified that when Turner ran out of "Super Kic," Turner recommended an application of dry fertilizer at a concentration of 500 pounds per acre. Jarman agreed, and the dry fertilizer was applied to the remaining acres. Turner testified that at least some of Jarman's land was not properly prepared, as it had "a lot of tall weeds in it." Jarman testified that he was present when Turner spread the fertilizer, and it seemed to him that Turner did a good job.

Jarman testified that he followed the identical procedure in preparing and planting all of the 373 acres, except that in the fields in which "Super Kic" liquid fertilizer was used, weed killer was mixed in with the fertilizer. Turner testified that these herbicides would not affect the effectiveness of the fertilizer.

Jarman testified that in the fields in which dry fertilizer was used, he had a good crop of corn in 1980, averaging 90 bushels of corn per acre; however, in the fields fertilized with "Super Kic," the corn quickly turned yellow. Although liquid nitrogen was ultimately used on the "Super Kic" fields so that the corn turned green and grew, these fields yielded very little corn, averaging 25 or fewer bushels per acre.

Turner testified that the "Super Kic" liquid fertilizer came premixed from a common storage tank and that Ed Greer had his 1980 corn crop fertilized with "Super Kic" from that tank the same week as the Jarmans. Greer testified that he applied additional fertilizer to the fields that had been fertilized with "Super Kic" at 400 pounds per acre, and he achieved a crop yield of 100 bushels of corn per acre that year.

Brown testified that he first received a complaint about Mr. Jarman's corn crop in early May 1980, when Jarman complained about weeds in his fields. Brown stated that he and the county agent went out to look at the land. Turner testified that the first time he knew something was wrong with Jarman's corn crop was during spring or summer 1980, when he and his wife rode through the Jarmans' farm. Turner stated that although he was sure he stopped and talked with Mr. Jarman, he never discussed any

problems with anyone at Harvey. Jarman testified that he discussed his problems with the corn crop with Turner, when he first became aware of them, and that a week or two later he told Brown that his "corn was sitting there yellow and wasn't growing a bit."

There was uncontradicted evidence that there was an open account between Harvey and Jerry Jarman in Jarman's name, and that in December 1980, Jerry and Edna Jarman signed a promissory note in the amount of $22,638.93, which represented the balance owed on the account for both "Super Kic" fertilizer and other items purchased from Harvey. Brown testified that it was Harvey's policy to have customers with outstanding accounts sign promissory notes at the end of the year. As of June 1981, a balance of $10,148.77 remained on that account, which Jarman testified represented the approximate amount due for "Super Kic" fertilizer. On 29 June 1981, Jerry and Edna Jarman signed a second promissory note for $10,148.77, which note is the subject of this action. Harvey's retired vice-president testified that no payments have been made on this note.

III

The Jarmans asserted four counterclaims in their Answer. The record shows that, after the presentation of Harvey's rebuttal evidence, the trial judge dismissed "all" of the counterclaims. The Jarmans contend that this was error, as Harvey had only moved to dismiss their third counterclaim, which was based on negligence. We disagree.

Harvey apparently originally made the motion to dismiss at the close of the Jarmans' evidence. No transcript of the trial proceedings was filed with this Court, and the pertinent portion of the printed record is incomplete. Significantly, the caption "MOTION BY MR. PERRY:" [Harvey's counsel], appears, but what counsel actually said does not appear. A few lines later appears: "MR. KING: [Jarman's counsel] Arguments Opposing Motion To Dismiss." Again, what counsel actually argued is missing. Therefore, we have no way of knowing which counterclaims were referred to in the motion.

[1] The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court,

with the burden on the appellant to show error. *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *app. dism.*, 459 U.S. 1139, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983). *Accord State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968) (reviewing court not required to, and should not, assume error by trial judge when none appears in the record before the reviewing court). Here, in the absence of a complete record, we presume a proper motion to dismiss all of the Jarmans' counterclaims was made. Accordingly, we turn to the merits.

The first counterclaim, relating to the Truth-In-Lending Act, had been dismissed prior to trial by order of the court. The second counterclaim, concerning the genuineness of signatures, was obviously dropped in that the Jarmans stipulated to having signed the note. As to the third counterclaim, based on Harvey's negligence in mixing and spreading the fertilizer, the Jarmans concede that no evidence was adduced to support a claim for negligence, and they do not argue this point in their brief. *See* N.C. Rules App. Proc., Rule 28(a) (questions raised but not briefed deemed abandoned).

[2] The fourth counterclaim is based on allegations of breach of express and implied warranties, specifically, that Harvey breached an express warranty that "Super Kic" was an excellent fertilizer and suited for the Jarmans' corn, and an implied warranty, in that the fertilizer was defective and hence not fit for the ordinary purposes for which it was intended. In determining whether these warranty counterclaims were correctly dismissed, the case of *Potter v. Tyndall*, 22 N.C. App. 129, 205 S.E. 2d 808, *cert. denied*, 285 N.C. 661, 207 S.E. 2d 762 (1974), is instructive. In that case, a seller of fertilizer sued on an account and the buyer counterclaimed against the seller and its agents, alleging that the agents had falsely represented to him that the fertilizer was a good one for use on tobacco, when it, in fact, caused his crop to wither and die. The trial court dismissed the counterclaim. The sole issue on appeal was whether the buyer's counterclaim could be maintained on theories of express or implied warranty. Crucial to this Court's resolution of the issue was the effect of former N.C. Gen. Stat. Sec. 106-50.7(e)(4) (1975) (recodified as N.C. Gen. Stat. Sec. 106-662(e)(4) (1978)). The current statute provides in pertinent part that:

> No suit for damages claimed to result from the use of any lot of mixed fertilizer or fertilizer material may be brought unless it shall be shown by an analysis of a sample taken and analyzed in accordance with the provisions of this Article, that the said lot of fertilizer as represented by a sample or samples taken in accordance with the provisions of this section does not conform to the provisions of this Article with respect to the composition of the mixed fertilizer or fertilizer material, unless it shall appear to the Commissioner that the manufacturer of the fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are prohibited by the provisions of this Article, or unless it shall appear to the Commissioner that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods or unless it shall appear to the Commissioner that the manufacturer of the fertilizer in question, or a representative, agent or employee of the manufacturer, has violated any provisions of G.S. 106-663.

N.C. Gen. Stat. § 106-662(e)(4) (1978).

In construing the effect of this statute on the buyer's warranty claims, this Court reasoned that when a litigant alleges damages caused by the use of an inherently defective fertilizer, the statutory prerequisites must be complied with. We further reasoned that since an action to recover damages for breach of an implied warranty is, in essence, an action based on inherent defects of the goods, an action based upon a theory of implied warranty of merchantability falls within the statutory ambit. However, this Court held that when a litigant alleges that losses are the result of false statements concerning fertilizer which constitute an express warranty of fitness, such a buyer is not required to comply with the statutory prerequisites. The Court made this distinction because, when a fraudulent misrepresentation is involved, compliance with the statute is impossible, and thus, application of the statute to express warranty cases would merely give sellers a "license to defraud." In *Potter v. Tyndall*, summary judgment for the seller was reversed, although G.S. § 106-50.7(e)(4) (1975) was not complied with, because the evidentiary forecast supported recovery on a theory of breach of ex-

press warranty of fitness, namely, that the fertilizer was not suitable for use on tobacco.

In applying here the principles outlined in *Potter v. Tyndall*, the evidence shows that the Jarmans never complied with the statutory prerequisites. It was therefore not error to direct judgment in Harvey's favor on the implied warranty portion of the counterclaim.[1] As to the express warranty claim, although the representations allegedly made to Mr. Jarman by Harvey's agent, that "Super Kic" was an excellent fertilizer and suitable for use on Mr. Jarman's corn crop, constitute an express warranty, there was absolutely no evidence produced at trial indicating that "Super Kic" was not a suitable corn fertilizer. *Cf. Potter v. Tyndall* (evidence that fertilizer in question not registered as a tobacco fertilizer). Therefore, on the question of breach of express warranty of fitness, there was nothing for a jury to decide, and the trial court properly directed judgment for Harvey.

For all the foregoing reasons, the trial judge acted properly in dismissing all of the Jarmans' counterclaims.

IV

Having dismissed the Jarmans' counterclaims, the trial judge announced in open court that he was "allowing judgment for the plaintiff on the note." The written judgment accordingly reflects a directed verdict in Harvey's favor on the note. The Jarmans contend that it was error to direct a verdict for Harvey because Harvey had never made a motion for a directed verdict. Harvey responds that the uncontroverted evidence was that the account was owing and the note unpaid, and that therefore it was entitled to judgment as a matter of law.

[3] The record before us indicates that Harvey never moved for a directed verdict. The authority of a trial judge to direct a verdict *sua sponte*, in the absence of a motion therefor, appears to be a question of first impression in this jurisdiction. Rule 50 of the North Carolina Rules of Civil Procedure provides that a party may make a motion for a directed verdict at the close of the evi-

1. Although Harvey "moved to dismiss" the counterclaims, as the case was heard before a jury, and both parties had presented evidence, the motion should have been for a directed verdict. *See* N.C. Rules Civ. Proc., Rule 50 (directed verdict). CF Rule 41(b) (involuntary dismissal).

dence, but must state the specific grounds on which the motion is based. Although under Rule 50 it is "clearly contemplated" that a motion be made, the language of Rule 50 does not directly authorize it. *Safeway Stores v. Fannan*, 308 F. 2d 94 (9th Cir. 1962) (interpreting similar federal rule). And the courts that have addressed the issue of whether a trial judge can direct a verdict of his or her own initiative have generally answered this inquiry in the affirmative. *See Aetna Cas. and Sur. Co. v. L. K. Comstock & Co.*, 488 F. Supp. 732 (D. Nev. 1980), *rev'd on other grounds*, 684 F. 2d 1267 (9th Cir. 1982) (observing that similar federal Rule 50 only concerns itself with a motion made by a party and the effect of a denial thereof; one source of federal district court's authority to direct verdict is its "inherent and independent discretionary powers"); *Peterson v. Peterson*, 400 F. 2d 336 (8th Cir. 1968) (when record left no issue of fact to be resolved by special interrogatories, formal motion not required for court to draw legal conclusions and to direct verdict); *Home Trust Co. v. Josephson*, 339 Mo. 170, 95 S.W. 2d 1148 (1936) (courts of general jurisdiction exercising common law powers have inherent power to direct verdict where facts are admitted).

Likewise, the North Carolina superior court is a court of general jurisdiction exercising equitable powers. *Cocke v. Duke University*, 260 N.C. 1, 131 S.E. 2d 909 (1963); *Walton v. Walton*, 80 N.C. 26 (1879) (superior court is court of general common law jurisdiction). *See* N.C. Const. art. IV, sec. 12 (3). We conclude that the trial judge in the instant case had the authority to direct a verdict of his own initiative. However, mindful of the low evidentiary threshold necessary to take a case to the jury, and also of the detailed procedure outlined in Rule 50, which presumes the use of a motion before a verdict is directed, we do not encourage the frequent use of this practice, and caution trial judges to use it sparingly.

Holding as we do that the trial judge had the authority to direct a verdict, we must determine whether Harvey was entitled to judgment on the note as a matter of law. In deciding whether to direct a verdict, the trial judge is presented with the question of "whether the evidence, when considered in the light most favorable to the party against whom the motion is made, [is] sufficient for submission to the jury." *Sink v. Sink*, 11 N.C. App. 549,

550, 181 S.E. 2d 721, 721 (1971). Applying this standard to the evidence at bar, we find a directed verdict proper.

[4] The requirements of a *prima facie* case in a suit on a negotiable instrument, such as a promissory note, are as follows: "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." N.C. Gen. Stat. Sec. 25-3-307(2) (1965). *See* N.C. Gen. Stat. Sec. 25-3-104 (1965) (defining negotiable instrument). At trial, Harvey produced and offered the note into evidence. Although both Mr. Jarman and Mrs. Jarman denied signing the note in their Answer, the Jarmans subsequently stipulated that their signatures were genuine. We conclude that Harvey made out a *prima facie* case for recovery on the note.

[5] In their Answer, however, the Jarmans raised six affirmative defenses, and we must review the evidence in light of these defenses to determine whether Harvey's *prima facie* case was rebutted so that Harvey's claim should have been submitted to the jury. The Jarmans' first two defenses are that they did not sign the promissory note and that their signatures were forged. As we have discussed, no issue remains as to the genuineness of the Jarmans' signatures. The third defense is that there was no consideration for the note in that the fertilizer provided was "improperly mixed or damaged." In our opinion, the note was properly supported by valid consideration. The amount of fertilizer purchased was delivered and applied. Any defects in the goods goes to the Jarmans' counterclaim for damages, not to the validity of consideration. *See Trio Estates, Ltd. v. Dyson*, 10 N.C. App. 375, 178 S.E. 2d 778 (1971).

[6, 7] Fourth, the Jarmans state that the note did not state an annual percentage rate. The record contains an order granting partial summary judgment for the Jarmans limiting any interest on the note to the legal rate of eight per cent (8%). Fifth, the Jarmans argue that the note was void as to Mrs. Jarman for want of consideration in that she had not purchased any supplies. This defense, too, is without merit. Mrs. Jarman herself testified that: "I help Mr. Jarman in the tobacco farming and I share the money that he makes from any of the farming operation. I share whatever we produce on the farm." In purchasing supplies from Harvey and establishing an account with them, Mr. Jarman was

indisputably acting as his wife's agent. *See Dubose Steel, Inc. v. Faircloth*, 59 N.C. App. 722, 298 S.E. 2d 60 (1982) (marital relationship alone does not establish agency; however, only slight evidence is necessary when wife receives and retains benefit of contract negotiated by husband). *Cf. J.L. Thompson Co. v. Coats*, 174 N.C. 193, 93 S.E. 724 (1917) (parties were separated; evidence insufficient to show agency of husband to bind wife's property for payment of debt to purchase fertilizer). Finally, the Jarmans alleged that they had been promised 15% credit or discount on the fertilizer. Harvey replied that this discount was only to have been effective if the Jarmans paid their bill by 1 June 1980, which they did not do. At trial, no evidence whatsoever was introduced on this point; as a matter of law, then, the Jarmans did not meet their burden of proof on their sixth affirmative defense.

Thus, as Harvey made out a *prima facie* case on the note that was not rebutted by the Jarmans, the trial court properly directed a verdict in Harvey's favor on the promissory note.

V

[8] Finally, the Jarmans contend, and Harvey concedes, that the trial court erred in awarding attorney's fees to the plaintiff because of a lack of compliance with the notice provision of N.C. Gen. Stat. Sec. 6-21.2 (1981). Provisions relative to the payment of attorney's fees are not enforceable unless expressly authorized by statute. *Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 266 S.E. 2d 812 (1980). G.S. Sec. 6-21.2 is such a statute. It allows recovery of attorney's fees incurred in the collection of a note subject to certain conditions. One of these conditions is found in G.S. Sec. 6-21.2(5), which provides that notice must be given to the maker of the note before attorney's fees may be recovered.

At bar, although the note sued upon provides for attorney's fees of up to 15% of the unpaid balance, the record shows, and the plaintiffs admit, that there was no evidence that any notice of plaintiff's intention to collect attorney's fees pursuant to G.S. Sec. 6-21.2 was ever mailed to the defendants. Thus, the provision in question relating to attorney's fees is void and unenforceable.

VI

In conclusion, we find that the trial judge correctly directed a verdict in favor of Harvey on the promissory note, and also acted correctly in dismissing the Jarmans' counterclaims. However, it was error to award attorney's fees, and the judgment is to be modified accordingly.

Modified and affirmed.

Judges PHILLIPS and EAGLES concur.

DAVID O. FARLOW, D.C. v. NORTH CAROLINA STATE BOARD OF CHIROPRACTIC EXAMINERS

No. 8410SC986

(Filed 6 August 1985)

1. **Physicians, Surgeons and Allied Professions § 6.2— chiropractor—suspension of license—evidence supported findings**

In an action to determine whether appellant chiropractor engaged in unprofessional conduct, there was evidence to support the board's findings that appellant requested insurance information prior to seeing Ms. Byerly and her two children, told Ms. Byerly that she could collect $1,800 and he would receive $1,000, set up a plan of treatment extending over a period of six weeks, told Ms. Byerly that the scheduled treatment would make the injuries look worse and that by the end of the following month the insurance company would be pushing for a settlement, did not ascertain where the passengers were situated in the vehicle that was involved in the collision, diagnosed symptoms which the patients never reported but which the appellant said would appear in several days, did not have positive x-rays when the treatment plan was formulated, had no positive findings from examinations or patients' complaints upon which to base a long range treatment plan, and the patients' complaints and findings upon examinations supported a diagnosis of simple or moderate muscle strain which would be self-limiting requiring minimal therapeutic utilization. There was no prejudicial error in a finding that appellant's diagnosis of all three patients was exactly the same where the evidence showed that the diagnosis of all three patients was very similar.

2. **Physicians, Surgeons and Allied Professions § 6.2— chiropractor—license suspended—no expert testimony—no error**

The evidence and the facts found supported the conclusion of the Board that there was no medical justification for appellant's treatment of three patients, even though appellant was the only medical expert who testified,

because the fact finders in this case were experts who could form opinions based on the evidence.

3. Administrative Law § 4; Physicians, Surgeons and Allied Professions § 6.1— suspension of chiropractor's license—decision not timely—no error

There was no prejudicial error where the Board of Chiropractic Examiners issued a decision to suspend appellant's license 127 days after a hearing and the applicable regulation requires that a decision be rendered within 90 days of the hearing because the result was not changed by the Board's failure to follow its own rule. Parties have the right to require an administrative agency to follow its own rules if its failure to do so would result in a substantial chance that there would be a different result from what the result would have been if the rule were followed. 21 N.C.A.C. § 10.0707(a).

4. Physicians, Surgeons and Allied Professions § 6— suspension of chiropractor's license—dishonorable conduct

The Board of Chiropractic Examiners did not err by suspending appellant's license under 21 N.C.A.C. 10.0301(4) and (6) for dishonorable conduct where that regulation was adopted under the former G.S. 90-154, which referred to dishonorable conduct, the General Assembly rewrote G.S. 90-154 to refer to unethical conduct but did not mention dishonorable conduct, and the Board did not readopt its regulation after the statute was rewritten. The unethical conduct which the statute authorizes the Board to penalize includes dishonorable conduct in which the Board found appellant had engaged.

5. Constitutional Law § 12.1— regulation of chiropractors—dishonorable conduct not unconstitutionally vague

The regulation which requires that chiropractors not engage in dishonorable conduct is not unconstitutionally vague because a chiropractor of ordinary intelligence would not have any difficulty knowing that he was forbidden from prescribing treatment for patients which was not to treat their physical ailments but was to build insurance claims.

6. Physicians, Surgeons and Allied Professions § 6.1— suspension of chiropractor's license—composition of Board

Appellant was not deprived of his right to an impartial decision maker in a hearing which resulted in the suspension of his license where two of the Board members resided in Guilford County, where appellant's office was located, and one of those Board members had told him "Farlow, I'm going to get your license if it's the last thing I ever do." A Board composed of members of the same profession as the person charged is not disqualified because of a financial interest in the case, and appellant waived his right to challenge any member of the Board by not petitioning under 21 N.C.A.C. § 10.610 for the disqualification of a member for personal bias.

7. Constitutional Law § 7.1— suspension of chiropractor's license—delegation of power to Board of Chiropractic Examiners not unconstitutional

The statute which allows the Board of Chiropractic Examiners to suspend the license of a chiropractor for unethical conduct is not an unconstitutional delegation of power by the Legislature because the proscription of unethical

conduct is a sufficiently definite standard so that the Board may set policies within it without exercising a legislative function. Some discretion has to be left to the Board because it would be virtually impossible for the General Assembly to define all possible unethical conduct by chiropractors. G.S. 90-154, Art. I, § 6 of the North Carolina Constitution.

APPEAL by petitioner from *Herring, Judge*. Judgment entered 13 June 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 6 May 1985.

Dr. David O. Farlow has appealed from a judgment of Superior Court which affirmed an order of the North Carolina State Board of Chiropractic Examiners suspending his license to practice for a period of six months. Following a complaint by Ms. Rebecca R. Byerly the North Carolina State Board of Chiropractic Examiners conducted a hearing as to Dr. Farlow's conduct in the practice of chiropractic. Following the hearing the Board on 24 February 1983 entered a decision in which it found facts to the effect that Ms. Byerly and her two children were patients of Dr. Farlow after they had been in an automobile accident and that Dr. Farlow prescribed a course of treatment for them which was not justified by the injuries they had received but was done to inflate insurance claims.

The Board concluded that Dr. Farlow was guilty of unprofessional, dishonest and dishonorable conduct in the practice of chiropractic. The Board ordered that his license be suspended for a period of six months. Dr. Farlow petitioned the Superior Court of Wake County for review, which court affirmed the decision of the Board. Dr. Farlow appealed.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith and Davison M. Douglas, for petitioner appellant.

Harrington & Stultz, by J. Hoyte Stultz, Jr., for respondent appellee.

WEBB, Judge.

[1] In his first assignment of error the appellant argues that certain findings of fact were not supported by substantial competent evidence in view of the entire record. The Board found as a fact that the appellant requested insurance information prior to seeing Ms. Byerly and her two children. The appellant contends this find-

ing of fact is not supported by the evidence. Ms. Byerly testified that before Dr. Farlow treated her he asked about her insurance. When she told him she had Blue Cross and Blue Shield and gave him the name of the insurance company of the driver of the vehicle that struck her:

> He said—all right. Say my bill is—say you've got $1,000.00 on your medical—on my car insurance. He says, "So there's $1,000.00 you can get," plus if I turn in a thousand dollar bill—all right—the other insurance company is going to pay a thousand. If Blue Cross and Blue Shield pays 80 percent—all right—that's $2,800.00. You make eighteen; I make a thousand.

We believe this evidence supports this finding of fact. Although it is true the Board said the appellant requested insurance information prior to seeing Ms. Byerly we believe it is clear that it intended that he requested the information prior to treating her. The appellant was not prejudiced because the Board used the word "seeing."

The Board made a finding of fact that appellant told Ms. Byerly that she could collect $1,800.00 and he would receive $1,000.00. The appellant contends the evidence on this point was in conflict and the testimony of Ms. Byerly was not credible. The credibility of Ms. Byerly was for the Board. The fact that there was a conflict in the evidence on this point does not mean Ms. Byerly's testimony does not support this finding of fact.

The Board found as a fact that Dr. Farlow set up a plan of treatment for the three patients extending over a period of six weeks, twice a day for two days, once a day for twenty-six days and every other day for twelve days. The appellant contends this finding is inaccurate, incomplete and misleading. He argues that he testified that the treatment plan was only a tentative one. Ms. Byerly testified that was the treatment plan given to her by Dr. Farlow and the Board accepted her testimony as was its prerogative.

The Board found as a fact that the appellant told Ms. Byerly that the schedule would make the injuries "look worse" and that by the end of the following month the insurance company would be "pushing for a settlement." The appellant denied this testi-

mony and he contends that Ms. Byerly's testimony was unbelievable. As we have said, the credibility of Ms. Byerly was for the Board to determine.

The Board found as a fact that the appellant did not ascertain where the passengers were situated in the vehicle that was involved in the collision. He contends this finding was erroneous and is in conflict with two exhibits he introduced. These two exhibits were accidental injury report forms dated 17 March 1982 and showed where the two passengers were sitting in the vehicle. Ms. Byerly testified that the appellant did not ascertain where the passengers were located in the vehicle at the time of the accident. The Board no more had to accept the exhibits as credible than it did the testimony of appellant.

The Board found as a fact that the appellant's diagnosis of all three patients was exactly the same for each patient. The appellant contends this is error because the record shows the diagnosis for each patient was different. The appellant is correct in this argument. We do not believe this was prejudicial error, however. There were other facts found based on competent evidence which would support the conclusion of the Board. The evidence shows the diagnosis of all three patients was very similar.

The Board found as a fact that the appellant's written diagnosis includes chest pain and lower back pain, which symptoms the patients never reported but which the appellant said would appear in several days. Ms. Byerly testified to this which would support this finding of fact.

The Board found as a fact that at the time appellant's treatment plan was formulated there had been no positive x-ray. The appellant contends that this finding is misleading because the treatment plan was tentative. As we have said the Board did not accept the appellant's testimony that the plan was tentative.

The Board found as a fact that at the time Dr. Farlow formulated his plan of treatment, he had no positive findings either from examinations or patients complaints upon which to have a long range treatment plan. Ms. Byerly testified that on her first visit the appellant gave her a schedule for a treatment plan for her and the three children. Each of them was x-rayed but according to her testimony he told her the plan was formulated to make

her injuries and the injuries of the children "look worse" rather than for medical reasons. We believe this testimony supports the finding of fact.

The Board found that the patients' complaints and findings upon examination support a diagnosis of simple or moderate muscle strain which would be self-limiting requiring minimal therapeutic utilization. Ms. Byerly testified the accident occurred on Wednesday and she went to the appellant on that day. She and her children returned on Thursday and she saw a medical doctor on Friday. The medical doctor put her in the hospital for one night. The difficulties she and the children had with their necks and back were gone by Saturday. This testimony supports this finding of fact.

[2] The Board concluded that there was no medical justification for appellant's treatment of his three patients, and that his treatment constituted overutilization and planned gross overutilization of chiropractic services. The appellant contends that he was the only medical expert who testified. He argues that there was no evidence to support this conclusion. He relies on *Warren v. Canal Industries*, 61 N.C. App. 211, 300 S.E. 2d 557 (1983); *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E. 2d 829 (1982); *Powell v. Shull*, 58 N.C. App. 68, 293 S.E. 2d 259, *disc. rev. denied*, 306 N.C. 743, 295 S.E. 2d 479 (1982); *Ballance v. Wentz*, 22 N.C. App. 363, 206 S.E. 2d 734, *aff'd*, 286 N.C. 294, 210 S.E. 2d 390 (1974) for the proposition that expert testimony is required to prove a departure from applicable standards of care in actions against health care providers. The cases cited by the appellant are civil actions tried before a jury. Expert testimony is required in order for laymen to reach a verdict. In this case the fact finders are experts. They can form opinions based on the evidence. The evidence and the facts found support the conclusion they reached.

The appellant's first assignment of error is overruled.

[3] The appellant next contends that it was error for the Superior Court to affirm the order of the Board because the Board's decision was not timely made. The applicable regulation, 21 N.C.A.C. § 10.0707(a), contains a provision that a decision of the Board "must be rendered within 90 days after the hearing." The Board's decision was issued 127 days after the hearing. The appellant argues that the decision of the Board is null and void.

He relies on *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974); *Snow v. Board of Architecture*, 273 N.C. 559, 160 S.E. 2d 719 (1968); *In re Trulove*, 54 N.C. App. 218, 282 S.E. 2d 544 (1981), *disc. rev. denied*, 304 N.C. 727, 288 S.E. 2d 808 (1982), and *Parrish v. Real Estate Licensing Board*, 41 N.C. App. 102, 254 S.E. 2d 268 (1979). None of the cases involve an administrative board's failure to follow its own rules. *Trulove* and *Parrish* are cases in which an administrative board did not comply with a statute. In *Snow* our Supreme Court said that an administrative board "loses its authority to render a decision at the expiration of 90 days from the date of hearing and an order entered thereafter is a nullity." This statement was based on G.S. 150-20 which has since been repealed. *Refining Co.* deals with a municipal ordinance. In that case our Supreme Court quoted from 2 Am. Jur. 2d Administrative Law § 350 (1962) which says:

> Procedural rules are binding upon the agency which enacts them as well as upon the public of the agency, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule so long as such rule remains in force.

The parties have not cited in their briefs and we have not found a North Carolina case which deals with the power of an administrative agency not to follow its own rules. There have been cases in the federal courts dealing with this question. *See American Farm Lines v. Black Ball Freight*, 397 U.S. 532, 25 L.Ed. 2d 547, 90 S.Ct. 1288 (1970); *Vitarelli v. Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012, 79 S.Ct. 968 (1959); *Service v. Dulles*, 354 U.S. 363, 1 L.Ed. 2d 1403, 77 S.Ct. 1152 (1957); and *United States v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954). We believe the rule from these cases is that a party has the right to require an administrative agency to follow its own rules if its failure to do so would result in a substantial chance that there would be a different result from what the result would be if the rule were followed. This insures that those who appear before a board will be treated equally. We believe this rationale is sound.

In this case the result was not changed because the Board did not follow its own rule. We do not believe it was prejudicial error for the Board not to do so. The appellant's second assignment of error is overruled.

[4] In his third assignment of error the appellant contends the regulation upon which the Board based its decision exceeded the statutory authority of the Board. The regulation, 21 N.C.A.C. 10.0301(4) and (6) is to the effect that a doctor of chiropractic "shall be honest, be of good moral deportment . . . [and] not engage in immoral or dishonorable conduct." The regulation was adopted pursuant to G.S. 90-154, which provided:

> The Board of Chiropractic Examiners may suspend or refuse to grant or may revoke a license to practice chiropractic in this State, upon the following grounds: immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate him or her for the performance of such professional duties, unethical advertising, unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession.

Before the charges were filed against the appellant the General Assembly rewrote G.S. 90-154 to provide in part:

> (a) The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):
>
> . . . .
>
> (2) Suspend a license to practice chiropractic;
>
> . . . .
>
> (b) The following are grounds for disciplinary action by the Board under subsection (a):
>
> . . . .
>
> (4) Unethical conduct in the practice of the profession as defined by rule or regulation of the Board.
>
> . . . .

The Board did not readopt its regulation after the statute was rewritten by the General Assembly. The Board in this case found the appellant had engaged in dishonorable conduct under its regulations. The appellant contends that the new statute does not

mention dishonorable conduct and the regulation which the Board found he had violated exceeds the statutory authority of the Board. We hold that "unethical conduct" which the statute authorizes the Board to penalize includes "dishonorable conduct" in which the Board found the appellant had engaged. The Board was authorized by the statute to make this regulation. The appellant's third assignment of error is overruled.

[5] In his fourth assignment of error the appellant contends the regulation which he was found to have violated is unconstitutionally vague.

> "[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

State v. Graham, 32 N.C. App. 601, 605, 233 S.E. 2d 615, 618-19 (1977) (*quoting Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S.Ct. 126, 127 (1926)). The appellant argues the terms "honest," "good moral deportment," "immoral conduct," and "dishonorable conduct" are extremely general, vague and uncertain terms which mean different things to different people. In this case we are concerned only with "dishonorable conduct" in which the appellant was found to have engaged. We do not believe a chiropractor of ordinary intelligence would have any difficulty telling that under the regulation prohibiting dishonorable conduct he was forbidden from prescribing treatment for patients which was not to treat their physical ailments but was to build up insurance claims. The appellant's fourth assignment of error is overruled.

[6] In his fifth assignment of error the appellant argues that because of the composition of the Board he was deprived of his right to an impartial decision maker. Two of the Board members resided in Guilford County, one in High Point, which is the location of appellant's office, and the other in Greensboro. Appellant argues each of them stood to "benefit financially in a direct and powerful way from the suspension of appellant's license." The ap-

pellant testified in Superior Court that in March 1981, Dr. Barbour, the Board member who resides in High Point told him, "Farlow, I'm going to get your license if it's the last thing I ever do."

We do not believe we should hold that a Board composed of the members of the same profession as the person charged is disqualified because of a financial interest in the case. The appellant had the right under 21 N.C.A.C. § 10.610 to petition for the disqualification of any member of the Board for personal bias. He did not do so. We hold he thus waived the right to challenge Dr. Barbour or any other member of the Board. The appellant's fifth assignment of error is overruled.

[7] In his sixth and last assignment of error the appellant contends that G.S. 90-154 which allows the Board to suspend the license of a chiropractor for "unethical conduct" is an unconstitutional delegation of power by the legislature. Article 1 § 6 of the Constitution of North Carolina provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." This section has been interpreted to mean that the General Assembly cannot delegate to an administrative board the power to legislate. If the General Assembly sets a policy and gives an administrative board the power to find facts which enable the board to carry out the legislative policy this is not a delegation of legislative power. *See State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 65 N.C. App. 198, 213-14, 309 S.E. 2d 473, 484-85 (1983), *aff'd*, 313 N.C. 614, --- S.E. 2d --- (filed 3 July 1985). The General Assembly must prescribe the standard for an administrative board with sufficient definiteness so that the board is bound by the legislative policy and cannot under the name of finding facts actually set the policy. *See Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E. 2d 665 (1970).

The appellant relies on *Harvell v. Scheidt, Comr. of Motor Vehicles*, 249 N.C. 699, 107 S.E. 2d 549 (1959); *State v. Harris*, 216 N.C. 746, 6 S.E. 2d 854 (1940) and *Drug Centers v. Board of Pharmacy*, 21 N.C. App. 156, 204 S.E. 2d 38 (1974) and argues that by leaving it to the Board to define "unethical conduct" as used in G.S. 90-154 the General Assembly has not provided the Board with guidelines which are sufficiently definite. For this reason he

argues that it is the Board which determines the policy as to when a chiropractor's license may be suspended. This, the appellant argues, is an unconstitutional delegation of legislative power. In *Harris* our Supreme Court reversed the conviction of a person for engaging in the business of dry cleaning without first obtaining a license to do so. The State Dry Cleaners Commission had been established which was empowered to "require examination of persons not entitled to have issued to them a license as provided in this act, such examination to cover subjects deemed necessary to promote the public health, safety and welfare of the people of the State of North Carolina." Our Supreme Court held the discretion given to Dry Cleaners Commission was so broad that it enabled the Commission to set policy rather than follow the policy of the legislature. In *Drug Centers* this Court held that a statute which granted the North Carolina Board of Pharmacy the authority to "adopt a code of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession of pharmacy" did not set a sufficient standard of definiteness and was a delegation of legislative power. In *Harvell* our Supreme Court held it was an unconstitutional delegation of legislative power for the General Assembly to authorize the Commissioner of Motor Vehicles to suspend a driver's license when the Commissioner found a person to be "an habitual violator of the traffic laws." The Supreme Court said the statute:

> [D]oes not contain any fixed standard or guide to which the Department must conform in order to determine whether or not a driver is an habitual violator of the traffic laws. But, on the contrary, the statute leaves it to the sole discretion of the Commissioner of the Department to determine when a driver is an habitual violator of such laws.

Harvell, supra, at 706, 107 S.E. 2d at 554.

In reaching our decision on this point we are guided by some of the language of *Adams v. N.E.R.*, 295 N.C. 683, 698, 249 S.E. 2d 402, 411 (1978), in which it is said:

> When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation

> of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goal to varying circumstances.

The Court in that case also said in determining whether there were sufficient guiding standards it is appropriate to consider whether there are procedural safeguards because procedural safeguards tend to encourage adherence to legislative standards. *Id.* Relying in part on the reasoning of *Adams* we hold there has not been an unconstitutional delegation of power in this case. There is a need for expertise in administering the chiropractic profession. We believe the proscription of "unethical conduct" is a sufficiently definite standard so that the Board may set policies within it without exercising a legislative function.

We believe the cases upon which the appellant relies are distinguishable. The promotion of "the public health, safety, and welfare" in *Harris* is obviously broader than the standard of this case as is the "maintenance of a high standard of integrity and dignity" of *Drug Centers*. In *Harvell* it would have been a simple matter for the General Assembly to define an "habitual violator of the traffic laws" rather than leaving the definition to the Commissioner of Motor Vehicles. In this case it would be virtually impossible for the General Assembly to define all possible "unethical conduct" by chiropractors. Some discretion has to be left to the Board. The appellant's sixth assignment of error is overruled.

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

CYNTHIA HANSEN NORTON (NOW HANSEN-BARLOW) v. HAROLD O. NORTON

No. 8421DC971

(Filed 6 August 1985)

1. Divorce and Alimony § 24.9— modification of child support—reasonable needs of child—abilities of parties to pay—insufficient evidence in findings

The trial court erred in reducing the amount of the father's child support payment after custody of one child was transferred from the mother to the

father where the father presented no evidence and the court made no findings concerning the reasonable needs of the child whose custody remained with the mother, and where there was inadequate evidence and no findings concerning the incomes, estates and present reasonable expenses of the parties.

2. **Divorce and Alimony § 27— attorney fees—modification of child custody and support—inadequate findings**

The trial court erred in awarding the mother attorney fees for a child custody and support modification hearing and two subsequent child support modification hearings where the court's order contained no findings as to the wife's good faith, and the court's finding as to the wife's insufficient means to defray expenses was not supported by competent evidence. G.S. 50-13.6.

3. **Divorce and Alimony § 27— child custody and support modification agreement —attorney fees precluded by consent judgment**

The mother was not entitled to an award of attorney fees for a 1983 child custody and support modification hearing where the parties, in a prior consent judgment, had agreed to be individually responsible for their own attorney fees in subsequent proceedings unless the father "fails to duly perform his financial and other obligations to the [mother] hereunder," in which case the father is to indemnify the mother for any resulting expenses, including attorney fees, and where the mother has not alleged any violation of visitation privileges or a child support arrearage which would activate the indemnity provision of the consent judgment.

4. **Divorce and Alimony § 27— child support modification hearings—mother not entitled to attorney fees under prior consent judgment**

The mother was not entitled to an award of attorney fees for two 1984 child support modification hearings under the terms of a consent judgment providing that the parties would be individually responsible for attorney fees but requiring the father to indemnify the mother for such fees if he failed to perform his financial and other obligations to the mother and, as a result thereof, the mother incurred any expenses to collect the same, where the mother's expenses were engendered by the father's motion to reduce child support, the arrearage originally alleged in the mother's countermotion to increase child support was never proven, and a stipulated arrearage was a byproduct of the trial court's calculations to reduce the husband's child support payments rather than the basis for a collection action by the mother.

APPEAL by defendant from *Alexander, Judge*. Order entered 7 May 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 18 April 1985.

D. Blake Yokley for plaintiff appellee.

Victor M. Lefkowitz and David B. Freedman, for defendant appellant.

BECTON, Judge.

This case deals with a court-ordered child support modification and the award of attorney's fees in child custody and support matters.

On 21 February 1978 the parties entered into a consent judgment that awarded the plaintiff mother custody of the parties' children, Keely Christine Norton, born 19 November 1970, and Corey Andrew Norton, born 23 March 1972, and ordered the father to pay $1,050 in child support monthly. In 1981 the father filed motions for change of custody and for a reduction in child support. In its 15 October 1981 order the trial court denied a change in custody while granting a reduction in monthly child support to $917.00. The trial court found as fact that the mother, who had been unemployed at the time of the consent judgment, now earned "somewhat less than $9,000.00 per year," and was therefore capable of contributing $113 monthly to support the minor children. It further found that (1) Keely's present need for maintenance and support was $527.00 per month; (2) Corey's present need was $503.00 per month; and (3) the father presently "earns in excess of $70,000 gross per year. The [father] has a take home pay of approximately $4,700.00 per month after taxes. The [father] has large debts which were incurred before and after separating from the [mother]." No specific findings were made on the parties' expenses or estates. Evidently, neither party appealed from the 15 October 1981 order.

On 9 December 1983 the trial court granted the father's motion for a transfer in custody of the older child, Keely, as of the end of January 1984. On 7 May 1984 the trial court ordered a reduction in the father's child support payments to $700 per month for the younger child, Corey, and the payment of $2,705.97 to the mother for necessary and reasonable expenses, including attorney's fees incurred from a November 1983 custody and support hearing until the present. Moreover, it ordered the mother to pay the father $100 per month towards the support of both minor children. The father appeals from the 7 May 1984 order.

The father questions the sufficiency of the findings of fact supporting the child support modification and the award of attorney's fees for the November 1983 custody and support hearing,

the 13 February and the 9 April 1984 support hearings. We reverse on both issues.

I

Child Support Modification

[1] Under the terms of the original 21 February 1978 consent judgment and the modifying 15 October 1981 order, the father was ordered to make a monthly lump sum support payment for the two minor children. After transfer of the custody of the older child, Keely, to the father in 1984, the father moved for a reduction in child support. N.C. Gen. Stat. Sec. 50-13.7 (1984) provides that a court order awarding child support "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances. . . ." As this Court emphasized in *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), the trial court need not order a reduction in child support, if the present needs of the minor child, who continues to be covered by the court order—in this case, Corey—warrant the full amount originally allocated for both children.

Thus, a trial court must determine the present reasonable needs of the subject minor child, before ordering a modification in child support. *Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540, *disc. rev. denied*, 309 N.C. 822, 310 S.E. 2d 351 (1983); *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429, *disc. rev. denied*, 301 N.C. 87, --- S.E. 2d --- (1980). To properly determine the child's present reasonable needs, the trial court must hear evidence and make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay. *Newman v. Newman*. The evidence of actual past expenditures is essential to the trial court's proper determination of the child's present reasonable needs.

Applying the above criteria to the 7 May 1984 order and the record before us, we conclude that the trial court had insufficient evidence of Corey's actual past expenditures to make the requisite specific finding of fact on actual past expenditures. In fact, the trial court omitted the requisite finding from its order. It merely found that Corey's present needs were $700. The father

contends that "there was no explanation as to how the Court arrived at the monthly sum of $700. . . ." That is true. Unfortunately, the trial court was compelled to speculate as to Corey's present needs, because it was presented with insufficient evidence of the actual past expenditures.

At the April 1984 hearing that resulted in the 7 May order, the trial court heard evidence from both parties. Only the mother presented evidence on Corey's expenses. She submitted an affidavit of Corey's monthly expenses for the years 1981 and 1984. Actual monthly expenditures for 1981 totalled $603. Estimated expenses for 1984 were $1,000. Significantly, no evidence of actual past expenditures for the interim years 1982 and 1983 appears in the record.

We note at this juncture that the trial court was ruling on the father's motion to reduce child support and the wife's countermotion to increase child support. Thus, each party had the burden of proving a substantial change in circumstances to gain a modification. G.S. Sec. 50-13.7 and cases cited (1984); *Daniels v. Hatcher.* Here, the trial court granted the father's motion without sufficient findings of fact supported by competent evidence. However, the father did not provide the required evidence. Consequently, the father has failed to carry his burden of proof. G.S. Sec. 50-13.7 and cases cited (1984). We therefore reverse the 7 May 1984 modification and reinstate the $917.00 monthly child support payment due under the 15 October 1981 order retroactive to 1 February 1984, the modification date stated in the 7 May 1984 order.

This case is distinguishable from *Daniels v. Hatcher,* in which this Court remanded the child support modification cause to the trial court to make the requisite specific findings from the evidence in the original record. The moving party had carried its burden of proof; the record was "replete with evidence" comparing the children's needs and expenses at frequent intervals from the time of the consent order to the present. The error lay instead with the trial court. It had not made the necessary findings.

An additional ground for reversal exists—the inadequate evidence and findings of fact necessary for a determination of the parties' relative abilities to pay. The trial court made one finding on the parties' extremely disparate annual gross incomes, before

determining that the father was able to pay $700 per month and the mother was able to reimburse him $100. The father argues that the trial court "appears to have looked only at the parties' gross income when setting the amount of child support." The trial court found the father earns in excess of $120,000 per year in gross income, while the mother's annual gross income is $10,-891.97. The father relies on *Walker v. Tucker*, 69 N.C. App. 607, 317 S.E. 2d 923 (1984) for the proposition that the trial court must make findings of fact on the parties' living expenses as well. The father asserts in his brief that his testimony and affidavits show that "his expenses exceeded his income and that he had only $900.00 per month to pay for food, clothing, gas, utilities for himself and five other members of his family." We agree with the father that the requisite finding on the parties' present expenses is lacking. However, no evidence of the wife's present reasonable expenses appears in the record. Similarly, evidence of the parties' "estates (e.g. savings, real estate holdings, including fair market value and equity; stocks; and bonds)," *Newman v. Newman*, 64 N.C. App. at 128, 306 S.E. 2d at 542, is lacking. We reiterate that evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay. *Id.* It is apparent from the record that the father, at least, has an estate. Although in his affidavit he denied owning stocks, bonds, or real estate, his affidavit lists two mortgage payments under monthly expenses and his testimony reveals direct payroll withdrawals of $50 per month for bonds and $100 per month for stock. The evidence, however, is insufficient to support specific findings on either party's estate.

II

Attorney's Fees

In the 7 May 1984 order the trial court awarded the mother $1,500 in attorney's fees for representation in connection with the 21 November 1983 hearing, the 13 February 1984 hearing, and the 9 April 1984 hearing. The husband argues that the award of attorney's fees was improper. We agree.

The November 1983 hearing dealt with the father's 4 November 1983 motions for a change in custody of the older child, Keely, and a consequent reduction in child support. In her 14 November 1983 countermotion the mother asked the trial court to increase

child support and to charge all costs and expenses, including attorney's fees, to the father. The trial court did not rule on her request for costs and expenses in its 9 December 1983 or its 16 February 1984 orders.

At the 13 February 1984 hearing on the father's 23 January 1984 motion to reduce child support and the wife's 6 February 1984 countermotion to increase support, the matter was continued for hearing on 9 April 1984.

Finally, in the 7 May 1984 order resolving the motions argued at the 9 April hearing, the trial court found that the mother had insufficient means to defray the expenses of the hearings from November 1983 until the present and awarded her $2,705.97 for necessary expenses. One thousand five hundred dollars of the necessary expenses were allotted for legal services.

[2] The 7 May 1984 order contains no finding on the wife's good faith. Nor is the finding on the wife's insufficient means to defray expenses supported by competent evidence. Thus, the 7 May 1984 order fails to meet the statutory requirements of N.C. Gen. Stat. Sec. 50-13.6 (1984), for the same reasons discussed in *Brower v. Brower*, 75 N.C. App. 425, 331 S.E. 2d 170 (1985). We therefore conclude that the trial court's discretionary award of attorney's fees pursuant to G.S. Sec. 50-13.6 was improper.

A. The November 1983 Hearing

[3] Neither is the mother entitled to attorney's fees for the November 1983 hearing under the terms of the parties' 21 February 1978 consent judgment. *See Zande v. Zande*, 3 N.C. App. 149, 164 S.E. 2d 523 (1968). In the Sixth Clause, entitled *Attorney's Fees*, the parties agreed to pay their respective attorneys from stock proceeds for representation resulting in the consent judgment. "The parties further agree[d] to be individually responsible for any further fees incurred by their respective attorneys." Paragraph Seven, entitled *Indemnity*, provides:

> If the [father], for any reason, fails to duly perform his financial and other obligations to the [mother] hereunder, and as a result thereof, the [mother] incurs any expense (including legal fees) to collect the same, or otherwise enforce her rights with respect thereto, the [father] shall indemnify her against and hold her harmless of any such expense.

A consent judgment is a court-approved and -sanctioned contract of the parties. *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732 (1965); *Houghton v. Harris*, 243 N.C. 92, 89 S.E. 2d 860 (1955); *Haynes v. Haynes*, 45 N.C. App. 376, 263 S.E. 2d 783 (1980). It is to be construed in the same manner as a contract to ascertain the parties' intent. *Haynes*. Words are to be given their ordinary meanings. *Harris v. Latta*, 298 N.C. 555, 259 S.E. 2d 239 (1979). And, when the language of a contract is plain and unambiguous, its construction is a matter of law for the court. *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E. 2d 377 (1981).

The language of the consent judgment is plain and unambiguous. The parties agreed to be individually responsible for their own attorney's fees in any subsequent proceedings, unless the father "fail[ed] to duly perform his financial and other obligations to the [mother] hereunder. . . ." In that case, the father is to indemnify the mother for any resulting expenses, including attorney's fees. There are no allegations in the mother's 14 November 1983 countermotion to activate the indemnity provision of the consent judgment. For example, she has not alleged any violation of the visitation privileges or a child support arrearage.

Significantly, a consent judgment cannot be set aside except by agreement of the parties, or upon allegations and proof of fraud, mutual mistake, or lack of consent. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). We have no evidence of a modifying agreement or even allegations of the other cited bases for setting the consent judgment aside. Thus, the terms of the 21 February 1978 consent judgment remain in effect and enforceable. We conclude that the mother is bound by the language of Paragraph Six; she must bear the costs of her own attorney's fees for the November 1983 hearing.

B. The 13 February 1984 and 9 April 1984 Hearings

[4] In the mother's 6 February 1984 response and countermotion to the husband's 23 January 1984 motion to reduce child support, she alleged that the father was presently in arrears on child support, but failed to state the sum due. She asked the trial court to increase child support and to charge all costs of the action to the father. According to her allegations, a 23 November 1983 order, that is not included in the record, required the father to make his child support payments "on or before the 25th day of each

month." At the April hearing, the mother presented no evidence on the arrearage issue. The father's evidence suggests that, as of 2 February 1984, he was $797.18 ahead in child support payments. Although the trial court found in its 7 May 1984 order: "The parties stipulated through counsel that, as of April 6, 1984, the defendant was in arrears concerning all court ordered payments . . .", this arrearage apparently accrued after the mother's 6 February 1984 response and countermotion.

Turning to the indemnity provision of the consent judgment, we concentrate on the cause and effect nature of the language: "If the [father], for any reason, fails to duly perform his financial and other obligations to the [mother] hereunder, and *as a result thereof*, the [mother] incurs any expense . . . to collect the same. . . ." (Emphasis added.) Thus, the father's child support arrearage must be an activating cause of the mother's expenses to bring the indemnity provision into play. Here the mother's expenses were engendered by the father's motion to reduce child support. The arrearage originally alleged in the mother's 6 February 1984 countermotion was never proven. Further, the stipulated arrearage in the 7 May 1984 order was a byproduct of the trial court's calculations to reduce the husband's child support payments, rather than the basis for a collection action by the mother. Therefore, the indemnity provision is not applicable. We are left to conclude that the wife must again bear the costs of her own attorney's fees for the February 1984 and April 1984 hearings.

C. In summary, the mother is not entitled to any portion of the $1,500 in attorney's fees awarded in the 7 May 1984 order.

III

Because of insufficient evidence and findings of fact, we reverse the trial court's 7 May 1984 reduction of the father's child support payments and reinstate the 15 October 1981 court order for monthly child support payments of $917 retroactive to 1 February 1984, the modification date stated in the 7 May 1984 order. Further, we reverse the 7 May 1984 award of $1,500 in attorney's fees to the mother.

Reversed.

Judges WEBB and PARKER concur.

JOSEPH M. PHELPS v. DUKE POWER COMPANY, A CORPORATION

No. 8415SC1246

(Filed 6 August 1985)

1. **Electricity § 4.1— height of electrical wire—electrical codes erroneously excluded**

The trial court erred in an action to recover for personal injuries sustained when plaintiff's combine came into contact with defendant's power line by excluding evidence relating to the National Electrical Safety Code and defendant's own adopted safety standards. Although the National Code is not decisive on the issue and voluntary safety codes are generally not admissible, both were admissible as an aid to the prudent or reasonable man rule.

2. **Electricity § 5.1— negligence—height of power line—directed verdict improper**

The trial court erred by directing a verdict for defendant in an action for personal injuries suffered when plaintiff's combine came into contact with defendant's power line and the court had erroneously excluded evidence of the National Electrical Safety Code and defendant's own safety standards. All of the competent evidence viewed most favorably to plaintiff would have revealed that the industry standard as contained in the National Code required minimum line heights over cultivated fields of sixteen feet four inches in the 1941 code and twenty-one feet in the 1977 code, that defendant's own internal standards required a minimum height of eighteen or nineteen feet, that the Code required regular inspection and maintenance of lines, that defendant's power line constructed around 1948 was approximately twelve feet three inches high, and that defendant had no record of inspection or maintenance of that power line.

3. **Electricity § 7.1— personal injury—height of power line over cultivated field—proximate cause**

In an action for personal injuries suffered after plaintiff's combine came into contact with defendant's power line, reasonable minds might differ as to whether plaintiff's injuries were foreseeable and the question should be left for the jury.

4. **Electricity § 8— power line over cultivated field—contact with combine—contributory negligence**

Plaintiff was not contributorily negligent as a matter of law where the evidence showed that he noticed smoke coming from the right front tire of his combine after making more than one circle around a cultivated field, and would further show through reasonable inference that he climbed down from the cab of the combine, went around to the right front tire to check on the cause of the smoke, and received an electric shock on his right front shoulder when it came into contact with the combine. Although there is a legal duty to avoid contact with a known electrical wire, a person is not guilty of contributory negligence as a matter of law if he contacts a known electrical wire regardless of the circumstances or of any precaution he may have taken.

5. Negligence § 28— directed verdict—judgment n.o.v. better practice

Issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant and the better practice is to deny a motion for a directed verdict and to submit the case to the jury; the trial court may reconsider the sufficiency of the evidence after the jury has rendered its verdict. The jury's verdict may then be reinstated without the need for a new trial if on appellate review the trial court's decision is vacated.

6. Electricity § 10— punitive damages—evidence insufficient

In an action for personal injuries resulting from plaintiff's combine touching defendant's power line, the evidence was insufficient to permit the jury reasonably to infer that defendant's actions were motivated by malice, wickedness or a reckless indifference to the rights of plaintiff and the trial court properly directed a verdict in favor of defendant on the issue of punitive damages.

APPEAL by plaintiff from *Lane, Judge*. Judgment entered 31 May 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 4 June 1985.

Plaintiff seeks to recover for personal injuries sustained on 23 November 1979, as a result of an electrical charge from defendant's high voltage line. The evidence for plaintiff tended to show that on 23 November 1979, plaintiff was harvesting soybeans in the McKee field. Plaintiff and his father had farmed the McKee field for the previous eight to ten years, planting and harvesting soybeans, corn and grain. On the date of the accident, plaintiff was operating a 715 International Harvester, which was approximately thirteen feet high. Plaintiff and his father purchased this combine in June of 1979. Prior to this date, they operated a 615 model which was only a few inches smaller than the 715 model.

Plaintiff, on 23 November 1979, began to combine the soybeans in the McKee field in a clockwise manner. He had made more than one circle in the field with the combine when he noticed smoke coming from the right front tire. Not knowing the cause of the smoke, he stated "he needed to see what was happening." The next thing plaintiff remembered was waking up in Durham County General Hospital. Plaintiff testified that at all times while he was combining the field, his attention was directed directly in front of him. Plaintiff was burned on his right shoulder and left thigh. The treating physician stated the right shoulder was the entry wound and the left thigh was the exit wound.

Plaintiff's witnesses testified that they found the combine under the forecorner of defendant's powerline. The powerline was running across the combine, real close above the top of the cab. One estimate put the powerline approximately four inches above the cab. The tires of the combine had sunk down into the ground. They also found some money and a knife under the powerline where the right front tire of the combine was located.

The powerline located above the cab of the combine was built by the defendant around 1948. There was evidence produced that during a severe ice storm in the winter of 1978, a cedar tree was down across a portion of the powerline. Defendant repaired the broken portion of the powerline, but there was no record of an inspection or repair to any other portion of the powerline. There is no history of any inspection to the powerline since it was built. Defendant's branch manager, George Johnson, investigating the McKee field after the accident, felt the wires to be low. His measurements showed that the lowest point from ground to wire was twelve feet three inches. Johnson's report designated the point the combine hit the wire as that lowest point.

The powerline in question had the primary or hot line (known as the conductor) on the bottom and the neutral line on top. Defendant has stopped constructing its powerlines in this manner. The lines, carrying a current of 7,200 volts, were not insulated.

Plaintiff attempted to introduce into evidence the National Electrical Safety Code and defendant's own adopted safety standards, but the trial judge upon motions by defendant excluded the evidence. At the close of plaintiff's evidence, defendant moved for a directed verdict on the grounds: (1) that plaintiff failed to offer evidence of actionable negligence for which a jury could find defendant was negligent with respect to plaintiff's injuries and (2) if defendant was negligent, plaintiff's evidence established that plaintiff was contributorily negligent as a matter of law. On 31 May 1984, the trial court granted defendant's motion for a directed verdict. From this judgment, plaintiff appeals.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Douglas Hargrave, for the plaintiff.

William I. Ward, Jr. and Newson, Graham, Hedrick, Bryson & Kennon, by E. C. Bryson, Jr., Joel M. Craig and Charles F. Carpenter and Cheshire & Parker, by Lucius Cheshire, for defendant.

JOHNSON, Judge.

Negligence

[1] A motion for a directed verdict made pursuant to G.S. 1A-1, Rule 50 tests the sufficiency of the evidence to go to the jury. In determining the sufficiency of the evidence to withstand a motion for a directed verdict, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. Plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom. *Ingold v. Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971).

We believe that in passing upon the motion for directed verdict the trial court must consider all competent evidence presented by the plaintiff, therefore we first consider the trial court's exclusion of plaintiff's evidence relating to the National Electrical Safety Code and defendant's own adopted safety standards. We believe it was error to exclude such evidence. As to the National Electrical Safety Code, we still adhere to the principle set forth in *Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *disc. rev. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979) that the code is not decisive on the issue of negligence and that the prudent or reasonable man rule still controls. But, *Hale* also stands for the proposition that the code is instructive as to whether an electrical company used reasonable care. *Id.; see also, Cole v. Duke Power Co.*, 68 N.C. App. 159, 314 S.E. 2d 808, *disc. rev. denied*, 311 N.C. 752, 321 S.E. 2d 133 (1984). The code therefore is admissible as an aid to the prudent or reasonable man rule, therefore it was error for the trial court to exclude evidence of the National Safety Codes' standard as to appropriate height for electrical lines.

As to defendant's own internal standards of appropriate height of its electrical lines, we also believe the trial court erred in excluding this evidence. We are acutely aware of the general proposition that voluntary safety codes or policies, which have not been given compulsory force by the legislature, whether issued by government agencies on voluntary safety councils, are not admissible in evidence. *Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822 (1958). However, we find *Slade v. Board of Education*, 10 N.C. App. 287, 178 S.E. 2d 316, *cert. denied*, 278 N.C. 104, 179 S.E. 2d 453 (1971) dispositive of this contention. In that case the defendant had voluntarily adopted certain safety policies and procedures, published in a handbook for bus drivers, to insure the safety of children riding in school buses. The court admitted the handbook into evidence, holding, *inter alia*:

> [W]here it appears that defendant has voluntarily adopted the rules or safety standards as a guide for the protection of the public, they are admissible as some evidence that a reasonably prudent person would adhere to their requirements. . . . The book obviously set forth the rules and standards of conduct which defendant instructed its drivers to follow in order to protect passengers and the public. They are defendant's rules and standards. It is universally held that a defendant may not complain about the introduction in evidence of its own relevant rules of conduct.

See also, Briggs v. Morgan, 70 N.C. App. 57, 318 S.E. 2d 878 (1984). We find that in the case *sub judice*, defendant's internal standards of safety should have been admitted into evidence.

[2] We would hold that in light of the exclusion of this evidence, the trial court in directing a verdict for defendant, did not view all the competent evidence in the light most favorable to plaintiff. The evidence would then have revealed: (1) that the industry standard as contained in the National Electrical Safety Code required minimum line heights over cultivated fields of sixteen feet four inches since the 1941 code and twenty-one feet in the 1977 code; (2) that defendant's own internal standards required a minimum height of eighteen or nineteen feet; (3) that the Code required regular inspection and maintenance of lines; (4) that defendant's power line constructed around 1948 was approximately twelve feet three inches high; and (5) that defendant had no record of inspection or maintenance of this powerline.

Applying all the evidence produced by plaintiff to the standard of care required of electrical companies as enunciated by our Supreme Court, *see Helms v. Power Co.*, 192 N.C. 784, 136 S.E. 9 (1926); *see also, Alford v. Washington*, 238 N.C. 694, 78 S.E. 2d 915 (1953), we believe reasonable minds could differ as to defendant's negligence; therefore, we cannot agree that the trial court properly entered a directed verdict based on the ground that defendant, as a matter of law, was not negligent.

The trial court rendered no opinion and stated no reason for granting the directed verdict. The trial court having failed to note any reason for awarding the directed verdict, we have no way to know whether such action related to the question of negligence on the part of the defendant, proximate cause of the injury or contributory negligence on the part of the plaintiff. It is necessary, therefore, to review the questions of proximate cause and contributory negligence.

Proximate Cause

[3] The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. *Brown v. Power Co.*, 45 N.C. App. 384, 263 S.E. 2d 366, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 615 (1980). However, it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." (Citations omitted.) *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979).

If under the circumstances of this case, defendant could have reasonably foreseen that placing its wires over the McKee field, where large farm machinery would be used, might result in harm to others, it would be answerable for plaintiff's injuries. We do not find as a matter of law that the type of injury incurred by plaintiff from defendant's alleged negligence was unforeseeable. We believe that reasonable minds might differ, as to whether plaintiff's injuries were foreseeable, therefore the question is one properly left for the jury to resolve. If the directed verdict was granted upon this ground it was error.

Contributory Negligence

[4] It has long been the law in this State that "[t]he burden of showing contributory negligence . . . is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary . . . to rely, in whole or in part, on evidence offered for the defense." *Williams v. Power & Light Co., supra.*

Plaintiff's evidence reveals that plaintiff had made more than one circle around the McKee field. While making these circles, he noticed smoke coming from the right front tire. Plaintiff knew he had to check the tires. Plaintiff's evidence would further show through reasonable inferences that he climbed down from the cab of the combine, whereupon he went around to the front right tire to check on the cause of the smoke. At this point his right shoulder came in contact with the combine giving him an electric shock. The doctor's report cited the wound on plaintiff's shoulder as the entry wound and the wound on plaintiff's thigh as the exit wound. The record does not reveal whether plaintiff knew that the combine was in contact with the power line. From this evidence, we believe it is for the jury to determine if plaintiff's actions were reasonable under the circumstances.

Defendant argues that the plaintiff was aware of the electrical lines, thus he was negligent in bringing the combine in contact with the lines. We disagree. We are well aware of the rule, which is well settled, that a person has a legal duty to avoid contact with an electrical wire of which he is aware and which he knows may be very dangerous. *Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788 (1956). "That does not mean, however, that a person is guilty of contributory negligence as a matter of law if he contacts a known electrical wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishaps." *Williams v. Power & Light Co., supra.*

Defendant relies on cases where the plaintiff through an affirmative act on his part brought his machinery in contact with the electrical line. *Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966) (plaintiff raised the blower pipe of his feed tank into contact with the power line); *Lambert v. Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *disc. rev. denied*, 292 N.C. 265, 233 S.E. 2d 392

(1977) (workman contacted electrical wire while working on top of a large outdoor sign); *Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976) (workman, while moving an aluminum ladder, allowed the ladder to come to rest against an overhanging power line). These cases are clearly distinguishable from the case *sub judice*. We fail to find that plaintiff was contributorily negligent as a matter of law, therefore if the directed verdict was granted on this ground it was error to do so.

We find that the trial court erred in directing a verdict for the defendant. Because the trial court runs the risk of invading the province of the jury, directed verdicts and summary judgments are to be sparingly granted in negligence actions. *Williams v. Power & Light Co., supra.* "The jury has generally been recognized as being uniquely competent to apply the reasonable man standard. Because of the peculiarly elusive nature of the term 'negligence,' the jury generally should pass on the reasonableness of conduct in light of all the circumstances of the case. This is so even though in this State '[w]hat is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does nor does not exist.'" *Willis v. Power Co.*, 42 N.C. App. 582, 591, 257 S.E. 2d 471, 477 (1979), *quoting McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E. 2d 457, 461 (1972).

[5] Also, as a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." *See, Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E. 2d 137, 140 (1980). We believe the better practice is for the trial court to deny the motion for a directed verdict and submit the case to the jury. After the jury has rendered its verdict, the trial court may reconsider the sufficiency of the evidence and if it finds the evidence insufficient, it can enter judgment not withstanding the verdict. Therefore, if on appellate review the trial court's decision is vacated, the jury's verdict may be reinstated without the need for a new trial.

[6] In his final assignment of error, plaintiff contends the trial court erred in granting defendant's motion for directed verdict on the issues of punitive damages.

> Our Court has stated that "[u]nder the common law of this State punitive damages may be awarded 'when the wrong is

done willfully or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights.' " "An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others." An act is wilful when there exists "a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another," a duty assumed by contract or imposed by law. (Citations omitted.)

Beck v. Carolina Power & Light Co., 57 N.C. App. 373, 291 S.E. 2d 897 (1982).

Applying these principles of law to the evidence presented by plaintiff, we conclude that the evidence was insufficient to permit the jury reasonably to infer that defendant's actions were motivated by malice, wickedness or a reckless indifference to the rights of the plaintiff. We find that the trial court properly directed a verdict in favor of the defendant on the issue of punitive damages.

We do not believe plaintiff's remaining assignments of error will arise at the new trial.

For the reasons stated,

Directed verdict on the issue of negligence is reversed and plaintiff is entitled to a new trial.

Directed verdict on the issue of punitive damages affirmed.

Judges WELLS and COZORT concur.

IN RE: APPLICATION OF GOFORTH PROPERTIES, INC.

GOFORTH PROPERTIES, INC., CHAPEL HILL ELECTRIC CO., INC., GEORGE FRAZIER, AND H. MARK DALEY v. THE TOWN OF CHAPEL HILL

No. 8415SC1312

(Filed 6 August 1985)

1. **Municipal Corporations § 30.6— entitlement to special use permit**

When an applicant has produced competent, material and substantial evidence tending to establish the existence of the facts and conditions which an ordinance requires for the issuance of a special use permit, he is *prima facie* entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material and substantial evidence appearing in the record.

2. **Municipal Corporations § 31.2— decision on special use permit—judicial review**

In reviewing a town council's decision on an application for a special use permit, the court must apply the whole record test and consider not only the evidence which in and of itself justifies the town council's result, but also consider contradictory evidence. However, the whole record test does not allow the reviewing court to replace the council's judgment as between two reasonably conflicting views.

3. **Municipal Corporations § 30.6— denial of special use permit—traffic congestion and safety hazard**

The evidence supported a town council's denial of a special use permit for a planned apartment development on the ground that the development was not located and designed so as to maintain or promote the public health, safety and general welfare because it would result in increased traffic congestion which would block a fire station driveway and cause increased danger to school children and other pedestrians and bicyclists in the area.

APPEAL by petitioners from *Battle, Judge*. Order entered 20 July 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 6 June 1985.

This appeal arises out of the denial of a request for a special use permit. The petitioner-appellants are the record owners of the tract for which the special use permit was sought.

On 3 May 1983, petitioner Goforth Properties, Inc. filed an application with the Town of Chapel Hill seeking a special use permit for construction of a planned development of 233 housing units to be known as Oxford Hills Apartments on Old Oxford Road. Following hearings in June 1983 before the Chapel Hill

Planning Board and Chapel Hill Town Council, Goforth amended its application on 30 June 1983 to change its proposal from a development of 233 units to a development of 180 units. Following a hearing on 5 July 1983, the Chapel Hill Planning Board recommended that the Town Council approve the application. On 11 July 1983, the proposal again came before the Town Council, which ruled that a new public hearing was required due to the changes that had been made in the plan. The matter was reheard before the Planning Board on 6 September 1983. The Planning Board again recommended approval of the application. A public hearing was held before the Town Council on 19 September 1983. Following this hearing, the Town Council referred the proposal to the town manager for his recommendation. On 10 October 1983, the matter came before the Town Council for final action. The town manager recommended that the application be approved. The Town Council, however, adopted a resolution denying the request for a special use permit.

Petitioners then obtained a writ of certiorari in Orange County Superior Court. Following a review of the transcripts of hearings and other materials before the Town Council, the Orange County Superior Court affirmed the denial of the special use permit.

Manning, Fulton & Skinner, by John B. McMillan and John I. Mabe, Jr., for petitioner appellants.

Grainger R. Barrett, Town Attorney for the Town of Chapel Hill, and Hunter, Wharton & Howell, by John V. Hunter III, for respondent appellee.

JOHNSON, Judge.

[1, 2] We begin our discussion by stating the applicable principles of judicial review in reviewing a municipality's decision on an application for a special use permit. The reviewing court's tasks include:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E. 2d 379, 383, *rehg. denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980). "In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court's order but whether the evidence before the town board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board." *Id.* at 626, 265 S.E. 2d at 383. When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, he is *prima facie* entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record. *Id.* at 625, 265 S.E. 2d at 382. In reviewing the sufficiency of the evidence, the reviewing court must apply the whole record test and consider not only the evidence which in and of itself justifies the Board's result, but also consider contradictory evidence. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977); *Jennewein v. City Council of Wilmington*, 62 N.C. App. 89, 302 S.E. 2d 7, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983). The whole record test does not allow the reviewing court to replace the council's judgment as between two reasonably conflicting views. *Id.*

Section 8.3 of the Chapel Hill Development Ordinance provides that no special use permit shall be approved by the Town Council unless each of the following findings is made concerning the proposed special use or planned development:

(a) That the use or development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;

(b) That the use or development complies with all required regulations and standards of this chapter, including all applicable provisions of Articles 4, 5, and 6 and the applicable specific standards contained in Sections 8.7 and 8.8, and with all other applicable regulations;

(c) That the use or development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property, or that the use or development is a public necessity; and

(d) That the use or development conforms with the general plans for the physical development of the Town as embodied in this chapter and in the Comprehensive Plan.

Thus, if the Town Council fails to find any one of the above, the application must be denied. In denying the application, the Town Council stated it could not make findings of (a), (b) or (d).

[3] Petitioners contend that they produced competent, material and substantial evidence of each of the elements required by the ordinance and that the Council's findings contra were not supported by competent, material and substantial evidence. Since all four findings must be made to receive a permit, we need only consider whether any one of the Council's findings contra were supported by competent, material and substantial evidence in order to affirm the Council's decision. *See Jennewein v. City Council of Wilmington, supra.*

With respect to the first condition, maintenance or promotion of the public health, safety, and general welfare, the Council made the following "findings" in its resolution:

WHEREAS, Old Oxford Road is presently a narrow, winding street only some 1330 feet long on the west side of Booker Creek, and

WHEREAS, this development will at least double traffic on Old Oxford Road in one increment, and even possibly increase it by 170% according to one expert's experience, and such an increase would immediately bring this low-traffic record to the lower part of its 3,000-6,000 range for full capacity as estimated by the Town Engineer, and

WHEREAS, this traffic would create congestion on Old Oxford Road and on Elliott Road and intensify that road's function from that of a minor street to that of a significant collector, and

WHEREAS, the improvements proposed for Old Oxford Road will not significantly improve traffic flow at its intersection with Elliott Road, where 80% to 90% of the traffic will be turning left, and

WHEREAS, traffic from this development will cause traffic hazard to pedestrians and bicyclists on Elliott, especially children riding or walking to or from school, and

WHEREAS, traffic from this development will increase the traffic entering the Franklin Street-Elliott Road intersection up to 70%, substantially increasing traffic congestion and increasing the risk of traffic accidents, especially for left turns onto Franklin Street in the peak evening traffic hours, and

WHEREAS, this traffic increase will substantially increase the chances that cars backed up on Elliott Road and the Franklin Street intersection will block the fire station driveway during a public safety or health emergency, ...

Based upon the foregoing, the Council adopted the following resolution:

BE IT RESOLVED by the Council of the Town of Chapel Hill that, with respect to the Special Use Permit application for Oxford Hills submitted by Goforth Properties and received by the Town on September 1, 1983, the Council fails to make the following findings set forth in Section 8.3 of the Development Ordinance:

1. That the proposed development will be located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare, because:

a. Traffic from this development will create traffic congestion at the intersection of Elliott and Old Oxford Roads, especially during peak travel hours; and

b. Traffic from this development will exacerbate traffic congestion on Elliott Road between Old Oxford Road and

Franklin Street, will exacerbate delays in making left turns to Franklin Street, and will add 50% or more traffic entering the intersection on Elliott, especially during the peak travel hours; and

c. Traffic from this development will create traffic safety concerns and increase sharply the risk of traffic accidents on Elliott Road between Old Oxford Road and Franklin Street, will conflict with traffic exiting the Arbors Office Park, and will substantially raise the chances that the fire station driveway will be blocked during a public safety or health emergency, impeding the response of fire or rescue vehicles; and

d. Traffic from this development will increase traffic safety concerns for pedestrians and bicyclists, particularly children going to or from school, on Elliott from Old Oxford to Audubon, Clayton or Curtis Roads.

The evidence showed that the proposed apartment complex would be located on the east side of Old Oxford Road, which is a narrow, winding road running north-south. Old Oxford Road empties to the south onto Elliott Road, which runs east-west. Elliott Road intersects with Franklin Street a short distance to the east. About three blocks to the west of the Old Oxford Road and Elliott Road intersection are an elementary school and a junior high school. On the south side of Elliott Road at the intersection of Elliott Road and Franklin street is a fire station. Directly across Elliott Road from the fire station is a bank. Next door to the bank to the west on Elliott Road is a new office complex, which has 303 parking spaces. Next to the driveway of the office complex, 50 feet west of the bank driveway, is a driveway to an apartment complex. Between the bank driveway and the apartment complex driveway is a school bus stop. Farther to the west, at the intersection of Old Oxford Road and Elliott Road, is a church and day care center.

The evidence is uncontradicted that the proposed Oxford Hills Apartment Complex would increase traffic on Old Oxford and Elliott Roads. Petitioners' own experts testified that the traffic on Old Oxford Road would increase from 1,081 vehicles per day to 2,581 vehicles per day and that the traffic on Elliott Road would increase from 2,278 vehicles per day to approximately 3,700

vehicles per day, and that the traffic at the intersection of Elliott Road and Franklin Street would increase by 50%. These figures did not take into account the new office complex on Elliott Road. The expert witness of the opponents to the project testified that traffic would increase by 170% on Old Oxford Road and by 70% on Elliott Road. He also estimated that approximately 408 more vehicles per day would travel on Curtis Road and Caswell Road near the elementary school and junior high.

Petitioners' expert witnesses testified that based upon their studies the existing streets could handle the increased traffic and that the increased traffic would not create a safety hazard. Petitioners proposed to improve Old Oxford Road and to add a left turn lane at the intersection of Old Oxford and Elliott Roads. Petitioners' experts conceded, however, that the left turn lane would not materially improve the traffic flow as most traffic would be turning left anyway.

Several witnesses in opposition to the project expressed concern for the safety of children walking or riding bicycles to school along Elliott Road, which has no sidewalks. Several had noticed an increase in the number of speeders on Elliott Road, which was becoming a cross-town artery. With increased traffic on Elliott Road caused by the proposed apartment complex, they foresaw increased danger to school children.

Several opponents also expressed concern over increased traffic congestion at the intersection of Elliott Road and Franklin Street, which already was rated as the third must dangerous intersection in Chapel Hill. Many voiced a concern that increased traffic congestion would hamper the ability of fire personnel from the Elliott Road fire station to respond to fires. The evidence showed that the sixth or seventh automobile at the traffic light at the Elliott Road/Franklin Street intersection blocked the entrance/exit of the Elliott Road fire station. Some citizens testified that existing traffic, without taking into account traffic from the proposed Old Oxford Apartment complex and the new office complex, was already contributing to traffic backups on Elliott Road that frequently block the exit to the fire station. Many complained about having to wait more than one cycle of the light to make a left turn from Elliott Road onto Franklin Street. Petitioners' experts testified that in peak hours that a motorist could

expect to complete a left turn on the first cycle of the traffic light 70% or less of the time. They conceded that traffic would back up in peak hours but stated that emergency vehicles would get out "as soon as the light changes." Petitioners testified that they had discussed the problem with fire department personnel, who had expressed confidence in their ability to respond to fires in a timely manner despite traffic congestion. No report from the fire department, however, was introduced at the hearing.

Based upon the foregoing, we hold that there was competent, material and substantial evidence to support the Council's findings and conclusions. The opponents' concerns about the adverse effect of the proposed apartment complex upon traffic congestion and safety were valid. These concerns may be the basis of the denial of a special use permit. *See* 3 Rathkopf, Law of Zoning and Planning, Sec. 41.09 (Supp. 1984). The Council's action, therefore, was not arbitrary and capricious.

Petitioners next contend that the Council improperly required them to establish conclusively their entitlement to a special use permit. We can find nothing in the Council's resolution or in the record that the Council applied a conclusive proof standard of proof. Instead, it is clear to us that the Council decided the matter on the basis of competent, material and substantial evidence.

We need not consider petitioners' remaining contention that the Council's finding that the design and plans for the tract did not suit or enhance the tract was based upon incompetent evidence because the one finding which we have found to be supported by competent, material and substantial evidence is sufficient to support the Council's denial of the permit.

In conclusion, we hold the Council's decision was supported by competent, material and substantial evidence, was not arbitrary and capricious and was not affected by error of law.

Affirmed.

Judges WELLS and COZORT concur.

Lowe v. Town of Mebane

JACK R. LOWE, ELLEN B. LOWE, JAMES T. WARREN, MARY E. WARREN, SIDNEY T. AMANDOLIA, MARGARET B. AMANDOLIA, CLAY D. WALKER, JANET A. WALKER, ELEANOR D. HARRIS, WILLIAM C. ZINT, JR., AND MARGARET J. ZINT, PETITIONERS v. TOWN OF MEBANE, NORTH CAROLINA, RESPONDENT

No. 8415SC832

(Filed 6 August 1985)

1. **Municipal Corporations § 2.2— annexation—lots of five acres or less—street right of ways excluded—no error**

Petitioners did not meet their burden of showing error in the Town's calculations concerning the number of lots of five acres or less where the Town's calculations did not make allowance for the acreage in street right of ways. The Town presented evidence indicating that its calculations were based on tax maps, subdivision plats and direct inspection; petitioners presented an alternative method of calculation that was different from but not necessarily more accurate than the method used by the Town. G.S. 160A-36, G.S. 160A-36(c).

2. **Municipal Corporations § 2.2— annexation—method of counting lots—common ownership and use**

The Town used an acceptable method of consolidating tracts and calculating whether sixty percent of the lots in an area to be annexed were used for urban purposes where the Town's engineer, upon personal inspection, consolidated lots in common ownership and use so that if an owner had two adjacent lots, one used for a residence and the second used as a yard, that tract was counted as a unit. G.S. 160A-36(c).

3. **Municipal Corporations § 2.2— annexation—apartment complex—classified as commercial**

The Town did not err in calculating urban density for annexation purposes by classifying a forty-unit apartment complex on 9.33 acres as commercial, thus removing that acreage from the residential subdivision test. G.S. 160A-36(c).

4. **Municipal Corporations § 2.3— annexation—use of streets as boundary lines or as a reference**

The Town's annexation plan conformed with the requirements of G.S. 160A-36(d) in the use of natural topographic lines as boundaries where the Town did not include developed land on both sides of the streets used as boundaries and drew a boundary line five feet from and parallel to a street used as a boundary. Petitioners failed to carry their burden of showing that it would have been practical to follow natural topographic features as boundaries, that to do so would not have defeated the overall annexation plan, and that the boundaries drawn by the Town violated the intent of the statute by depriving citizens within the newly annexed area of the central city services; moreover, there is no provision in the statute which prevents a municipality

from using a street as a reference in setting the boundary lines of an area to be annexed.

5. **Municipal Corporations § 2.3— annexation plan—compliance with statute**

The format and substance of the Town's annexation ordinance was consistent with approved plans and there was no merit to contentions that the ordinance did not comply with all statutory requirements in that it did not include the methods used to determine compliance with G.S. 160A-36(c) or specific findings about financing the annexation as required by G.S. 160A-37(e)(1).

6. **Municipal Corporations § 2.5— annexation—failure to show material injury**

The trial court correctly found that petitioners in an action challenging an annexation ordinance had failed to carry their burden of proof on the issue of material injury where one petitioner testified that a sewer line would not be going across his property because the city would be building a pump station elsewhere, and where petitioners' conclusory allegations of "additional burdens" if annexed did not entitle them to relief.

APPEAL by petitioners from *Lee, Judge.* Judgment entered 4 January 1984 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 4 April 1985.

Foster, Conner & Robson by Eric C. Rowe and C. Allen Foster for petitioner appellants.

Bateman & Stedman by Charles L. Bateman for respondent appellee.

COZORT, Judge.

On 26 July 1982 pursuant to G.S. 160A-37, the Town of Mebane adopted an ordinance of intent to annex three separate areas adjacent to the town and gave notice to the public of a hearing to be held on 13 September 1982. After the hearing at which many of the petitioners spoke in opposition to the plan, the Town Council adopted an ordinance implementing the proposed annexations with some minor alterations. On 30 November 1982, pursuant to G.S. 160A-38, petitioners filed a petition in Superior Court, Alamance County, seeking review of the annexation ordinance. At trial petitioners presented the testimony of their expert, civil engineer Carroll J. Mann, Jr., suggesting that the town had used a method to measure compliance with the statutorily mandated requirements for character of area to be annexed which did not provide reasonably accurate results. Civil engineer Lawrence Alley, who helped prepare the annexation plan for the

town, testified in detail about the methods he used for measuring whether the proposed areas met the statutory requirements. The court entered judgment making findings of fact and conclusions of law and declared the annexation ordinance effective. We affirm.

In their first issue on appeal petitioners question whether the trial court erred when it determined that the town had used methods calculated to provide reasonably accurate results when it ascertained that the three areas to be annexed, Areas A, B, and C, conformed to the use and subdivision requirements of G.S. 160A-36(c).

G.S. 160A-36(c) provides:

> (c) The area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which 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.

[1] Petitioners claim that according to their calculations, Area A fails the subdivision test because less than 60% of the adjusted acreage consists of lots and tracts five acres or less in size. Petitioners claim the town failed to make allowance for the acreage contained in street right-of-ways and therefore its calculations are in error.

The town admits that street right-of-ways were not measured nor were they specifically made a part of the town's calculations. The town points out, however, that there is no statutorily mandated method of calculating compliance, and our courts have approved both plans that include and plans that exclude street right-of-ways in their computations.

In determining whether the statutory standards enunciated in G.S. 160A-36 are met, the reviewing court shall accept the estimate of the municipality if the estimates are based on reasonably reliable sources unless petitioners demonstrate that such

estimates are in error by 5% or more. G.S. 160A-42. The statutes do not specify any particular method of calculation and the reasonableness of the method chosen is to be determined in light of the particular circumstances of the questioned annexation proceedings. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E. 2d 123 (1980). The findings of the trial court are binding on appeal if supported by competent evidence even if there may be evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980).

The town presented evidence at trial indicating that their calculations were based upon tax maps, subdivision plats and direct inspection of the area involved. Petitioners presented an alternative method of calculation based upon maps which was different from but not necessarily more accurate than the method used by the town. Based upon competent evidence the court found that the town used a reasonably accurate method of calculation and the petitioners had failed to demonstrate error. Because petitioners failed to meet the burden of showing error in the town's calculations and because adequate evidence supports the findings of the trial court, we find that Area A meets the requirements of G.S. 160A-36(c).

[2] Next, petitioners argue that according to their calculations, Area B fails the use test because less than 60% of the tracts in that area are used for urban purposes. Petitioners argue that the town arbitrarily combined lots thus altering the urban use percentage so that it conformed with the statute.

The town responds that based upon their engineer's personal inspection, he consolidated lots in common ownership and common use so that if an owner had two adjacent lots, one used for a residence and the second used as a yard, that tract was counted as a unit in his calculations. The engineer testified that based on his calculations there was a total of sixty-six lots, forty-one of which, or 62.1%, were used for urban purposes.

In appraising an area to be annexed one of the methods which can be used to determine what is a tract is to consider several lots in single ownership used for a common purpose as being a single tract. These consolidated lots can then be used to determine the percentage of tracts used for urban purposes. *See*

Adams-Millis Corp. v. Kernersville, 6 N.C. App. 78, 169 S.E. 2d 496, *cert. denied*, 275 N.C. 681 (1969).

In Area B the town utilized an acceptable method of consolidating tracts in keeping with the spirit and intent of *Adams-Millis Corp. v. Kernersville*. Furthermore, petitioners have failed to demonstrate any error in the town's computations. Therefore, we find that the town has properly determined that Area B is in compliance with G.S. 160A-36(c).

[3] Next petitioners claim that in Area C the town erroneously classified an apartment complex as commercial rather than residential property. Petitioners contend that had the apartment complex been properly classified, Area C would have failed the subdivision test of G.S. 160A-36(c), because less than 60% of its adjusted acreage would be of tracts five acres or less in size. The town responds that there is no rule concerning whether an apartment complex should be classified as commercial or residential property; therefore, the trial court properly concluded that the commercial classification was reasonable.

Our courts have stated that annexation is a part of sound economic urban development. *Tar Landing Villas v. Town of Atlantic Beach*, 64 N.C. App. 239, 307 S.E. 2d 181 (1983), *disc. rev. denied*, 310 N.C. 156, 311 S.E. 2d 296 (1984). The general intent of the statutes is not to exclude areas of urbanized land from annexation on a technicality, but to provide municipalities with a flexible planning tool. In the present case a forty-unit apartment complex on 9.33 acres of land was classified as commercial, thus removing that acreage from the residential subdivision test. Petitioners would have that tract counted as one residential unit when computing the percentage of residential tracts of five acres or less. To allow petitioners to prevail would be an unreasonably restrictive interpretation of the law which would fly in the face of the policy behind annexation, which is to allow cities to annex contiguous urbanized areas to facilitate city planning. Petitioners' argument, if adopted, would allow the incongruous possibility that areas densely populated with apartment dwellers would be unavailable for annexation because the apartment buildings were built on tracts larger than five acres.

[4] Petitioners next claim that the town's annexation plan does not conform to G.S. 160A-36(d) because the town failed to use

natural topographic lines as boundaries and failed to include developed land on both sides of the streets used as boundaries. Mr. Alley, testifying for the town, explained that when preparing the annexation plan natural topographic features were used as boundaries wherever they felt it was practical to do so. He further stated that boundaries were set after his personal inspection of the area to be annexed.

G.S. 160A-36(d) provides: "In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality developed land on both sides of the street."

To establish noncompliance with G.S. 160A-36(d) with regard to natural boundaries petitioners must show: (1) that the boundary of the annexed area does not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features. *Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E. 2d 630 (1982). The legislative history of this portion of the statute suggests that it was included because the Legislature was concerned that a full range of municipal services be available to citizens in the annexed area. *Id.* The Legislature did not intend that this section, which is not mandatory, would defeat compliance with the requirements for annexation of an otherwise annexable area. *Id.* Petitioners have failed to carry their burden of showing that it would have been practical to follow natural topographic features as boundaries, that to do so would not have defeated the overall annexation plan, and that the boundaries drawn by the town violated the intent of the statute by depriving citizens within the newly annexed area of essential city services.

Petitioners also contend that in drawing a boundary exactly five feet from and parallel to a street for its entire length, the town violated the requirements of G.S. 160A-36(d). In *Rexham Corp. v. Town of Pineville*, 26 N.C. App. 349, 216 S.E. 2d 445 (1975), this Court approved a plan which had set back lines roughly parallel to streets used as boundaries. The Court said, "[W]e find no provision in G.S. 160A-36(d) which prevents a municipality from using a street as a *reference* in setting the boundary lines of an area to be annexed." *Id.* at 356, 216 S.E. 2d

at 450 (1975). Here the trial court properly concluded that petitioners had failed to show that the boundaries as drawn violated applicable law.

[5] Petitioners next argue that the trial court erred when it determined that the town complied with all statutory requirements in enacting its ordinance because the town did not include: (1) the methods used to determine compliance with G.S. 160A-36 (c), and (2) specific findings about financing the annexation as required in G.S. 160A-37(e)(1). We have perused the annexation ordinance and amendments and find that its format and substance are consistent with approved plans. *See Re Annexation Ordinance*, 304 N.C. 565, 284 S.E. 2d 475 (1981); *Adams-Millis Corp. v. Town of Kernersville, supra.* We find these assignments of error to be without merit.

[6] In their fourth issue on appeal, petitioners contend the trial court erred when it concluded there was no evidence of material injury to any of the petitioners and that petitioners had failed to carry their burden of proof on this issue. Petitioners argue that they were not required to show material injury unless they complained of procedural irregularities. They then contend that, nonetheless, there was material injury to: (1) Petitioner James Warren, whose land was the potential site for a sewer line; and (2) "Petitioners, residents of those areas [to be annexed], [who] will be subject to additional burdens."

Petitioners' claims are without merit. The trial court found "[n]o evidence was presented by the Petitioners as to any prejudice or injury" and concluded that Petitioners failed to carry their burdens of proof "that the Petitioners have been prejudiced or injured by the boundaries drawn" and "that any irregularities in the annexation proceedings materially prejudiced the substantive rights of the Petitioners or caused them any material injury." First, the record shows that Petitioner Warren testified at trial that the sewer line will not go across his property because the city will instead be building a pump station elsewhere. Second, their conclusory allegations of "additional burdens" if annexed entitle them to no relief. As the Supreme Court has recently stated:

> The burden was on the petitioners, who appealed from the annexation ordinance, to show by competent evidence that the city in fact failed to meet the statutory requirements

> or that there was irregularity in the proceedings which materially prejudiced their substantive rights. . . .
>
> * * * *
>
> It is common knowledge and experience that residents of areas adjacent to our cities and towns which are subject to annexation under the laws of our State enjoy a great many city services financed by city taxpayers without paying city property taxes themselves. . . . Fairness dictates that there comes a time when these residents must join in bearing the costs of those services.

In re Annexation Ordinance, 303 N.C. 220, 233-34, 278 S.E. 2d 224, 232-33 (1981). We hold the trial court's finding and conclusions in this issue were correct.

In their final argument petitioners state that the annexation statutes violate the North Carolina Constitution and the United States Constitution. Identical arguments have been ably answered by this Court in *Campbell v. City of Greensboro*, 70 N.C. App. 252, 319 S.E. 2d 323, *disc. rev. denied*, 312 N.C. 492, 322 S.E. 2d 553 (1984), and need not be addressed here.

We find petitioners' assignments of error to be without merit and the judgment appealed from is affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

GUSS ALSTON v. ANNE H. HERRICK

No. 8415SC919

(Filed 6 August 1985)

1. Automobiles and Other Vehicles § 78.1— contributory negligence—failure to keep proper lookout—failure to reduce speed—sufficiency of evidence

In an action to recover damages sustained by plaintiff when the garbage truck he was driving overturned after defendant allegedly drove across the center line when entering the highway from a driveway, the evidence presented questions for the jury as to whether plaintiff was contributorily

negligent by failing to maintain a proper lookout and by pulling off the road and not applying his brakes to reduce his speed where there was evidence tending to show that plaintiff had a clear view of defendant and her driveway for 200 feet but did not see defendant's vehicle until he was aproximately 30 feet from it; when plaintiff first saw defendant's vehicle he tapped his brakes but then determined that he would slide into defendant's vehicle if he hit the brakes; he then turned his truck toward the shoulder of the highway and traveled about 100 feet beyond defendant's driveway without applying his brakes before his right wheels struck a driveway and his truck overturned.

2. **Automobiles and Other Vehicles § 88.3— contributory negligence—exceeding reasonable speed—sufficiency of evidence**

The evidence presented a jury question as to whether plaintiff was contributorily negligent by driving at a speed greater than was reasonable under the circumstances where there was evidence tending to show that plaintiff was driving an eight-foot wide 16,700 pound garbage truck in a travel lane slightly wider than nine feet at 45 miles per hour in the rain.

3. **Witnesses § 6.3— prior convictions of traffic offenses—proper cross-examination**

The trial court in a motor vehicle accident case did not abuse its discretion in permitting plaintiff to cross-examine defendant concerning prior convictions for traffic offenses where the court clearly instructed the jury that defendant's prior convictions were only to be considered on the issue of her credibility.

4. **Trial § 13.1— jury view of repaired truck**

The trial court did not abuse its discretion in permitting a jury view of a repaired garbage truck which had been damaged in the accident in question.

Judge WEBB dissenting.

APPEAL by defendant from *Russell G. Walker, Judge.* Judgment entered 5 April 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 16 April 1985.

Epting & Hackney, by Joe Hackney, for plaintiff appellee.

Bryant, Drew, Crill & Patterson, P.A., by Lee A. Patterson, II, for defendant appellant.

BECTON, Judge.

I

Plaintiff, Guss Alston, brought this action to recover damages suffered when the truck he was driving overturned. He alleged that this accident was caused by defendant Anne Herrick's operating her automobile in the path of Alston's truck.

At trial, Alston and Herrick were the principal witnesses. Several other witnesses provided testimony chiefly relating to damages. At the close of all the evidence, the trial court directed a verdict in favor of Alston on the issue of contributory negligence. The court submitted two issues to the jury: whether Herrick was negligent, and if so, the amount of damages to which Alston was entitled for personal injury and property damage. The jury found Herrick negligent and awarded Alston damages. Herrick moved for a judgment notwithstanding the verdict and for a new trial, which motions were denied.

Herrick appeals, her principal assignments of error relating to the trial court's failure to submit the issue of Alston's contributory negligence to the jury. We conclude that it was reversible error for the trial court to direct a verdict in Alston's favor on the issue of his contributory negligence, and to fail to submit that issue to the jury. Therefore, the case is remanded for a new trial. Insofar as it may aid the litigants and the trial judge on remand, we also briefly address several of the remaining assignments of error.

II

Factual Background

On 14 February 1983, at about 2:00 p.m., Guss Alston was operating a trash compacting garbage truck belonging to him in an easterly direction along a rural paved road in Chatham County. It was raining. The speed limit was 55 miles per hour, and Alston testified that he was traveling at 45 miles per hour. As Alston approached the driveway to Herrick's house, Herrick entered the roadway, turning right into the westbound lane. Herrick testified that in making the turn, she did not cross the double lines in the middle of the road; Alston testified that she did. As Herrick entered the highway, Alston swerved his truck right, onto the shoulder of the road. With the right-hand wheels on the shoulder and the left-hand wheels on the pavement, Alston testified that he proceeded another 50 feet (Herrick's evidence indicates 100 feet) until the right-hand wheels hit a driveway and the truck overturned. Alston was injured, and the truck and garbage compacting unit on it were damaged.

III

During the charge conference, counsel for Alston moved that no instruction on contributory negligence be given. The trial court construed the motion as one for a directed verdict on the issue of Alston's contributory negligence, and allowed the motion. We conclude that it was reversible error for the trial court to so direct a verdict, and to fail to submit the issue of Alston's contributory negligence to the jury.

A motion for a directed verdict presents the same question for both the trial and appellate courts: whether the evidence, taken in the light most favorable to the non-movant, and giving the non-movant the benefit of every reasonable inference arising from that evidence, is sufficient for submission to the jury. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979). *See Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 301 S.E. 2d 439, *disc. rev. denied*, 308 N.C. 678, 304 S.E. 2d 759 (1983) (non-movant's evidence to be taken as true). Although it is true that in situations involving negligence, issues of fact and determinations of the reasonableness of conduct are for the jury, and not for the court, *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981), evidence which merely raises a conjecture is not sufficient to warrant submission to the jury. *Jones v. Holt*, 268 N.C. 381, 150 S.E. 2d 759 (1966).

Applying the foregoing principles to the instant facts, we find that the evidence plainly discloses a triable issue of whether Alston was contributorily negligent by failing to maintain a proper lookout, by driving at a speed greater than was reasonable under the circumstances, and by pulling off the road and not applying his brakes to reduce his speed. Taking the evidence in the light most favorable to the non-movant Herrick, we find: that Alston had a clear view of Herrick and her driveway for 200 feet; that he did not see Herrick's vehicle until he was approximately 30 feet away from her; that when he first saw her vehicle he tapped his brakes, but then determined that he would "slide into" Herrick if he "hit the brakes"; that he then turned his truck toward the shoulder of the highway and traveled about 100 feet beyond the driveway without applying his brakes before his truck overturned.

[1] Although Alston argues that the course of conduct he elected to follow—pulling over to the side of the road without braking—was, as a matter of law, reasonable and non-negligent, we do not agree. We cannot say that this is the sole conclusion that can be drawn from the evidence. *See Maness v. Fowler-Jones Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816, *cert. denied*, 278 N.C. 522, 180 S.E. 2d 610 (1971). Alston himself testified that he considered several options before deciding to pull over onto the shoulder. Further, in light of Alston's testimony that he did not notice Herrick until he was a short distance away from her, we note that whether a driver is keeping a reasonably careful lookout to avoid danger is ordinarily a question of fact. *Taylor v. Combs*, 1 N.C. App. 188, 160 S.E. 2d 539 (1968).

[2] Finally, the evidence raises a question of fact as to whether Alston was guilty of contributory negligence by driving at a speed that was not reasonable and prudent under the circumstances. A motorist may be found negligent by driving at a speed less than that posted when there has been a showing that conditions were such that the speed traveled exceeded that which a reasonable person would have traveled under the same conditions. *Primm v. King*, 249 N.C. 228, 106 S.E. 2d 223 (1958). Alston's own testimony was that he was driving an eight-foot wide 16,700 pound truck in a travel lane slightly wider than 9 feet at 45 miles per hour in the rain. Herrick's testimony, erroneously excluded by the trial court, was that Alston was traveling at 50 miles per hour. *See Gore v. Williams*, 58 N.C. App. 222, 293 S.E. 2d 282 (1982) ("any person of ordinary intelligence who has had a reasonable opportunity to observe a moving automobile is competent to testify as to that automobile's rate of speed"; Herrick testified she observed Alston's truck for two to three seconds). Under the circumstances, whether Alston was driving at a reasonable and prudent speed was for the jury to determine.

We conclude that sufficient evidence was adduced to permit a jury to reasonably find that defendant Alston's contributory negligence was at least one of the proximate causes of his accident. It was, therefore, error for the trial court to direct a verdict in Alston's favor on this issue. *See Dunn v. Herring*, 67 N.C. App. 306, 313 S.E. 2d 22 (1984) (directed verdict on issue of contributory negligence not appropriate in close case; to direct verdict, evidence must *compel* finding of contributory negligence).

IV

We briefly address three of the remaining six assignments of error.

First, Herrick argues that the trial court committed reversible error in denying her motion for a directed verdict at the close of all the evidence and in denying her motion for a judgment notwithstanding the verdict because the evidence failed to establish her negligence as a matter of law, and also showed as a matter of law that Alston was contributorily negligent. As to Herrick's negligence, Herrick testified that she did not cross the center line when she pulled out; Alston testified that she did. This evidence alone takes the issue of Herrick's negligence to the jury. And, as we have already discussed, the evidence also raises a factual issue as to Alston's contributory negligence. Thus, Herrick's motions for a directed verdict and judgment n.o.v. were properly denied.

[3] Herrick also contends that the trial court erred in permitting cross-examination of her as to prior convictions of traffic offenses. At the time of trial, the controlling rule of law was that a defendant who takes the stand and testifies is subject to impeachment by cross-examination, including unrelated violations of motor vehicle laws. *E.g., State v. Atkinson*, 39 N.C. App. 575, 251 S.E. 2d 677 (1979) (evidence admissible as tending to show lack of trustworthiness). The trial judge's determination to allow such evidence was only reversible for an abuse of discretion. *Id.* At bar, the trial judge clearly instructed the jury that Herrick's prior convictions were only to be considered on the issue of her credibility; hence we detect no abuse of discretion.

Upon retrial, however, N.C. Gen. Stat. Sec. 8C-1, Rule 609 (Supp. 1983), effective 1 July 1984, will govern.[1] Rule 609 is much more restrictive than the former law, and limits admissible evidence of prior convictions to those convictions less than ten years old and punishable by more than 60 days confinement. Thus,

1. The introductory comment to the new North Carolina Evidence Code provides that its rules shall apply to actions and proceedings commencing after 1 July 1984, and shall also apply to further procedure in actions and proceedings than pending, except to the extent that applications of the Chapter would not be feasible or would work injustice. *See also* 1 H. Brandis, *North Carolina Evidence* Sec. 6 (2d ed. 1982).

under Rule 609, most of Herrick's prior convictions will now be inadmissible.

[4] Finally, Herrick argues that it was reversible error to allow a jury view of the repaired truck at the close of all the evidence. As Alston correctly points out, the decision to allow a jury view is within the discretion of the trial court, and not reviewable absent a showing of abuse of that discretion. *See* 1 H. Brandis, *North Carolina Evidence*, Sec. 120 & esp. n. 49 (2d rev. ed. 1982). We are of the opinion that no abuse of discretion has been shown here.

New trial.

Judge WEBB dissents.

Judge PARKER concurs.

Judge WEBB dissenting.

I dissent. I do not believe there was sufficient evidence of contributory negligence to be submitted to the jury. If the plaintiff could see defendant's driveway for 200 feet he was not required to anticipate the defendant would come out of the driveway and force him off the road. For this reason I do not believe there is evidence from which the jury could find his failure to keep a proper lookout was a proximate cause of the collision.

I also do not believe there is sufficient evidence that plaintiff was speeding to create a jury issue. If he was driving at 50 miles per hour there is no evidence this was not within the speed limit. I do not believe that we should hold that his negligent speed could be a proximate cause of the collision. He was not required to anticipate the defendant would come out of her driveway in front of him and slow down to meet this eventuality.

Finally, I do not believe the evidence that plaintiff did not apply his brakes but drove on the shoulder of the road is sufficient to create a jury issue. He was faced with a sudden emergency. I do not believe the jury could find he did not act as a reasonable prudent man would have acted under the circumstances.

The jury by its verdict has found the defendant came out of her driveway and caused the plaintiff to run off the road. I do not believe we should disturb this verdict.

ANN S. SHELTON AND ROBERT F. SHELTON, JR. v. MOREHEAD MEMORIAL HOSPITAL, LINDA T. ROSS, ADMINISTRATRIX OF THE ESTATE OF ROBERT J. ROSS, M.D., ROBERT P. SHAPIRO, M.D., STUART M. BERGMAN, M.D. AND THE BOARD OF TRUSTEES OF MOREHEAD MEMORIAL HOSPITAL, INCLUDING JOSEPH G. MADDREY, JOHN E. GROGAN, JAMES M. DALY, JR., ROY C. TURNER, JOYCE JOHNSON, WILLIAM O. STONE, JESSIE L. BURCHELL, GARLAND S. EDWARDS, WILLIAM R. FRAZIER AND GERALD JAMES, INDIVIDUALLY, AND THE EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF MOREHEAD MEMORIAL HOSPITAL, INCLUDING SHELTON DAWSON, M.D., EDWARD L. GROOVER, M.D., BARRY L. BARKER, M.D., DAVID LEE CALL, M.D., JOHN R. EDWARDS, M.D. AND JAMES B. PARSONS, M.D., INDIVIDUALLY

No. 8417SC1214

(Filed 6 August 1985)

1. **Evidence § 29.3— medical malpractice action—materials held by executive committee of medical staff—not discoverable**

In an action in which plaintiffs alleged that the hospital knew prior to plaintiff's injury that two doctors were incompetent and unfit to practice medicine, the minutes, proceedings, and materials held by the Executive Committee of the Medical Staff of the hospital were not discoverable pursuant to G.S. 131E-95.

2. **Evidence § 29.3— medical malpractice action—chief executive officer of hospital served with subpoena duces tecum—properly quashed**

In an action in which plaintiffs alleged that defendant hospital knew prior to plaintiff's injury that two doctors were incompetent, the trial court properly quashed a subpoena served on the Chief Executive Officer of the hospital where the CEO had attended meetings of the Executive Committee of the Medical Staff. To allow plaintiffs to depose the CEO of the hospital to obtain privileged information that could not be obtained directly from the hospital would circumvent the legislative intent of G.S. 131E-95.

3. **Hospitals § 6; Evidence § 29.3— medical malpractice action—minutes of hospital board of trustees—not privileged**

In an action in which plaintiffs alleged that the hospital knew prior to plaintiff's injury that two doctors were incompetent, the trial court erred in its conclusion that the minutes and records of the Board of Trustees were barred from discovery by G.S. 131E-95 where the members of the Board of Trustees were not charged with peer review functions. G.S. 131E-76(5).

APPEAL by plaintiffs from *Morgan, Judge*. Order entered 3 August 1984 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 4 June 1985.

On or about 5 January 1983, Robert J. Ross, M.D., deceased, performed a total hysterectomy upon Ann S. Shelton, plaintiff. During the course of the operation, plaintiff's bladder was inadvertently cut or damaged thus allowing urine to pass involuntarily through the vagina. Plaintiff was dismissed from the hospital on 11 January 1983, however, the problem persisted. On 20 January 1983, Dr. Ross inserted a catheter and on 21 January 1983, plaintiff underwent a cystourethrogram performed by Carl W. Nash, M.D. This procedure revealed a vesciovaginal fistula, or an opening between the bladder and vagina. On 23 January 1983, plaintiff was referred to Stuart M. Bergman, M.D., a urologist practicing in Martinsville, Virginia. Dr. Bergman attempted unsuccessfully to remove two sutures which held the hole open. Upon the advice and recommendation of Dr. Bergman and Dr. Ross, plaintiff underwent major surgery in Martinsville, Virginia in an attempt to repair the vesciovaginal fistula. Plaintiff was discharged from the hospital on 5 February 1983, and in a day or so again became unable to control the passage of her urine. On 24 February 1983, plaintiff underwent a second cystourethrogram in Martinsville which revealed that Dr. Bergman's earlier attempt to repair the vesciovaginal fistula had been unsuccessful. On 9 March 1983, a third cystourethrogram was performed which revealed that plaintiff's condition was unchanged. On 1 May 1983, plaintiff was admitted to Wesley Long Memorial Hospital in Greensboro, N. C. where Alfred H. Garvey, M.D. performed the surgery to repair the vesciovaginal fistula.

On 12 January 1984, plaintiff Ann S. Shelton and her husband Robert F. Shelton filed this civil action against Morehead Memorial Hospital, the estate of Robert J. Ross, M.D. (Dr. Ross died in an automobile accident on 13 October 1983), and others. Plaintiffs allege seven separate causes of action, and seek an award of both compensatory and punitive damages. The allegation with which this appeal is concerned is contained in counts three and five of the complaint. Plaintiffs allege that the Hospital, the Board of Trustees, and the Executive Committee of the Medical Staff knew prior to plaintiff's injury that Dr. Ross and Dr. Shapiro, who assisted Dr. Ross in the initial surgery, were incompetent and un-

fit to practice medicine, and that Drs. Ross and Shapiro had repeatedly violated the hospital's prescribed standards of care.

On or about 19 March 1984, plaintiffs served requests for discovery upon the various defendants. Plaintiffs sought to discover (1) personnel records including documents relating to the investigation of Dr. Ross' and Dr. Shapiro's credentials; (2) all records, minutes and documents of the peer review committee and/or the Executive Committee of the Medical Staff; (3) all incident reports; (4) all minutes and records of the Board of Trustees; and (5) all policies, procedures and guidelines relating to risk management and prescribed standards of care at Morehead Memorial Hospital. Plaintiffs served the former Executive Director of the Hospital, L. Amos Tinnell, with a subpoena duces tecum directing him to produce all relevant documents, minutes, notes, and memoranda in his possession concerning medical staff committee proceedings regarding Dr. Ross, Dr. Shapiro, and all Board of Trustees meetings concerning Dr. Ross.

Defendant hospital answered plaintiffs' interrogatories, and objected to the request on the basis that the information being sought by plaintiffs was privileged pursuant to G.S. 131E-95. The other defendants did not answer or produce any documents, rather they filed a motion for a Protective Order. Mr. Tinnell moved for a Protective Order to quash the subpoena duces tecum and to limit the scope of his deposition to matters not privileged pursuant to G.S. 131E-95.

Plaintiffs filed a motion to compel discovery. The trial court denied the motion, quashed plaintiffs' subpoena duces tecum and ordered that Mr. Tinnell should not produce for plaintiffs any information without the permission of the hospital. The trial court also ordered defendant hospital to produce all the requested documents under seal for delivery to the Court of Appeals for review of this action. From the trial court's order, plaintiffs appeal.

Graham, Cooke, Miles & Bogan, by Donald T. Bogan, for plaintiffs appellants.

Tuggle, Duggins, Meschan & Elrod, P.A., by Joseph E. Elrod, III, J. Reed Johnston, Jr. & Sally A. Lawing, for defendants appellees.

JOHNSON, Judge.

[1] Plaintiffs assign error to the trial court's conclusion of law that (1) G.S. 131E-95 bars from discovery the materials, documents, and reports of Medical Review Committees; (2) G.S. 131E-95 bars a former Executive Director of a Hospital from testifying regarding Medical Review Committee proceedings and Board of Trustees proceedings; and (3) there is a common law privilege which bars from discovery hospital or medical staff committee proceedings or documents.

G.S. 131E-76(5) defines a Medical Review Committee as

> A Committee of a State or local professional society, of a medical staff of a licensed hospital or a committee of a peer review corporation or organization which is formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing.

The committee charged with medical review function at Morehead Memorial Hospital is the Executive Committee of the Medical Staff which consist of "the officers of the Medical Staff, and the chairmen of all standing committees. The chairman of the Board of Trustees and the Hospital Chief Executive Officer shall be invited to attend meetings of this committee." Bylaws of the Medical and Dental Staff of Morehead Memorial Hospital, April 20, 1978. G.S. 131E-95(b) provides that

> the proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential . . . and shall not be subject to discovery or introduction into evidence in any civil action against a hospital or a provider of professional health services which results from matters which are the subject of evaluation and review of the committee. . . .

The purpose of the statute is to ensure that members of Medical Review Committees may be candid and objective in peer investigations. The statute represents a legislative choice between medical staff candor and plaintiff's access to evidence. *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E. 2d 901, appeal dismissed; *cert. denied*, 307 N.C. 127, 297 S.E. 2d 399 (1982). Plaintiffs argue that the information they seek to discover is not

privileged pursuant to 131E-95 since the information did not "[result] from matters which are the subject of evaluation and review of the committee. . . ." Plaintiffs contend that the information held by the Executive Committee of the Medical Staff related to matters of credentials and competence, and that the information they seek to discover relates to a medical malpractice action. This contention is without merit. To allow plaintiffs access to the information compiled by the Executive Committee of the Medical Staff of the Hospital would clearly contravene the language and purpose of G.S. 131E-95. It would discourage the objectivity and candor that the legislature has deemed vital to the peer review process. We hold that the minutes, proceedings, and materials held by the Executive Committee of the Medical Staff of Morehead Memorial Hospital are not discoverable pursuant to G.S. 131E-95.

[2] Plaintiffs sought to discover privileged information from the former Chief Executive Officer (CEO) of Morehead Memorial Hospital by serving him with a subpoena duces tecum. The trial judge properly quashed plaintiffs' subpoena duces tecum. As Chief Executive Officer of the Hospital, Mr. Tinnell was invited to and did attend meetings of the various committees of Morehead Memorial Hospital, including meetings of the Executive Committee of the Medical Staff. The record tends to show that Mr. Tinnell actively participated in the investigation of Dr. Ross as evidenced by a letter from Mr. Tinnell which contained information "reviewed only by our Executive Committee of the Medical Staff." To allow plaintiffs to depose the former CEO of Morehead Memorial Hospital to obtain privileged information that could not be obtained directly from the Hospital would circumvent the legislative intent of G.S. 131E-95. The statute is explicit in its reference to persons in attendance at meetings. "No person who was in attendance at a meeting of the Committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings. . . ." For the aforementioned reason, we find no error in the trial judge's order to quash plaintiffs' subpoena duces tecum.

[3] Ancillary to plaintiffs' motion to discover minutes and records of the Executive Committee was a motion to discover the records, minutes and materials of the Board of Trustees. Defendants contend that the Board of Trustees at Morehead Memorial

Hospital functions like a Medical Review Committee and therefore proceedings of the Board are privileged pursuant to G.S. 131E-95. We find no merit in this contention. A careful reading of the bylaws of the Medical and Dental Staff of Morehead Memorial Hospital shows that the Board of Trustees and the Executive Committee of the Medical Staff are distinctly different entities which serve different functions. The duties of the Executive Committee of the Medical Staff of Morehead Memorial Hospital include "to receive reports regarding the performance and clinical competence of staff members and as a result of such review to make recommendations for reappointments and renewal of or changes in clinical privileges." Bylaws of the Medical and Dental Staff of Morehead Memorial Hospital, April 20, 1978. The members of the Board of Trustees are not charged with peer review functions. The statute is specifically designed to protect those persons who provide information about their peers in the medical profession. The Board of Trustees does not meet that criterion and is thus not within the scope of G.S. 131E-76(5). Therefore, we hold that the trial court erred in its conclusion that the minutes and records of the Board of Trustees are barred from discovery pursuant to G.S. 131E-95.

The disposition of the first and second assignments of error renders plaintiffs' third assignment of error moot. The common law privilege which plaintiffs assert has been codified in G.S. 131E-95. See discussion of plaintiffs' first assignment of error, *supra*. Such privilege does not apply to the Board of Trustees since it has been determined that a Board of Trustees is not within the contemplation of G.S. 131E-76(5) which defines a Medical Review Committee.

Affirmed in part.

Reversed in part.

Judges WELLS and COZORT concur.

STEPHANIE S. HUNNICUTT AND HUSBAND, JAMES E. HUNNICUTT v. MARION GRIFFIN

No. 8415SC1160

(Filed 6 August 1985)

1. **Physicians, Surgeons and Allied Professions § 20.2— erroneous instructions in medical malpractice case**

The trial court's instructions in a medical malpractice case were erroneous under the decision of *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1985), where the court instructed the jury that a general surgeon providing orthopedic care is not responsible for a mistake if his diagnosis, analysis or judgment is the result of "honest error," instructed that a general surgeon providing orthopedic care "does not ordinarily guarantee or insure the correctness of his diagnosis, analysis, or judgment as to the nature of the patient's condition," and instructed on six different occasions that negligence cannot be presumed from the mere fact of injury.

2. **Rules of Civil Procedure § 59— instruction erroneous when case overruled— failure to object—award of new trial**

The trial judge properly awarded plaintiffs a new trial in a medical malpractice action under G.S. 1A-1, Rule 59 when the authority upon which he based his charge had been overruled by the N. C. Supreme Court the day of the charge conference and the day before the charge was given, notwithstanding plaintiffs' counsel failed to object to the charge. App. Rule 10(b)(2).

3. **Appeal and Error § 67— appellate decision—when binding**

An appellate decision becomes binding authority upon filing, not upon publication in the advance sheets or reports or upon discovery by counsel or judge.

APPEAL by defendant from *Robert H. Hobgood, Judge.* Order entered 29 February 1984 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 15 May 1985.

Blanchard, Tucker, Twiggs, Earls & Abrams, P.A., by Charles F. Blanchard and Irvin B. Tucker, Jr., and Allen & Walker, by Louis C. Allen, Jr., for plaintiff appellees.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan and Martha T. Peddrick, for defendant appellant.

BECTON, Judge.

This case presents an appeal from an order of the trial court awarding plaintiffs, Stephanie and James Hunnicutt, a new trial.

Finding that the court did not abuse its discretion in awarding a new trial, we affirm.

I

In this medical malpractice action, the Hunnicutts allege that defendant doctor, Marion Griffin, was negligent in his treatment of a femur fracture suffered by Mrs. Hunnicutt. The case was heard before a jury. On 2 February 1984, at the conclusion of the presentation of the evidence, a charge conference was held. Plaintiffs did not object to any part of the instructions during the conference. The following morning, 3 February 1984, the trial judge charged the jury. Counsel were then given an opportunity to object to the jury instructions. Except for an objection directed specifically to the issue of damages, not germane to this appeal, the Hunnicutts' counsel made no objection. Nor did the Hunnicutts' counsel object when, after having given the jury a supplemental charge at their request, the trial judge again asked for objections.

The jury returned a verdict in favor of Dr. Griffin, and judgment was entered thereon. On 10 February 1984, the Hunnicutts moved for a new trial pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 59 (1983). The trial court granted the motion, stating that a new trial was being allowed because of error in the jury instructions, such error being caused by a change in the applicable law as a result of a decision handed down by the North Carolina Supreme Court on 2 February 1984 at 11:24 a.m., *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984), reversing the opinion of this Court reported at 61 N.C. App. 576, 301 S.E. 2d 467 (1983).

II

The contentions of the parties are easily summarized. Defendant Griffin argues that plaintiffs Hunnicutts' failure to object to the charge constituted a waiver of any later right to claim prejudice. Defendant Griffin relies on Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, which precludes a party from assigning error to any portion of the jury charge unless that party has made an objection thereto before the jury retires. Dr. Griffin argues that the Hunnicutts were required to object to any portions of the charge they felt were erroneous and prejudicial, whether or not the instructions were consistent with prior case

law, and that it was therefore an abuse of discretion for the trial judge to award a new trial when no objection had been made. In the alternative, Dr. Griffin argues that the jury charge comports with *Wall v. Stout.*

The Hunnicutts contend that the jury instructions were erroneous in light of the Supreme Court's opinion in *Wall v. Stout,* and further contend that in the particular context of this case, their failure to object to the jury instructions was not a waiver of their right to challenge them. Without disputing the rule that jury instructions must be objected to before they are reviewed, the Hunnicutts maintain that this case is controlled by the exception to the general rule, namely, that no objection is required when it would not have produced any result in the trial court because a "solid wall of appellate authority" then foreclosed the point.

A

[1] Before determining whether the Hunnicutts' failure to object to the charge precluded the trial court from granting them a new trial, we examine whether, under *Wall v. Stout,* the charge was in fact erroneous. We conclude that it was.

In the instant case, the jury was instructed that a general surgeon providing orthopedic care is not responsible for a mistake if the "diagnosis, analysis, or judgment is the result of honest error." The Supreme Court found nearly identical instructions in *Wall v. Stout* prejudicial, holding that the phrase "honest error" should not be used in instructing the jury on a physician's liability because of its "potentially misleading and exculpatory import." *Id.* at 194, 311 S.E. 2d at 577.

Next, in both the original and supplemental charges, the trial court instructed the jury that "a general surgeon providing orthopedic care does not ordinarily guarantee or ensure the correctness of his diagnosis, analysis, or judgment as to the nature of the patient's condition." In the case at hand, as in *Wall v. Stout,* the facts did not give rise to the issue of a physician's guarantee, and therefore the quoted instruction should not have been given. *See id.* at 196-7, 311 S.E. 2d at 578-9. Such an extraneous instruction is *prejudicial* error because it interjects unnecessary considerations, and because it is exculpatory. *Id.* In both cases, the error was compounded by repetition of the instruction.

Finally, in *Wall v. Stout*, the jury was instructed on three different occasions that negligence cannot be presumed from the mere fact of injury. In the case before us, this instruction was given six different times, thrice in the original charge, and thrice more in the supplemental charge. Our case provides an even more dramatic example for the Supreme Court's conclusion "that repetition of this legal maxim . . . was excessive and tended to overemphasize yet another legal principle exculpatory to defendant." *Id.* at 200, 311 S.E. 2d at 581.

We note that the pattern jury instructions expressly disapproved in *Wall v. Stout* were the same instructions relied upon by the trial court in framing the charge here. The instant charge thus markedly resembles the charge in *Wall v. Stout*, and like that latter charge, is unduly exculpatory and emphatically favorable to the defendant. *See Morrison v. Stallworth*, 73 N.C. App. 196, 326 S.E. 2d 387 (1985) (along with other errors, charge that included instruction that doctor does not guarantee or insure successful breast examination and diagnosis, entitled plaintiff to new trial).

B

[2] Concluding as we do that error inhered in the jury charge, we turn to the primary question of this appeal: whether the Hunnicutts are entitled to a new trial. We note at the outset that both parties have analyzed this case under Appellate Rule 10(b)(2), which rule undeniably requires that jury instructions be objected to in order for a party to preserve its right to challenge them on appeal. *See State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982) (Rule 10(b)(2) is mandatory, not directory). However, this appeal does not involve a direct challenge by the Hunnicutts to the propriety of the jury instructions. Rather, this case is an appeal from an order granting a Rule 59 motion for a new trial. The trial judge's granting of a motion for a new trial may only be reversed upon a showing of an abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). No precise test has been developed for determining abuse, and it is the rare case in which this discretionary grant will be disturbed on appeal. *See id.* However,

> [w]hen a Judge presiding at a trial below grants or refuses to grant a new trial because of some question of 'law or legal in-

> ference' which [the judge] decides, and either party is dissatisfied with [the] decision of that matter of law or legal inference, [t]he decision may be appealed from, and we may review it.

Id. at 483, 290 S.E. 2d at 603 (quoting *Brink v. Black*, 74 N.C. 329, 329 (1876)). The trial judge's grant of a new trial was expressly premised on the effect of *Wall v. Stout* on these proceedings. Thus, his order is reviewable by us as a matter of law.

In making our analysis, we emphasize that this case does not involve a retroactive application of *Wall v. Stout*. Instead, we are called upon to determine if the trial judge properly awarded a new trial when the authority upon which he based his charge had been overruled immediately before the charge was given, even though counsel failed to object to the charge. We conclude that not only did the trial judge have the discretion to award a new trial, but that in these circumstances, he was required to.

[3] When *Wall v. Stout* was filed on the morning of 2 February 1984 at 11:24 a.m., it became the law in North Carolina. It is elementary that a case becomes binding authority upon filing, not upon publiction in the advance sheets or in the reporters or upon discovery by counsel or judge. *See State v. Riven*, 299 N.C. 385, 261 S.E. 2d 867 (1980) (filing date of opinion used in giving prospective application). Simply stated, at the time the jury was charged, they were instructed pursuant to legal principles no longer the law in this State. In our opinion, the decision to award a new trial was not a mere permissible exercise of discretion; it was the only decision at which the trial judge could properly arrive.

Our decision receives solid support from the policy reasons underlying Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, and its federal counterpart, Rule 51 of the Federal Rules of Civil Procedure. According to our Supreme Court, the purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). *Accord, Wall v. Stout*. Likewise, it has been said that Federal Rule 51 "was designed to prevent unnecessary new trials caused by errors in

instructions that the district court could have corrected if they had been brought to its attention at the proper time. . . . The rule was not intended to require pointless formalities." *Robinson v. Heilman*, 563 F. 2d 1304, 1306 (9th Cir. 1977) (per curiam) (citations omitted). *Accord Brown v. AVEMCO Inv. Corp.*, 603 F. 2d 1367 (9th Cir. 1979) (where plaintiff failed to object and trial court "fully aware" of plaintiff's position, "[t]o preclude review of the trial court's instructions . . . would exalt form over substance with injustice to plaintiffs"). *See also Lang v. Texas & Pac. Ry. Co.*, 624 F. 2d 1275 (5th Cir. 1980).

Robinson v. Heilman presented a fact situation similar to the one before us. In *Robinson*, the lower court instructed the jury based on authority that was overruled while the case was on appeal. The plaintiffs argued that Rule 51 barred the defendants from contending that the instructions were erroneous. The Ninth Circuit disagreed:

> No exception is required when it would not have produced any results in the trial court because 'a solid wall of Circuit authority' then foreclosed the point. . . . '[W]ere we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on the then-settled principles out of hope that those principles will be later overturned.'

Robinson v. Heilman, 563 F. 2d at 1307 (quoting *United States v. Scott*, 425 F. 2d 55, 57-8 (9th Cir. 1970)).

In this case, it is obvious that any objection lodged by the Hunnicutts would have been unavailing. The trial judge instructed the jury in accordance with what to him was still established law. *See Wall v. Stout*, 310 N.C. at 190, 311 S.E. 2d at 576 (charge "nearly in precise conformity with the pattern jury instructions and our prior case law"). Both court and counsel were understandably unaware that the law had changed: it would be unreasonable to expect either to be informed of such changes in the law when they occurred only hours before the jury was charged. And while we encourage the practicing bar to take responsibility for changing the law by challenging instructions they believe to be incorrect or unjust, under the circumstances of

this case they are not to be penalized for failing to object to instructions which reflect the controlling law of the jurisdiction.

III

In summary, we conclude that the jury instructions were erroneous under the controlling law stated in *Wall v. Stout.* We further conclude that since *Wall v. Stout* was filed the very day of the charge conference, and the day before the jury was charged, both counsel and court lacked a realistic opportunity to apprise themselves of the holding in that case. Under these circumstances, although plaintiffs did not object to the jury instructions, it was not error for the trial court to grant a new trial on the grounds that the jury had been erroneously charged.

Affirmed.

Judges PHILLIPS and EAGLES concur.

HOSPITAL GROUP OF WESTERN NORTH CAROLINA, INC. v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 8410DHR1194

(Filed 6 August 1985)

1. **Constitutional Law § 1.1; Hospitals § 2.1— certificate of need statute—constitutionality not properly before the court**

The constitutionality of the certificate of need statute, G.S. 131E-175 *et seq.*, was not properly before the court where the hearing officer and the director of the Division of Facility Services had appropriately declined to decide the issue because they lacked authority to rule on constitutionality. A party who seeks to challenge the constitutionality of a statute such as this must bring an action pursuant to the Declaratory Judgment Act. G.S. 1-253 *et seq.*, G.S. 131E-188(b).

2. **Hospitals § 2.1— denial of certificate of need—whole record test—findings supported by evidence**

Respondent's findings of fact regarding the review criteria set forth in G.S. 131E-183 were supported by competent, material and substantial evidence under the whole record test.

APPEAL by petitioner from the Division of Facility Services of the North Carolina Department of Human Resources. Order en-

tered 24 September 1984. Heard in the Court of Appeals 4 June 1985.

Petitioner Hospital Group of Western North Carolina, Inc., (hereinafter HGA) applied to the Certificate of Need Section (hereinafter Section) of the Department of Human Resources for a certificate of need to construct a psychiatric hospital with private funds in Morganton. The Section rejected petitioner's request stating, among other things, that the construction of such a hospital would be in excess of bed need in that particular geographic area.

Petitioner requested a hearing which was held on 8 and 9 May 1984, before a hearing officer. On 8 May 1984, petitioner filed a motion that the hearing officer declare G.S. 131E-175, *et seq.*, the certificate of need statute unconstitutional. After making extensive findings of fact and conclusions of law, the hearing officer recommended "that the application for a certificate of need . . . be denied," and concluded "as a matter of law that she [was] without authority to rule on the constitutionality of the certificate of need law . . ." and recommended that petitioner's motion to have the statute declared unconstitutional be denied.

Petitioner requested oral argument, which was held before the Director of the Division of Facility Services (hereinafter Director) on 12 September 1984, which rendered a final agency decision upholding the denial of the certificate of need and stating that "[p]etitioner's motion to declare the Certificate of Need Law unconstitutional is denied." On 4 October 1984, petitioner appealed the final agency decision.

Attorney General Thornburg by Associate Attorney General Gayl M. Manthei and Assistant Attorney General John R. Corne for respondent-appellee.

Redmond, Stevens, Loftin & Currie, P.A. by Thomas R. West; and Herbert L. Hyde for petitioner-appellant.

PARKER, Judge.

On appeal, petitioner presents two questions for review: (i) whether G.S. 131E-175, *et seq.*, is constitutional, and (ii) whether certain findings of fact and conclusions of law are supported by the evidence.

[1] Petitioner contends that G.S. 131E-175, *et seq.*, is unconstitutional and notes that our Supreme Court, in *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973), struck down the former certificate of need law, codified at G.S. 90-291, *et seq.*, because it constituted a deprivation of liberty in violation of Article I, § 19 of the North Carolina Constitution. After *Hospital* was decided and after Congress passed the National Health Planning and Resource Development Act of 1974 requiring a state certificate of need program as a prerequisite to obtaining federal health program financial grants, our General Assembly enacted G.S. 131E-175, *et seq.*, in 1977. Petitioner urges this Court to strike down this statute as unconstitutional based on the *Hospital* decision. However, the constitutional question is not properly before this Court.

The appeal of a final agency decision of the Division of Facility Services is controlled by G.S. 131E-188(b) (amended 1 October 1984), which in pertinent part provides:

> Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a).

Under this statute, as amended, this Court is the proper forum only for review of "all or any portion of any final decision."

In our view the denial of petitioner's motion was not a final decision on the constitutional issue. Appellate courts "will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564, 89 S.E. 2d 129, 130 (1955). The record clearly reflects that the hearing officer determined that she lacked the authority to rule on the constitutionality of the law and denied petitioner's motion to that effect. The final decision from which petitioner appealed also denied petitioner's motion to declare the law unconstitutional. These agency officials appropriately declined to decide the issue for the reason that they lacked authority to rule on the constitutionality of this law. As stated in *Insurance Co. v. Gold*, 254 N.C. 168, 173, 118 S.E. 2d 792, 796 (1961), "[a]dministrative boards have only such authority as is properly conferred upon them by the Legislature.

The question of constitutionality of a statute is for the judicial branch."

By amending G.S. 131E-188(b), the Legislature has opted to bypass the superior court in a contested certificate of need case, and review of a final agency decision is properly in this Court. However, a party who seeks to challenge the constitutionality of a statute such as this must bring an action pursuant to G.S. 1-253, *et seq.*, the Declaratory Judgment Act. *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971). A statute may be declared unconstitutional "in a properly constituted action under the Declaratory Judgment Act when a specific provision of a statute is challenged by a person directly and adversely affected thereby." *Id.* at 562, 184 S.E. 2d at 264. Having determined that the constitutional question is not properly before this Court, we now examine petitioner's remaining assignments of error.

[2] The scope of review of an agency decision is the "whole record" test. Under this test, "[t]he findings of fact of an administrative agency are conclusive if they are supported by competent, material and substantial evidence when the record is reviewed as a whole." *Forsyth County Bd. of Social Services v. Division of Social Services*, 72 N.C. App. 645, 647, 325 S.E. 2d 47, 49 (1985). This includes evidence which supports and evidence which detracts from the agency decision. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). The Supreme Court, in *In re Rogers*, 297 N.C. 49, 65, 253 S.E. 2d 912, 922 (1979), stated: "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."

In order to qualify for a certificate of need, a petitioner must prove that the proposed project conforms to certain review criteria set forth in G.S. 131E-183, and certain state and federal regulatory review criteria. Respondent found that HGA did not conform to these criteria. Although set out in several separate assignments of error, the petitioner contends the respondent erroneously determined that (i) to build the facility proposed by HGA would be in excess of the need for such a hospital in that geographic area, (ii) HGA had demonstrated insufficient support for the proposed hospital from the providers of mental health serv-

ices in the area, (iii) to build the proposed hospital would result in unnecessary expenditures, (iv) to build the proposed hospital would impact negatively on the operational efficiency of other providers of psychiatric services, (v) the medically underserved population in the proposed services area would not have adequate physical access to the proposed hospital, and (vi) there was no need for the proposed hospital because competition does not appropriately allocate the supply of inpatient health services and therefore must be regulated. We consider each of these assignments separately as follows:

(i) Petitioner contends the Director erred in determining that the proposed services were in excess of the identified need for these services. The parties stipulated that the adjusted projected number of psychiatric beds needed for that entire geographic area was eighty-nine. Petitioner contends that its proposed hospital was not in excess of need since the sixty beds it applied for was less than the eighty-nine needed. Respondent counters this by asserting that the eighty-nine bed need was for an area which covered twenty-nine counties in Western North Carolina, and that the area petitioner proposed to serve encompassed only eleven of those counties. Respondent's methodology indicated that there was already an excess of five beds in that eleven county area. Although respondent chose to limit the proposed service area to the eleven county area indicated in petitioner's application rather than to the entire twenty-nine county area as it could have done, there was substantial evidence from which the Director could find that petitioner's proposed facility would exceed the projected bed need in that area.

(ii) Petitioner contends the Director erred in determining that there was insufficient support for the proposed hospital from the providers of mental health services in the area. The parties agree that support for the facility is not determinative of the need for the facility, but that support for the facility reflects solely upon the financial feasibility of the proposal. Respondent asked petitioner for letters from "physicians, community mental health centers, schools, churches, the court systems and other groups/individuals who could affect the projects [sic] success." Respondent received eight letters of support. None of these letters were from schools or from the courts, and all of the letters received were from only one county out of the twenty-nine county area. There-

fore, there was substantial evidence to support the Director's determination.

(iii) Petitioner contends the Director erred in finding that the proposed hospital would result in unnecessary expenditures. Petitioner is particularly concerned by the fact that this finding was made, yet the Section found that it was "without sufficient information and or knowledge to formulate an answer," as to what expenditures would be "unnecessary." The respondent asserts that when the Legislature enacted G.S. 131E-175, it determined that excess capacity causes unnecessary expenditures and that respondent is not charged with determining in each case which proposed expenditures would be unnecessary. Given the findings of fact made by the Legislature in G.S. 131E-175, the Director's finding was not erroneous.

(iv) Petitioner contends the Director erred in determining that approval of the proposed hospital would impact negatively on the operational efficiency of other providers of psychiatric services. Respondent contends that the development of services considered to be in excess of need results in the underutilization of existing and proposed services which leads to higher costs and charges for such services, and that by enacting G.S. 131E-175, the Legislature determined that excess capacity results in a negative impact on costs and charges. Petitioner failed to present any evidence to the contrary on this issue.

(v) Petitioner contends that the Director erroneously determined that the medically underserved would not have physical access to the proposed services. Petitioner argues that handicapped and Willie M patients will be provided for and that it will serve the medically indigent population. Respondent did not deny the certificate because of the lack of proposed available services to the underserved population. Rather, respondent contends that because petitioner failed to demonstrate that it would receive support from mental health care providers, that people in need of such care will not be referred to the facility, thereby creating a physical access barrier to some medically underserved individuals. This finding was based on substantial evidence.

(vi) Petitioner contends the Director erred in determining that there was no need for the proposed facility. In 42 U.S.C. § 300K-2(b), Congress determined that competition does not ap-

propriately allocate the supply of inpatient health services, and such services must be regulated. Respondent asserts that the Legislature, in enacting G.S. 131E-175, determined this to be true, and that petitioner failed to present any evidence to the contrary. In the absence of evidence to the contrary, the Director's determination must be upheld.

We have carefully examined the record, briefs, transcript and the exhibits submitted in this matter. "Once all the competent evidence in the record has been examined, the reviewing court must decide if it is substantial." *Thompson, supra.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Commissioner v. Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977), and "is more than a scintilla or a permissible inference." *Commissioner v. Automobile Rate Office*, 287 N.C. 192, 205, 214 S.E. 2d 98, 106 (1975). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson, supra.*

Based on the foregoing principles, we hold that the findings of fact were supported by competent, material and substantial evidence.

Affirmed.

Judges ARNOLD and MARTIN concur.

EDNA AUSTIN BRENDLE v. SHENANDOAH LIFE INSURANCE CO.

No. 8421SC1069

(Filed 6 August 1985)

1. Insurance § 51— accidental death insurance—time limitation clause—not void as against public policy

A provision that accidental death benefits would be payable only if death occurred within 90 days of the accident was not void for reasons of public policy.

2. Insurance §§ 8, 51— accidental death coverage—waiver of time limitation—summary judgment improper

A provision that accidental death benefits would be payable only if death occurred within 90 days of the accident was a matter of forfeiture rather than of coverage because it did not create new risks for the insurer but merely extended a condition of existing coverage; therefore, a genuine issue of fact existed as to whether the insurer waived the 90-day clause and summary judgment for defendant insurer was improper.

3. Insurance §§ 16, 67.2— accidental death benefits—group policy—waiver of premiums

Summary judgment for defendant insurer as to accidental death benefits was not proper where a group life insurance policy did not lapse when payment of premiums ceased but was continued so long as proof of total disability was renewed each year and the policy and a letter from defendant to the insured regarding extension of coverage were silent as to whether the extension included the accidental death and dismemberment clause.

APPEAL by plaintiff from *Wood (William Z.), Judge.* Judgment entered 23 July 1984, Superior Court, FORSYTH County. Heard in the Court of Appeals 9 May 1985.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by G. Gray Wilson and Leon E. Porter, Jr., for the plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and William McBlief for the defendant appellee.

COZORT, Judge.

Plaintiff filed a complaint seeking to recover double indemnity accidental death benefits under a group life insurance policy for the accidental death of her husband. Plaintiff's husband was involved in a truck accident which rendered him a quadriplegic until his death three years later. Defendant answered that nothing was owed under the accidental death coverage because death did not occur within 90 days of the accident as stipulated in the policy. Defendant moved for summary judgment claiming the insurance policy did not provide the coverage claimed by the plaintiff. The court entered summary judgment in favor of defendant and dismissed the action. We find summary judgment inappropriate in this case.

Plaintiff was the beneficiary of a group life insurance policy held by her husband's employer on his life. Included in the cover-

age was an accidental death and dismemberment provision which provided, "If an employee, while insured . . . under this policy, sustains bodily injuries solely through violent, external and accidental means and within ninety days thereafter suffers any of the losses specified . . . as a direct result of such bodily injuries and independently of all other causes, [insurer] will pay the amount specified for such loss."

Plaintiff's husband, Kenneth E. Brendle, was involved in a truck accident on 30 May 1980 which left him a quadriplegic and eventually brought about his death 34 months later. On 3 September 1980, 96 days after the accident, Brendle's left eye was surgically closed because of damage incurred secondary to injuries received in the accident. Loss of an eye was compensable under the policy.

Husband's employer discontinued premium payments on the policy on 1 June 1981. On 1 July 1981, defendant sent a letter to plaintiff's husband giving notice that premium payments had ceased. The letter stated that the insurer had notice of the husband's total disability and the insurer would extend the group life insurance coverage for one year. The letter instructed plaintiff's husband that, if insurer received written proof of continuing total disability by the anniversary of the date payments were discontinued, it would extend the group life insurance coverage for another year. Upon proof of continuing total disability, coverage could be extended for successive periods of one year each.

On 30 September 1981, plaintiff's husband filed a claim for the loss of his eye which had occurred more than a year before the claim was filed. Even though the surgery on the eye was performed 96 days after the accident and the claim was filed after defendant gave notice of waiver of premiums, defendant on 21 December 1981, paid $12,150.00 on the claim. On 3 April 1983 husband died and plaintiff gave notice and proof of loss to defendant. Defendant paid plaintiff $27,000.00 in ordinary life insurance under the group life insurance policy without objection; however, it refused to pay any sum under the accidental death provision.

Plaintiff filed suit claiming that the total policy was in full force at the time of her husband's death and that she was due an additional sum under the accidental death provision of the policy. Defendant answered by denying any additional liability under the

policy, claiming that the accidental death coverage had ceased when employer had ceased making premium payments and that her husband's death was not compensable under the accidental death provisions because his death had occurred outside the 90-day limit specified in the policy. After extensive discovery defendant filed a motion for summary judgment claiming it was entitled to judgment as a matter of law because the policy did not provide the coverage plaintiff claimed. At the hearing on the motion plaintiff submitted an affidavit in which decedent's physician stated that Brendle had died from complications which "resulted directly and independently from injuries sustained in the motor vehicle accident on May 30, 1980." On 23 July 1984, the court entered summary judgment for defendant dismissing the action. Plaintiff appealed.

[1] Plaintiff asks us to rule that summary judgment was improper in this case because provisions that accidental death benefits are payable only if death occurs within 90 days of the accident are void for reasons of public policy. Plaintiff claims that the purpose behind such time limitations is to protect the company from having to pay where the passage of time makes the determination of death difficult. Here, according to plaintiff, there is no question that decedent died as the result of his accident which had occurred thirty-four months earlier, and, therefore, there is no need to protect insurer from a questionable claim. Citing supporting case law from three other jurisdictions, plaintiff argues that to enforce the 90-day limit when there is no question about the cause of death would operate as an arbitrary forfeiture of the coverage the policy was designed to provide. *See National Life and Accident Insurance Co. v. Edwards*, 119 Cal. App. 3d 326, 174 Cal. Rptr. 31 (1981); *Karl v. New York Life Ins. Co.*, 139 N.J. Super. 318, 353 A. 2d 564 (1976); *Burne v. Franklin Life Insurance Co.*, 451 Pa. 218, 301 A. 2d 799 (Pa. 1973).

Defendant answers plaintiff's argument by pointing out that only those three jurisdictions have disallowed time limits on accidental death coverage while the vast majority of jurisdictions, like North Carolina, uphold the time limitation clauses as reasonable. Defendant points out that these limits serve several purposes among which are the avoidance of possible disputes between beneficiaries and insurers as to cause of death and that

insurers are able to fix premiums which are fair to insured and insurer.

Our courts have approved limitations in policies which restricted covered losses to those which occurred 90 days within the date of the accident. *Huffman v. Insurance Co.*, 264 N.C. 335, 141 S.E. 2d 496 (1965). The courts reason that an insurer must set out the specific types of loss covered and the time limit within which loss must occur in order to determine a reasonable premium rate. *Parker v. Insurance Co.*, 259 N.C. 115, 130 S.E. 2d 36 (1963). The time limitation clauses which have been approved by North Carolina appellate courts have not been on accidental death provisions, as we have here; however, the rationale remains the same. Thus, we decline to hold the 90-day limitation void for reasons of public policy. We also note that insurance policies and premium rates must be approved by the North Carolina Commissioner of Insurance. While such approval is not conclusive upon the courts, it is entitled to consideration when an insured contests an insurance clause on public policy grounds. *See Clark v. Insurance Co.*, 193 N.C. 166, 136 S.E. 291 (1927).

[2] Plaintiff next argues that summary judgment was improper because an issue of fact remains as to whether defendant waived its right to enforce the 90-day limitation. Defendant paid a claim outside the 90-day limit for the loss of an eye under the same coverage as the current claim, according to plaintiff, and this constituted the waiver of a forfeiture provision (the 90-day clause) in the policy.

Defendant counters that while waiver and estoppel allegations present fact questions inappropriate for summary judgment, there is no such issue here because waiver and estoppel do not apply to policy provisions concerning coverage. Defendant continues that to disallow the 90-day clause would give plaintiff coverage which was not provided in the policy; therefore, the 90-day provision is a matter of coverage, not forfeiture, and cannot be waived absent an express agreement supported by new consideration. In addition defendant points out that even if waiver could be found, decedent's employer ceased making premium payments nearly two years before decedent's death, and the accidental death coverage had terminated because there was no express provision in the policy which allowed for its extension.

An insurer may be found to have waived a provision or condition in an insurance policy which is for its own benefit. *Brandon v. Insurance Co.*, 301 N.C. 366, 271 S.E. 2d 380 (1980). Implied waiver occurs when the insurer acts in a manner inconsistent with an intention to enforce strict compliance of the contested provision, *id.*, and the insured is naturally led to believe that the right has been intentionally given up. *Thompson v. Insurance Co.*, 44 N.C. App. 668, 262 S.E. 2d 397, *cert. denied*, 300 N.C. 202, 269 S.E. 2d 620 (1980). Although waiver and estoppel have been applied to nearly every area in which an insurer may deny liability, most courts give voice to the proposition that waiver and estoppel cannot be used to create coverage which is nonexistent or expressly excluded from a policy. *Currie v. Insurance Co.*, 17 N.C. App. 458, 194 S.E. 2d 642 (1973). The essential question which must be answered when an issue of waiver or estoppel is raised is whether the contested provision is a matter of forfeiture, to which the principles apply, or a matter of coverage, where any change in terms must be by express agreement supported by new consideration. *Id.* The general rule enunciated by our courts is that if the provision's subject matter is within the terms of the contract, it is a matter of forfeiture. If, however, the provision creates new terms or creates a new risk which is expressly excepted or excluded by the policy, the provision is one of coverage. *Durham v. Cox*, 65 N.C. App. 739, 310 S.E. 2d 371 (1984). In North Carolina it would appear that the only provisions which have thus far been determined to be conditions of coverage are age limitations in life insurance policies, *Currie v. Insurance Co., supra*, and clauses which exclude flight crew members from coverage if their death occurs while they are working or training on a flight. *Pearce v. American Defender Life Insurance Co.*, 74 N.C. App. 620, 330 S.E. 2d 9 (1985).

In the present case, we are persuaded by defendant's own actions that it considered the 90-day clause subject to waiver. Plaintiff's husband filed a claim for the loss of his eye which had occurred more than 90 days after the accident. Although defendant maintains that the actual loss preceded the 3 September 1981 operation and was within the 90-day period, there is no evidence in the record which supports their claim. We can only assume that the compensable loss occurred more than 90 days after the accident. That defendant was willing to extend coverage to ac-

commodate the loss of the eye would seem to support plaintiff's contention that the primary purpose of the clause was not to limit coverage absolutely, but was protection for the insurer to assure them that they only compensated loss due to the accident. We find that the 90-day clause was a matter of forfeiture rather than coverage because it did not create new risk for the insurer but merely extended a condition of existing coverage. Therefore, a genuine issue as to whether the insurer waived the 90-day clause exists between the parties. Because issues of waiver and estoppel are mixed questions of law and fact which must be submitted to a jury, we hold that summary judgment for the defendant was improper because a genuine issue of material fact existed between the parties.

[3] Finally, with regard to defendant's contention that coverage on the accidental death provision had lapsed because the employer had failed to continue premium payments, we find nothing in the record which compels us to so find as a matter of law. It is well established in this State that an insurance company may waive its right to assert forfeitures of an insurance policy for the nonpayment of premiums. *Thompson v. Insurance Co., supra.* In the present case, the policy did not lapse when payment of premiums ceased but was continued so long as proof of total disability was renewed each year. The policy and the 1 July 1981 letter from defendant to insured are silent as to whether the extension included the accidental death and dismemberment clause.

Evidence is sufficient to go to the jury and defeat a motion for summary judgment when the evidence is sufficient to permit, but not compel, a favorable verdict. *Brandon v. Insurance Co., supra.* Because genuine issues of fact concerning waiver or estoppel and continuation of coverage exist between the parties, and because plaintiff has presented sufficient evidence which would allow her a favorable verdict, we find summary judgment to be inappropriate in this case.

Reversed.

Judges WELLS and JOHNSON concur.

JAMES L. SARTIN, JR., D/B/A UNITED CONSTRUCTION v. DEWEY G. CARTER AND GAIL M. CARTER

DEWEY G. CARTER AND WIFE, GAIL M. CARTER v. JAMES L. SARTIN, JR., D/B/A UNITED CONSTRUCTION, UNITED CONSTRUCTION COMPANY, AND BERWICK DEVELOPMENT CORPORATION

No. 8415SC1277

(Filed 6 August 1985)

1. **Contracts § 6.1— general contractor—license expired—no further recovery**

A general contractor was not entitled to recover any further amounts for work performed in constructing a residence for defendants, and summary judgment was properly entered for defendants, where defendants' forecast of evidence showed that plaintiff was licensed when he began construction on 10 October 1978, that his license expired on 31 December 1978, that he was not licensed at any time thereafter while performing under either the original contract or a settlement agreement, and that he was fully paid for work performed between 10 October and 31 December 1978, and where plaintiff contractor made no forecast of evidence to the contrary. G.S. 87-10.

2. **Compromise and Settlement § 1.1; Contracts § 6.1— contractor's work after license expired—settlement agreement invalid**

A settlement agreement for illegal work performed by a general contractor while his license was expired was invalid as being contrary to public policy and could not be the basis of recovery by the contractor. G.S. 87-13.

3. **Contracts § 6.1— unlicensed contractor—no affirmative recovery—setoff to sums due owners**

Although an unlicensed general contractor had no right affirmatively to recover under his agreements with the owners, he could offset, as a defense against sums due the owners, any amounts that would otherwise be due him under their agreements so as to reduce in whole or in part their claims against him.

APPEAL by James L. Sartin, Jr., d/b/a United Construction, from *McLelland, Judge*. Judgment entered 18 July 1984 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 6 June 1985.

James L. Sartin, Jr., d/b/a United Construction, seeks in these two actions to recover from Dewey and Gail Carter monies allegedly due because of his construction of improvements on land owned by the Carters. On or about 30 August 1978, the Carters purchased a tract of land from Berwick Development Corporation, the president of which was James L. Sartin, Jr. Sartin, individual-

ly, was also engaged in business as a building contractor. The Carters at the same time entered into a written contract with Sartin, d/b/a United Construction, for construction of a residence on the property for the sum of $112,000.00. Sartin began construction of the residence on 10 October 1978. During the course of construction, disputes arose over certain changes requested by the Carters and delays in construction, for which each of the parties blame the other. In February 1980 Sartin stopped work on the dwelling because plaintiffs refused to authorize payment of his draw requests.

In July 1980, the Carters instituted civil action No. 80CVS-1013 seeking to recover damages arising from Sartin's alleged breach of the contract. Sartin answered and counterclaimed seeking to recover for labor and materials furnished to the project, plus loss of anticipated profits, or, in the alternative, to be allowed to complete the project and recover compensation due him under the contract. In August 1980, Sartin instituted civil action No. 80CVS1135 seeking to recover the balance of funds due him on construction draws for work completed under the contract and to have the judgment declared a lien on the property.

On 20 January 1981, the parties entered into an "Agreement and Mutual Release" in settlement of their dispute wherein they agreed that Sartin would complete construction of the improvements for the total contract price of $127,268.28. The parties further agreed that upon completion of the conditions set forth in the agreement, they would grant to each other mutual releases and voluntarily dismiss with prejudice the actions pending between them, in consummation of the settlement agreement. Apparently Sartin completed construction of the residence in May 1981, but the Carters declined to authorize payment to him of the full amount to which he claimed he was entitled under the "Agreement and Mutual Release."

Further pleadings were filed in the actions pending between the parties in which the Carters alleged that Sartin was barred from any recovery because he was a general contractor subject to the licensing requirements of this state and was not properly licensed as such at times material to the actions, that Sartin had been paid $102,069.98 pursuant to the original contract and the settlement agreement, that such amount was in excess of that to

which Sartin was entitled, and that therefore they were entitled to recover from Sartin the amount of such overpayment as well as other damages. Sartin filed responsive pleadings in which he admitted that he was a general contractor subject to the statutory licensing requirements and asserted that he was licensed when the original contract was entered. He further alleged that the Carters had waived their right to certain damages sought by them by entering into the settlement agreement; that pursuant to the settlement agreement, the Carters had accepted his undertaking to complete the improvements as an accord and in full satisfaction and discharge of their claims; that the Carters had breached the settlement agreement; and that he was entitled to recover the relief he had previously requested as well as damages resulting from the Carters' breach of the settlement agreement.

The Carters filed a motion for summary judgment on the claims and counterclaims asserted by Sartin in the two actions, along with supporting documents and affidavits. The affidavit of H. M. McCown, custodian of the records of the North Carolina Licensing Board for General Contractors, showed that in August 1978 when the original contract between the parties was entered, Sartin was licensed as a general contractor limited to single projects with a value not in excess of $125,000.00 in accordance with G.S. 87-1, *et seq.* It further showed that Sartin's license was not renewed for the year 1979, was renewed in March 1980 for the remainder of the year 1980, and was renewed on 18 May 1981 for the remainder of the year 1981.

By order entered 18 July 1984, the trial court granted the motion and entered summary judgment for the Carters on the claims and counterclaims asserted by Sartin. Sartin appealed.

Holt, Spencer, Longest & Wall, by Frank A. Longest, Jr., for appellant James L. Sartin, Jr.

Nichols, Caffrey, Hill, Evans & Murrelle by Lindsay R. Davis, Jr. and Martha T. Peddrick, for appellees Dewey G. Carter and Gail M. Carter.

MARTIN, Judge.

The question presented by this appeal is whether the trial court erred in granting the Carters' motion for summary judg-

ment, dismissing Sartin's claims in No. 80CVS1135 and his counterclaims in No. 80CVS1013. We hold that it did not. 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."

[1] Sartin first contends that the entry of summary judgment for the Carters was error because a genuine issue of fact exists with respect to the amount which he is entitled to recover for work performed while he was duly licensed. He argues that, unlike the unlicensed contractor in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983) who was found to have no right to recover under the construction contract entered by him, he is entitled to recover some amount under the contract because he was licensed when the contract was entered.

In *Brady*, the Supreme Court adopted the rule that a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor and cannot be validated by the contractor's subsequent procurement of a license. *Id.* at 586, 308 S.E. 2d at 331. The court also addressed a contractor's right to recover in a situation such as the present one, stating as follows:

> [I]f a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate our statutes [G.S. 87-1, *et seq.*], the contractors themselves bear both the responsibility and the blame.

Brady, 309 N.C. at 586, 308 S.E. 2d at 332.

The materials submitted by the Carters in support of their motion affirmatively show that Sartin was licensed when he began construction on 10 October 1978, that his license expired on 31 December 1978 pursuant to G.S. 87-10, that he was not licensed at any time thereafter while performing under either the original

contract or the settlement agreement, and that he was fully paid for the work performed between 10 October 1978 and 31 December 1978. The record contains no forecast of evidence by Sartin to the contrary. It appears from these undisputed facts that Sartin has been paid for all work performed while he was licensed. Thus, as a matter of law, he is not entitled to recover any further amounts for work performed in constructing the improvements for the Carters. *See Brady, supra.* For this reason, we find Sartin's argument meritless.

[2] Sartin next contends that the Carters were not entitled to summary judgment on his claims because a genuine issue of fact exists concerning his right to recover under the "Agreement and Mutual Release" executed by the parties. He argues that this agreement is a compromise and settlement agreement and therefore operates as a merger of the antecedent claims included therein, and that the Carters, by signing the settlement agreement and accepting its benefits waived all other claims and defenses they may have had against him including the defense of his failure to comply with the licensing requirements.

Although the law favors the resolution of disputes through compromise and settlement, *see Dixie Lines v. Grannick*, 238 N.C. 552, 78 S.E. 2d 410 (1953), it is the policy of the law to uphold and enforce compromise and settlement agreements only if they are fairly made and are not in contravention of some law or public policy. *See* 15A Am. Jur. 2d *Compromise and Settlement* Sec. 5, at 777 (1976). If a settlement agreement is based on an antecedent claim or transaction which is undisputedly illegal or contrary to public policy, the agreement is considered invalid on the ground of illegality as well as a lack of consideration. 15A Am. Jur. 2d *Compromise and Settlement* Sec. 28, at 800 (1976). Commonly, such agreements are said to be contrary to public policy instead of, or in addition to, being called illegal. *Id.* at note 53. Courts generally will not permit the law or any judicial machinery to be used in assisting the enforcement of such an agreement, nor will it permit a party to maintain an action founded on the agreement. 15A Am. Jur. 2d *Compromise and Settlement* Sec. 28, at 801. The usual effect of invalidation of a settlement agreement is to restore the parties to their antecedent positions. *Id.* at Sec. 40.

G.S. 87-13 makes it a misdemeanor for one to practice or attempt to practice general contracting in this state while not licensed in accordance with G.S. 87-1, *et seq.*, or while using an expired license. The work performed by Sartin for the Carters for which he seeks recovery was performed while his license was expired and thus was performed illegally. Accordingly, it would be contrary to public policy to allow him to recover for such work. *See Brady v. Fulghum, supra.* Since Sartin's claims are based on illegal conduct and thus are contrary to public policy, the settlement agreement entered into by the parties based on those claims is invalid. Thus, Sartin cannot recover under that agreement.

[3] We conclude as a matter of law that Sartin has no right to recover any additional monies from the Carters for work performed by him, under the original contract or the "Agreement and Mutual Release," in constructing the residence. Therefore, the trial court correctly entered summary judgment for the Carters on Sartin's claims and counterclaims. We note, however, that although Sartin has no right to affirmatively recover on his claims and counterclaims, he may offset, as a defense against sums due the Carters, any amounts that would otherwise be due him under their agreements so as to reduce in whole or in part their claims against him. *See Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977), *overruled on other grounds*, 311 N.C. 717, 319 S.E. 2d 607 (1984).

Affirmed.

Judges ARNOLD and PARKER concur.

T. C. STANFORD AND WIFE, PHYLLIS A. STANFORD, AND SILAS CREEK STATION, INC. v. EDWARD P. OWENS AND WIFE, NANCY P. OWENS, J. R. YARBROUGH, AND S. REVELLE GWYN AND ALLEN HOLT GWYN, JR., CO-EXECUTORS OF THE LAST WILL OF SUZANNA R. GWYN

No. 8421SC886

(Filed 6 August 1985)

1. Negligence § 2— sufficient evidence of negligent misrepresentation—no contributory negligence as matter of law

Plaintiffs' evidence was sufficient for the jury on the issue of whether defendants negligently misrepresented that land they developed and sold to plaintiffs, which had previously been used for a sanitary landfill, was suitable for plaintiffs' restaurant building where it tended to show: defendants graded the land and filled it in where necessary; when plaintiffs asked defendants about the stability of the soil, defendants stated it was "virgin" soil and they would have an engineer verify it; defendants' engineer tested the soil in the lot plaintiffs bought and in two lots adjacent to it and gave defendants a written report which showed that no garbage was found under plaintiffs' lot at depths of 20 feet in the front and 10 and 15 feet in the back, but that garbage was found at depths of only 15 feet on the adjacent lots; at defendants' request, the engineer prepared a separate report for each of the three lots tested, and the only report that defendants gave plaintiffs was of the testing done on their lot; plaintiffs completed the purchase and erected a restaurant building on the lot; after plaintiffs' building began to settle, their engineers tested the soil and found garbage under the lot at depths of 17 to 27 feet; and information contained in the first report prepared by defendants' engineer about garbage found under the adjacent lots would have alerted plaintiffs' architect or builder to the necessity of testing their lot further before putting a building on it. Evidence that plaintiffs knew that a landfill had been conducted on the tract and that plaintiffs' first application for a building permit was denied because a landfill had been located on the tract did not establish that plaintiffs were negligent as a matter of law in failing to investigate the land for themselves before putting a restaurant building on it but presented a question of fact for the jury.

2. Rules of Civil Procedure § 41.1— voluntary dismissal of negligent misrepresentation claim—no right to institute fraud action

The voluntary dismissal without prejudice of plaintiffs' claim for negligent misrepresentation did not give plaintiffs the right to institute an action for fraud within one year of the dismissal even though the fraud claim rested upon somewhat the same allegations made in support of the negligent misrepresentation claim, since a claim for fraud is fundamentally different from a claim for negligent misrepresentation and must be pleaded with particularity. Therefore, the claim for fraud was barred by the three-year statute of limitations of G.S. 1-52 where it was filed seven years after it accrued. G.S. 1A-1, Rule 41(a)(1).

Stanford v. Owens

APPEAL by plaintiffs from *Hairston, Judge.* Judgment entered 9 December 1983 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 April 1985.

This action filed in March 1983 and its forerunner filed in 1977 arose out of a transaction that occurred during the winter of 1975-76, in which the plaintiffs Stanford bought a lot from the defendants Owens and put a restaurant building on it. The lot was part of a larger tract of land, much of which had been used by the City of Winston-Salem as a sanitary landfill. After the tract was obtained by defendants Owens, defendants Suzanna R. Gwyn, now deceased, and J. R. Yarbrough, veteran real estate agents, developed it as business property and handled the sale of the lot that plaintiffs bought. A few months after the restaurant building was completed, so plaintiffs allege, the structure suffered much damage because the land under it was unstable and began to settle. Based upon these events plaintiffs asserted nine claims for relief in the preceding action and upon the defendants' motions under Rule 12(b)(6) of the N.C. Rules of Civil Procedure, all the claims were dismissed by the trial judge for failing to state a claim upon which relief could be granted. On appeal this Court reversed only the dismissal of plaintiffs' claim for negligent misrepresentation, *Stanford v. Owens*, 46 N.C. App. 388, 265 S.E. 2d 617, *cert. denied*, 301 N.C. 95, 273 S.E. 2d 300 (1980), and after the case returned to the trial court plaintiffs moved to amend their complaint to include a claim for fraud. This motion was denied, however, and plaintiffs then moved for and were granted a voluntary dismissal without prejudice, which was entered on 13 November 1981. In filing this action plaintiffs asserted claims for relief against the defendants based on claims for negligent misrepresentation and fraud. Upon defendants' motion, the claim for fraud was dismissed by order of summary judgment and when the claim for negligent misrepresentation was tried a verdict for the defendants was directed at the close of plaintiffs' evidence. Other facts pertinent to our decision are stated in the opinion.

Harrell Powell, Jr., David Crescenzo, and Hafer, Hall & Schiller, by Marvin Schiller, for plaintiff appellants.

Weston P. Hatfield and Carol L. Allen for defendant appellees.

PHILLIPS, Judge.

[1] In the preceding appeal, *Stanford v. Owens, supra,* it was determined that plaintiffs had alleged an enforceable claim for negligent misrepresentation. Thus, the main question raised by this appeal is whether the evidence that plaintiffs presented at trial, when viewed in the light most favorable to them, is sufficient to support the claim stated. We hold that it is and that the verdict against the claim was erroneously directed.

The requirements for an action based on negligent misrepresentation are as follows:

> INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS.
>
> One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, and
>
> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

Restatement of Torts § 552 (1938). *Davidson and Jones, Inc. v. County of New Hanover,* 41 N.C. App. 661, 255 S.E. 2d 580 (1979). In our opinion, the evidence presented, when favorably viewed for the plaintiffs, tends to establish all the foregoing stated requirements and plaintiffs are entitled to have a jury pass on the claim.

In substance, plaintiffs' evidence tends to show that: In developing the entire tract where the sanitary landfill had been, defendants graded the land and filled it in where necessary. While plaintiffs knew that a garbage dump or landfill had occupied part of the tract, they did not know which part, and when

plaintiffs asked defendants about the stability of the lot they were interested in defendants stated that it was "virgin" soil and they would have an engineer verify it. Defendants' engineer tested the soil in the lot plaintiffs bought and in two lots adjacent to it, and gave defendants a written report which showed that no garbage had been found under plaintiffs' lot at depths of 20 feet in the front and 10 and 15 feet depths in the back, but that garbage was found at depths of only 15 feet on the lots contiguous to plaintiffs'. At defendants' request the engineer then prepared a separate report for each of the three tracts tested and the only report that defendants gave plaintiffs was of the testing that was done on their lot. Finding no indication in the report received from defendants that the land was not stable, plaintiffs completed the transaction and erected their restaurant building. Later, after plaintiffs' building began to settle their engineers tested the soil and found garbage under the lot at depths of 17 to 27 feet. These engineers testified that the information contained in the first report prepared by defendants' engineer about garbage being found at 15 feet under the adjacent lots would have alerted plaintiffs' architect or builder to the necessity of testing their lot further before putting a building on it. The evidence also tends to show that defendants specifically instructed their engineer where to drill and how deep. All this evidence, if believed, would warrant a jury concluding, we think, that: In the course of their real estate developing and selling business defendants undertook to supply plaintiffs with information for their guidance in building on the property acquired; in doing so they neglected to include information that tended to show that the land was not suitable for plaintiffs' building; and plaintiffs justifiably relied thereon and suffered harm and damage thereby. Thus, whether the defendants negligently misrepresented that the land was suitable for plaintiffs' building is an issue that the jury should have decided, rather than the court.

Even so, the directed verdict was still proper if plaintiffs' evidence establishes their own contributory negligence, *Beatty v. H. B. Owsley & Sons, Inc.*, 53 N.C. App. 178, 280 S.E. 2d 484, *cert. denied*, 304 N.C. 192, 285 S.E. 2d 95 (1981), as defendants forcibly argue was the case. In support thereof they point to the fact that plaintiffs, along with the public at large, knew that a garbage dump had been conducted on the tract and that when plaintiffs

first applied for a building permit the City of Winston-Salem refused to give it to them for the explicit reason that a "garbage dump" used to be "out there." Having thus been put on their guard with respect to the suitability of the land, so defendants argue, plaintiffs were negligent as a matter of law in failing to investigate the land for themselves before putting their restaurant building on it. Certainly, the evidence presented is sufficient to support a finding of contributory negligence, but viewing the evidence favorably for the plaintiffs we do not believe that such a finding is required. Since defendants filled in and graded the tract involved, apparently knew the nature and condition of plaintiffs' lot, and gave plaintiffs an engineering report which confirmed their representations that the land was solid, we cannot say as a matter of law either that plaintiffs did not rely upon defendants' information or that they had no right to do so. Whether in erecting their building plaintiffs in fact relied upon defendants' information concerning the land, including the engineering report that contained no suggestion that garbage might be under or near the soil involved, and whether plaintiffs acted reasonably in relying thereon, if they did so under the evidence recorded, are questions of fact for a jury to decide.

[2] Plaintiffs also contend that it was error to dismiss their fraud claim. The dismissal was based on the statute of limitations and plaintiffs argue that since the present action was instituted within one year after the voluntary dismissal of the prior action and it "arises from the common nucleus of operative facts which support [their] negligence misrepresentation claim," the claim was timely filed. We disagree and affirm the dismissal.

The statute of limitations for a claim based on fraud is three years, G.S. 1-52, and plaintiffs' claim for fraud is not saved by the fact that it was filed within one year after the voluntary dismissal of the prior action without prejudice. The rule of law governing plaintiffs' contention is contained in Rule 41(a)(1) of the N.C. Rules of Civil Procedure, which in pertinent part provides as follows:

> If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a

stipulation filed under (ii) of this subsection shall specify a shorter time.

Plaintiffs' fraud claim accrued in 1976, but no claim therefor was filed until 1983. Though nine claims were asserted in the 1977 action, none was for fraud; and the claim that was voluntarily dismissed without prejudice less than a year before this action was filed was the claim for negligent misrepresentation, the only claim initially asserted that was then still viable. While, under the circumstances of this case, Rule 41(a)(1) does prevent the negligent misrepresentation claim from being barred by the statute of limitations, nothing in the rule, as we read it, exempts plaintiffs' fraud claim, filed for the first time seven years after it accrued, from the fatal effects of the three-year statute of limitations. Plaintiffs' contention that the fraud claim has in effect been before the court all along, since it rests upon somewhat the same allegations that were made in support of the negligent misrepresentation claim when the action was first filed, though appealing to some extent is nevertheless unavailing. A claim for relief based on fraud is unique, *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957), and must be pleaded with particularity even under our liberal rules of notice pleading. Rule 9, N.C. Rules of Civil Procedure; *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E. 2d 63 (1979). A claim for fraud is fundamentally different from a claim for negligence and in alleging in the first action that defendants had negligently misrepresented the condition of the land plaintiffs did not in effect or otherwise also allege that defendants had defrauded them.

Affirmed in part; reversed and remanded in part.

Judges ARNOLD and COZORT concur.

NORTH CAROLINA ASSOCIATION OF ABC BOARDS, GASTONIA ABC BOARD, BESSEMER CITY ABC BOARD, JOHN ALEXANDER, SR., CITY OF BESSEMER CITY v. JAMES B. HUNT, JR., GOVERNOR OF THE STATE OF NORTH CAROLINA; DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; HEMAN CLARK, SECRETARY OF THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; NORTH CAROLINA ABC COMMISSION; MARVIN L. SPEIGHT, JR., CHAIRMAN OF THE NORTH CAROLINA ABC COMMISSION; HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA

No. 8410SC1057

(Filed 6 August 1985)

1. **Intoxicating Liquors § 1; Taxation § 1— bailment surcharge on distilled spirits —not a tax**

The bailment surcharge on distilled spirits imposed by § 133 of Chapter 761 of the Session Laws of the 1983 General Assembly is not a tax and is therefore not an unconstitutionally enacted or inequitable tax. The cost of liquor enforcement is a burden incident to the privilege of buying spirituous liquors in this state and placing the burden of state liquor law enforcement on the consumers of spirituous liquor is not the imposition of a pecuniary charge to provide revenue for the maintenance and expense of government; moreover, expenditure of revenue generated from the bailment surcharge to operate the ALE Division bears a direct and reasonable relationship to enforcement of alcoholic beverage control laws.

2. **Constitutional Law § 25.1; Intoxicating Liquor § 1— bailment surcharge on distilled spirits—no impairment of contract**

The bailment surcharge on distilled spirits imposed by § 133 of Chapter 761 of the Session Laws of the 1983 General Assembly does not unconstitutionally impair the security of bonds issued to construct a new warehouse in that § 133 makes the surcharge the source of funding for the ALE Division and thereby impairs the security of the bonds. The bondholders have first priority on revenues from bailment surcharges, the surcharges can be increased if necessary, and plaintiff failed to introduce any evidence that the value of the bonds has decreased and that the contract is impaired. Art. 1, § 10, Clause 1 of the United States Constitution.

APPEAL by plaintiff from *Barnette, Judge*. Judgment entered 20 June 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 9 May 1985.

Plaintiffs brought this action seeking a declaratory judgment that Section 133 of Chapter 761 of the Session Laws of the 1983 General Assembly of North Carolina was unconstitutional. In their complaint plaintiffs alleged that in July 1982 the General Assembly enacted Chapter 1285 which established a bailment sur-

charge to be imposed on each case of distilled spirits shipped from the ABC warehouse to ABC stores. The operating budget of the ABC Commission, which had previously been paid from the General Fund, would be paid from the bailment surcharge. Chapter 1285 directed the ABC Commission to set the bailment surcharge at a level sufficient to retire the bonds that were to be issued to pay for building a warehouse and to pay the ABC Commission's operating budget. The ABC Commission set the bailment surcharge at $.66 per case. On 29 December 1982 the ABC Commission sold revenue bonds in the principal amount of $5,550,000 to pay for the warehouse. Plaintiff John Alexander, Sr. is the owner of a $5,000 bond. In the 1983 General Assembly by enactment of Section 133, Chapter 761, this statute was amended to provide that the operating budget of the Alcohol Law Enforcement (ALE) Division of the Department of Crime Control and Public Safety would also be paid out of funds generated by the bailment surcharge. The surcharge was increased from $.66 to $1.70.

Plaintiffs alleged that Section 133 of Chapter 761 is unconstitutional because it imposes a tax and was not "read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days," as required by Article II, Section 23 of the North Carolina Constitution.

Plaintiffs also alleged that Section 133 violates Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution because it delegates the power to set the bailment surcharge to the ABC Commission, and it is not subject to review by the General Assembly. Plaintiffs further alleged that Section 133 violates Article V, Section 2 of the North Carolina Constitution because it is an unjust and inequitable tax, and violates Article I, Section 10, Clause 1 of the United States Constitution in that it impairs the contract between the ABC Commission and the purchasers of bonds.

The trial judge found that plaintiffs North Carolina Association of ABC Boards, Gastonia ABC Board, and Bessemer City ABC Board had no standing and granted defendants' motion to dismiss as to those parties.

On 20 July 1984 the trial judge granted defendants' motion for summary judgment. Plaintiff John Alexander, Sr. appeals.

Attorney General Thornburg by Special Deputy Attorneys General Isaac T. Avery, III and David S. Crump for the State.

Jordan, Brown, Price and Wall by John R. Jordan, Sr. and Joseph E. Wall for plaintiff-appellant.

PARKER, Judge.

Plaintiff assigns error to the trial judge's entry of summary judgment for defendants. We note at the outset that summary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law. *Threatte v. Threatte*, 59 N.C. App. 292, 296 S.E. 2d 521 (1982). In the instant case the facts are undisputed. The only issue is whether the bailment surcharge is unconstitutional.

[1] Plaintiff argues (i) that the surcharge is a tax which is unconstitutional because it was not read "three several times" in the House, and (ii) that it is an unjust and inequitable tax. Both these arguments depend on the bailment surcharge being a tax.

Citing the definition of "tax," *i.e.*, a pecuniary charge or levy enforced by government to raise money for the maintenance and expense of government, plaintiff argues that the bailment surcharge is a tax. Plaintiff emphasizes that before enactment of Section 133, the operating budget for the ALE Division was paid from the general fund, and that the primary function of the ALE Division is enforcement of gambling and drug laws and alcoholic beverage control laws regulating unfortified wine and beer.

The State, on the other hand, relying on *North Carolina Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E. 2d 319 (1965), argues that the bailment surcharge is analogous to a toll or user fee and is not a tax since the surcharge is paid by the consumers of liquor at ABC stores and the revenues go to pay the cost of liquor law enforcement. In *Turnpike*, the appellant argued that the creation of a toll road was imposing a tax on the people of the State, and the session law enacting the toll road was not enacted under the procedure for passing a law which imposes a tax. The Supreme Court disagreed, holding that a tax is levied for

the support of the government whereas a toll is compensation for the use or improvement of property. "Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll." *Id.* at 116-117, 143 S.E. 2d at 325.

We agree with the State that the surcharge is not a tax. Section 133 of Chapter 761 imposes upon liquor only the cost of regulation. Enforcement of the alcoholic beverage control laws is part of the cost of regulating liquor traffic. All local ABC boards are required to pay for liquor law enforcement out of the profits of the local ABC system. G.S. 18B-805. To place the burden of State liquor law enforcement on the consumers of spirituous liquor is not the imposition of a pecuniary charge to provide revenue for the maintenance and expense of government. Just as the cost of building and maintaining a toll road is a burden incident to the privilege of using a toll road, the cost of liquor enforcement is a burden incident to the privilege of buying spirituous liquors in this State. A person purchases spirituous liquors at his option; if he does not purchase it, he does not pay the bailment surcharge. *See Turnpike, supra.*

While ALE agents have broader territorial jurisdiction and are also concerned with policing wine and beer violations, their enforcement functions supplement that of the local ABC officers. Not infrequently violations of drug and gambling laws occur where spirituous liquor and fortified wine are consumed; ALE agents also serve and execute notices, orders and demands relating to spirituous liquor and fortified wine issued by the ABC Commission. By statute, the primary responsibility of both an ABC officer and an ALE agent is the enforcement of the ABC laws and Article 5 of Chapter 90 (The Controlled Substance Act). G.S. 18B-500(b) and G.S. 18B-501(b).

Expenditure of revenues generated from the bailment surcharge to operate the ALE Division bears a direct and reasonable relationship to enforcement of alcoholic beverage control laws. The need for this law enforcement arises out of the sale and distribution of alcoholic beverages, including distilled liquors and fortified wine. The funds do not go to the general maintenance and expense of government. For these reasons the bailment surcharge is, in our view, not a tax, and the authorizing statute, Section 133, Chapter 761, is not unconstitutional on account of the

manner in which it was enacted. Additionally, as it is not a tax, the bailment surcharge is not unconstitutional as an inequitable tax.

[2] Plaintiff argues that the statute is unconstitutional because it violates the contract clause of the United States Constitution. Article I, Section 10, Clause 1 of the Constitution provides as follows:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

Plaintiff argues that originally the ABC Commission covenanted to utilize the bailment surcharge only to pay off the bonds issued to construct a new warehouse. Section 133, however, makes the surcharge the source of funding for the ALE Division and thereby unconstitutionally impairs the security of the bonds. Plaintiff relies on *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed. 2d 92, *rehearing denied*, 431 U.S. 975, 97 S.Ct. 2942, 53 L.Ed. 2d 1073 (1977), to support this proposition. In *United States Trust*, New York and New Jersey had agreed, in 1962, that as long as bonds issued by the Port Authority were outstanding, neither the states nor the Port Authority would pledge Port Authority revenues or reserves for subsidizing rail passenger transportation. In 1974 the 1962 covenant was repealed. The appellant claimed, and the trial court found, that after the covenant was repealed the market price for the Port Authority bonds dropped. The Supreme Court noted that no one could be sure precisely how much financial loss the bondholders suffered because other factors may have influenced the price, and the market may not have fully reacted because of the pending litigation. The Supreme Court held that the covenant had limited the Port Authority's deficits and protected the bondholders; when the covenant was repealed an important security provision had been eliminated and the obligation of the State's contract had been impaired.

In the instant case, plaintiff contends that by funding the ALE Division from the bailment surcharge revenues there will be

less potential revenue for the bondholders. The bondholders, however, have first priority on revenues from bailment surcharges, and the surcharges can be increased if necessary. Plaintiff has failed to introduce any evidence that the value of the bonds has decreased and that the contract is impaired.

In conclusion, we find that the bailment surcharge is not a tax, and that the plaintiff's contract is not impaired. Summary judgment for defendant is

Affirmed.

Judges ARNOLD and MARTIN concur.

CORRENE OWEN MORTON v. CHARLES WILFORD MORTON

No. 8415DC1096

(Filed 6 August 1985)

1. Divorce and Alimony § 30— equitable distribution—military pension

Federal law does not preempt state law concerning equitable distribution of military retirement pay but allows states to treat "disposable" military retirement pay as defined in 10 USCA § 1408(a)(4) as either marital or separate property. Under G.S. 50-20(a) and (b)(1), the trial court had authority to equitably distribute the husband's "disposable" military pension in a divorce action filed on or after 1 August 1983.

2. Courts § 21.8; Husband and Wife § 10— separation agreement—implied intent to apply N. C. law—absence of acknowledgment

Although the parties executed a separation agreement in Maryland, the caption of the agreement reading "North Carolina Guilford County," viewed with the husband's acknowledgment before a certifying officer as required by North Carolina but not by Maryland, reveals an implied intent by the parties to apply North Carolina law to the agreement. Therefore, the separation agreement is invalid under G.S. 52-10.1 and does not bar the wife's claim for equitable distribution where it was not acknowledged by the wife before a certifying officer.

APPEAL by defendant from *J. B. Allen, Jr., Judge*. Order entered 5 July 1984 in District Court, ALAMANCE County. Heard in the Court of Appeals 8 May 1985.

Hemric, Hemric & Elder, P.A., by H. Clay Hemric, Jr. and James F. Walker, for plaintiff appellee.

C. Orville Light for defendant appellant.

BECTON, Judge.

We are asked to decide whether a percentage of the husband's military pension was properly awarded to the wife in an equitable distribution action.

The parties were married on 22 May 1952 and separated in January 1977. On 1 November 1983 the wife, Correne Owen Morton, filed this action seeking alimony *pendente lite*, permanent alimony, an absolute divorce, and an equitable distribution of the parties' marital property. The absolute divorce was granted on 19 January 1984. The wife took a dismissal with prejudice against the husband on her claims for alimony *pendente lite* and permanent alimony in March 1984. After a hearing on the equitable distribution claim in May 1984, the trial court awarded the wife whatever percentage of the husband's "disposable" military pension yields 35% of his gross military pension. From the 5 July 1984 equitable distribution order, the husband appeals. We affirm.

I

[1] The husband contends that his military pension is not subject to equitable distribution. We hold that it is.

The North Carolina Equitable Distribution Act, as codified at N.C. Gen. Stat. Secs. 50-20 and -21 (1984), was enacted in 1981 to enable an equitable distribution of the parties' marital property upon an absolute divorce. G.S. Sec. 50-20(a); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985); 1981 N.C. Sess. Laws Ch. 815. Under the 1981 version of the Act, vested pension and retirement rights were classified as separate property, G.S. Sec. 50-20(b)(2) (Supp. 1981). Thus, they were not subject to equitable distribution. G.S. Sec. 50-20(a) (Supp. 1981). A 1983 amendment to the Act reclassified vested pension and retirement rights as marital property. G.S. Sec. 50-20(b)(1) (Supp. 1983); 1983 N.C. Sess. Laws Ch. 758, Sec. 5. For the first time, military pensions were specifically enumerated as a vested property right: "Marital property includes all vested pension and retirement rights, including military pensions eligible under the

federal Uniformed Services Former Spouses' Protection Act." G.S. Sec. 50-20(b)(1) (Supp. 1983); 1983 N.C. Sess. Laws Ch. 758, Sec. 1. This 1983 amendment is applicable only to actions for absolute divorce filed on or after 1 August 1983. 1983 N.C. Sess. Laws Ch. 811, Sec. 1. Therefore, "military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act" are subject to equitable distribution, G.S. Secs. 50-20(a) and (b)(1) (1984), if the action for absolute divorce was filed on or after 1 August 1983. The wife filed her action for absolute divorce on 1 November 1983. As a result, the husband's military pension is subject to equitable distribution.

Federal law does not preempt state law in this instance; however, the Uniformed Services Former Spouses' Protection Act (USFSPA) places certain limitations on the exercise of state law. The USFSPA recognizes that military pensions are a property interest, rather than a personal entitlement. 10 USCA Sec. 1408 (c)(1) (1983); *cf. McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed. 2d 589, 101 S.Ct. 2728 (1981) (military pensions not subject to division under state law upon dissolution of a marriage). Significantly, the USFSPA authorizes state courts to treat "*disposable* retired . . . pay payable to a member [of an armed force] for pay periods beginning after 25 June 1981" as marital or separate property, depending on the local law. 10 USCA Sec. 1408(c)(1) (1983) (emphasis added).[1] "Disposable retired . . . pay" is the total monthly military pension less federal, state, and local income tax, any other debts to the federal government, and any court-ordered annuities paid to a spouse or former spouse. 10 USCA Sec. 1408(a)(4) (1983).

We conclude that the trial court had the authority to equitably distribute the husband's "disposable" military pension, as defined in 10 USCA Sec. 1408(a)(4) (1983).

II

[2] The parties executed a separation agreement on 15 January 1977, which provided, in pertinent part, that each party releases

1. Although the USFSPA became effective on 1 February 1983, 10 USCA § 1408(c) (1983) applies retroactively to actions pending on or after 26 June 1981, the date of the *McCarty v. McCarty* decision. *Faught v. Faught*, 67 N.C. App. 37, 312 S.E. 2d 504, *disc. rev. denied*, 311 N.C. 304, 317 S.E. 2d 680 (1984); *Smith v. Smith*, 458 A. 2d 711 (Del. Fam. Ct. 1983).

> to the other all right, title and interest that he or she may now or hereafter have in any personal property whether tangible or intangible, now owned or hereafter acquired by the other. . . .

In his Answer, the husband pleaded the separation agreement in bar to the wife's claims for alimony *pendente lite*, permanent alimony and equitable distribution. On appeal, he argues that the separation agreement is valid and binding on the parties, pursuant to G.S. Sec. 50-20(d) (1984). We are not persuaded.

G.S. Sec. 50-20(d) (1984) provides:

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

Referring to N.C. Gen. Stat. Sec. 52-10.1 (1984), we note that a separation agreement, to be "legal, valid, and binding in all respects" under North Carolina law, "must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b)." Here only the husband acknowledged the execution of the separation agreement before a certifying officer, in this case, a notary public. The separation agreement is, therefore, not valid and binding under North Carolina law.

However, the parties executed this separation agreement in Maryland. Normally, we would proceed to determine whether the separation agreement was valid under Maryland law. *See Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E. 2d 718 (1981) (court takes judicial notice of foreign law, when foreign law governs the action); N.C. Gen. Stat. Sec. 8-4 (1981). North Carolina has long adhered to the general rule that "lex loci contractus," the law of the place where the contract is executed governs the validity of the contract. *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931); *Carpenter, Baggott & Co. v. Hanes*, 167 N.C. 551, 83 S.E. 577 (1914); *Cannaday v. R.R.*, 143 N.C. 439, 55 S.E. 836 (1906); 17 C.J.S. *Contracts* Sec. 12(4) (1963). Thus, the language of G.S. Sec. 50-20(d), "by a written agreement valid in the jurisdic-

tion where executed," merely restates the longstanding general rule. Significantly, North Carolina recognizes an important exception to the general rule. The general rule is based on the presumed intent of the parties. 17 C.J.S. *Contracts* Sec. 12(4) (1963). North Carolina case law stresses that the express or implied contrary intent of the parties rebuts the parties' presumed intent, *i.e.*, the "lex loci contractus" rule. *Bundy v. Commercial Credit Co.; Cannaday v. R.R.*

In the case at hand the parties' implied intent to apply North Carolina law is clear. The caption of the agreement reads: "North Carolina Guilford County." Furthermore, the agreement was entered into with reference to North Carolina law. One of the parties, the husband, complied with the North Carolina statutory law on execution and acknowledgment of separation agreements. He acknowledged the execution of the agreement before a notary public. Under Maryland law a separation agreement need not be acknowledged before a certifying officer to be valid and enforceable. Md. [Fam. Law] Code Ann. Sec. 8-101(a) (1984). Ordinarily, Maryland law draws no distinction between a separation agreement and a contract between two strangers. *Eckstein v. Eckstein*, 38 Md. App. 506, 379 A. 2d 757 (1978). "Absent proof of a confidential relationship between the parties, separation agreements, not disclosing any injustice or inequity on their face, are presumptively valid and the burden is on the party challenging the agreement to show its execution resulted from coercion, fraud, or mistake." *Bell v. Bell*, 38 Md. App. 10, 14, 379 A. 2d 419, 422 (1977); *Blum v. Blum*, 59 Md. App. 584, 477 A. 2d 289 (1984) (duress).

In summary, the caption of the separation agreement, viewed together with the husband's acknowledgment before a certifying officer, reveal the parties' clear implied intent to apply North Carolina law. As Professor Williston explains, "the intent which is applied is a constructive intent deduced by the court from all the circumstances of the case without necessarily giving weight to any actual intent of the parties." 15 S. Williston, *Contracts* Sec. 1792, at 382 (3d ed. 1972).

Having determined that the separation agreement was not valid and enforceable under North Carolina law and further, that the parties intended North Carolina law to govern, although the

agreement was executed in Maryland, we hold that the agreement is invalid and does not bar the wife's claim for equitable distribution.

III

The husband's remaining assignment of error is without merit. We conclude that the trial court did not err in awarding the wife a percentage of the husband's military pension.

Affirmed.

Judges PHILLIPS and EAGLES concur.

CLA-MAR MANAGEMENT v. LINDA HARRIS

No. 8410DC1257

(Filed 6 August 1985)

1. **Ejectment § 3— summary ejectment—no findings as to nature of tenancy or expiration date—remanded**

A summary ejectment action was remanded for further findings as to the nature of the tenancy where the trial court made no findings of fact on the nature of the tenancy or the expiration date of the lease term and stipulations as to the nature and term of the tenancy were not included in the record on appeal. G.S. 42-26(1) (1984), G.S. 42-14 (1984).

2. **Ejectment § 4— summary ejectment—notice to vacate sufficient**

A district court's findings in a summary ejectment action supported its conclusion that defendant received sufficient notice to vacate her lot where the findings indicated that defendant had forty-two days' notice to vacate, in excess of the requirements even for a year-to-year tenancy. The notice was no less effective because it afforded defendant the alternative of remaining on her lot should she meet the requirements stated in the notice. G.S. 42-14 (1984).

3. **Landlord and Tenant § 2— security deposit in excess of one and a half month's rent—new lease—proper**

A landlord could require payment of a security deposit of $150 even though the June rental was $66 because the security deposit was to be submitted in connection with a new lease to be effective 1 July under which the monthly rental was $145. G.S. 42-51 (1984).

4. Landlord and Tenant § 19— rent increase not approved by HUD—valid

A rent increase was not invalid in that it had not been approved by HUD where the increase was scheduled to take effect on 1 July and the federally-insured mortgage was paid and satisfied in full on 28 June.

APPEAL by defendant from *Cashwell, Judge*. Judgment entered 19 September 1984 in District Court, WAKE County. Heard in the Court of Appeals 5 June 1985.

Stubbs, Cole, Breedlove, Prentis & Poe, by James A. Cole, Jr. and Terry D. Fisher, for plaintiff appellee.

East Central Community Legal Services, by Augustus S. Anderson, Jr., for defendant appellant.

BECTON, Judge.

This action in summary ejectment was brought by plaintiff, Cla-Mar Management (Cla-Mar), against defendant, Linda Harris (Harris), on 3 July 1984 for possession of Lot No. 120, Schenley Square Mobile Home Park. In her "Motion to Dismiss and Answer," Harris contended that Cla-Mar was not a legal entity with the capacity to sue, and denied that the lease term had ended. Based upon facts stipulated to by counsel and upon the legal arguments of counsel, the district court concluded that Harris did not have a lease for Lot No. 120, and accordingly, entered judgment for possession in favor of Cla-Mar. Harris appeals, but has included no exceptions or assignments of error in the record on appeal. Therefore, considering Rule 10(a) of the North Carolina Rules of Appellate Procedure, the only question presented for review is whether the district court's judgment is supported by the Findings of Fact and Conclusions of Law. We conditionally rule in favor of Cla-Mar, for the following reasons.

I

On 1 June 1984, Cla-Mar assumed the management of Schenley Square Mobile Home Park (formerly known as "Central Park"). Harris had prior knowledge that Cla-Mar would assume management as indicated in the following Findings of Fact by the district court:

> 4. That on May 18, 1984, Defendant and all other tenants within the mobile home park were notified by Cla-Mar Man-

agement that any tenant who did not apply for, and receive a new lease for their space to become effective July 1, 1984, and pay a new security deposit, would have to vacate their space in the mobile home park on or before June 30, 1984.

5. That on June 7, 1984, Defendant received an additional notice entitled 'Official Notice to Vacate,' from Plaintiff Cla-Mar Management stating that upon failure to sign a new lease and tender a security deposit of $150.00 prior to June 9, 1984, Defendant should vacate his or her lot in the mobile home park on or before June 30, 1984.

Harris received each of the notices described above and signed the new lease agreement. However, Harris did not tender the security deposit as required, and therefore, Cla-Mar did not sign or accept the new lease with Harris.

Prior to 28 June 1984, the mobile home park was subject to a federally-insured mortgage under the "207 Mortgage Insurance Program" of the United States Department of Housing and Urban Development (HUD), which required HUD Commissioner approval for rent increases during the term of the mortgage. As of 28 June 1984, soon after Cla-Mar had assumed management of Schenley Square, the federally-insured mortgage was satisfied in full. Also, on 28 June 1984, an assumed name certificate for Cla-Mar Management was recorded in the office of the Wake County Register of Deeds.

II

Harris contends that Cla-Mar is not entitled to possession of Lot #120, because (1) "the judgment is not supported by findings of fact to show that defendant is holding over after the expiration of her term," and (2) "the findings of fact do not support a conclusion of law that sufficient notice was received by defendant to terminate the lease even if a month-to-month tenancy is assumed." We agree with Harris' first contention and, therefore, remand the matter to the district court to make findings of fact on the nature of the tenancy (month-to-month or year-to-year) and on the lease term expiration date. As to Harris' second contention, we conclude that the defendant received sufficient notice to terminate the lease under N.C. Gen. Stat. Sec. 42-14 (1984).

[1] The question to be resolved on remand is whether Harris' lease term had expired on 30 June 1984, giving Cla-Mar the right to possession on 1 July 1984. A landlord may bring a summary ejectment action under N.C. Gen. Stat. Sec. 42-26(1) (1984), "[w]hen a tenant in possession of real estate holds over after his term has expired." Thus, expiration of the lease term is one prerequisite of summary ejectment. The trial court found: "That prior to, and on June 1, 1984, defendant Linda Harris was lessee of Lot #120 within said mobile home park." The trial court made findings of fact on the notice given, discussed *infra*, but made no findings of fact on the nature of the tenancy or the expiration date of the lease term before concluding that "as of July 1, 1984, defendant Linda Harris did not have a lease for Lot #120 in Schenley Square and plaintiff is entitled to immediate possession thereof."

In its brief, Cla-Mar asserts that the parties stipulated as to the nature and term of the tenancy and further, that the trial court relied on the stipulations in awarding Cla-Mar possession. Unfortunately, the trial court failed to make the requisite findings of fact to reflect this consideration.

According to Cla-Mar, the contested stipulations were not included in the record on appeal, "because the lease term was never in issue in the court below and was not identified by appellant as an issue on appeal by the taking of an exception." Yet, in her Answer, Harris had denied Cla-Mar's allegations that the lease term ended 30 June 1984. And, although our standard of review is certainly severely constrained by Harris' failure to include exceptions or assignments of error in the record on appeal, we still are left to determine whether the findings of fact and conclusions of law support the district court's judgment. Since a landlord is not entitled to possession until the lease term expires, even with sufficient notice, G.S. Secs. 42-14 and -26 (1984), we believe that a judgment in favor of Cla-Mar requires findings of fact on the nature and term of the tenancy. We therefore remand to the trial court for further findings of fact on this allegedly stipulated issue.

[2] Turning to the sufficiency of the notice issue, we note that the district court made Findings of Fact 4 and 5, cited above, before concluding: "That defendant received sufficient notice to vacate his or her lot in Schenley Square as required by N.C.G.S. Sec. 42-14." G.S. Sec. 42-14 (1984) provides: "A tenancy from year

to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days. . . ." Thus, Findings of Fact 4 and 5 clearly support the district court's conclusion of law. The record does not reflect whether the timeliness of the notices sent to Harris was questioned in the trial court. The record demonstrates, however, that Harris received in excess of thirty days' notice to vacate, thereby even exceeding the requirements of G.S. Sec. 42-14 (1984) for a year-to-year tenancy. As stated in Finding of Fact 4, the defendant was notified on 18 May 1984 that she must (1) apply for a new lease, (2) be accepted for a new lease, and (3) furnish a new security deposit, *or she should vacate her lot by 30 June 1984*. Harris, thus, had 42 days' notice to vacate, and this notice is no less effective because it afforded Harris the alternative of remaining on her lot should she meet the requirements stated in the notice. "A notice may be in the alternative to pay rent in arrears or quit. . . ." 50 Am. Jur. 2d, *Landlord and Tenant* Sec. 1206, at 94 (1970). Based on the above analysis, and considering the further fact that Harris did not note an exception to the trial court's Conclusion of Law that she "received sufficient notice . . ." nor assign as error the lack of any supporting Findings of Fact regarding that Conclusion of Law, we find no error.

[3] We summarily reject Harris' further contention that the findings do not support a Conclusion of Law that she received sufficient notice. Both the 18 May and 7 June 1984 notices state in clear and unequivocal language what Harris had to do to continue leasing her space. We also summarily reject Harris' argument that Cla-Mar could not lawfully require payment of a security deposit in the amount of $150.00 when the June rental was for $66.00. Harris' reference to N.C. Gen. Stat. Sec. 42-51 (1984), which provides that a security deposit "shall not exceed an amount equal to . . . one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month" is inapposite. Harris ignores the fact that the $150.00 security deposit was to be submitted in connection with the new leases, which became effective 1 July 1984, under which the monthly rental was $145.00.

[4] Finally, we summarily reject Harris' contention that the lease proposed by Cla-Mar was invalid because it contained a rent

increase that had not been approved by HUD. The rent increase, scheduled to take effect 1 July 1984, was not subject to HUD regulations, since the federally-insured mortgage was paid and satisfied in full on 28 June 1984.

Believing that Cla-Mar was entitled to possession, if the lease term had expired 30 June 1984, and that Harris waived any further objections to the judgment when she failed to note exceptions and assign error in the record on appeal, we

Remand for further findings of fact.

Judges PHILLIPS and EAGLES concur.

E. D. CALHOUN, JR. AND VILA AUTRY CALHOUN, CO-EXECUTORS OF THE ESTATE OF JOHN R. CALHOUN, DECEASED v. JOHN S. CALHOUN AND KATHIE W. CALHOUN

No. 8412SC1330

(Filed 6 August 1985)

Contracts § 27.1; Gifts § 1— loan or gift—time of repayment—jury questions

In an action to recover the unpaid balance of an alleged $10,000 loan made by decedent to his nephew, the evidence presented questions for the jury as to whether the $10,000 was a gift or whether there was an agreement to repay this amount; whether the terms of such agreement required defendant nephew to pay decedent only if decedent needed the money; whether decedent and defendant agreed on a twelve-month renewable note with unlimited renewal privileges; and whether the parties failed to designate a time frame for defendant's performance of his obligation to repay and, if so, what constitutes a reasonable time for repayment.

APPEAL by plaintiffs from *Herring, Judge*. Judgment entered 6 September 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 7 June 1985.

Butler, High, Baer & Jarvis, by Ervin I. Baer and Rebecca F. Person, for plaintiff appellants.

Beaver, Thompson, Holt & Richardson, P.A., by H. Gerald Beaver, for defendant appellees.

BECTON, Judge.

In this action by the estate of John R. Calhoun, deceased, to recover the unpaid balance of alleged loans made by John R. Calhoun to his nephew, John S. Calhoun, we must determine the propriety of the trial court's judgment granting defendants' Rule 50 motion for a directed verdict. The only evidence presented by the plaintiffs in this case was the testimony of the defendant-nephew, John S. Calhoun (nephew).

The purpose of a motion for a directed verdict under Rule 50 of the Rules of Civil Procedure is to test the legal sufficiency of the non-movant's evidence to take the case to the jury, *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982), and the evidence is to be taken in the light most favorable to the non-movant. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978). Considering the well-established principle that the evidence presented should be considered in the light most favorable to the non-moving party, we first review the facts in the light most favorable to the plaintiffs.

On 28 December 1977, defendant, who had owned and operated The Medicine Shoppe for eight years, needed to borrow money to purchase a building for his business. Defendant testified:

> I discussed with my mother that I needed to borrow some money, and on or about December 28, 1977, we went to see Uncle John at his house on 301 South, Fayetteville, North Carolina. Everyone knew that he had a considerable amount of money. . . . Plaintiffs' Exhibit #4 is a check, which I received, made out to me and my wife dated December 28, 1977, for Eight Thousand Dollars ($8,000.00) signed by my uncle, John R. Calhoun. At the bottom of the check on the line where it says "For," there are written the words, "Loan, building." After I received the check, I deposited it in my account at Southern National Bank.

Thereafter, on 11 January 1978, defendant received an additional sum of $2,000 by way of a check from his uncle. This check contained a notation on the memorandum portion which read: "Loan."

Sometime after the transactions, the defendant drafted a "memorandum" of the transactions, which recited that his uncle had loaned him $10,000 and that he would pay 8% interest upon the unpaid balance. Defendant then gave the memorandum to his uncle, who, after signing it and returning it to the defendant, stated that he did not want a copy. On redirect examination, the defendant admitted that he had also signed a paper writing, which stated that the memorandum in question "was a twelve-month renewable note with unlimited renewable privileges."

Approximately one year after receiving the $10,000, defendant gave his uncle a check in the amount of $800, representing 8% of the $10,000 borrowed. The uncle accepted the check, but, according to defendant, only because "the farm payment was late and Aunt Lena [the uncle's wife] was running up considerable expenses at the nursing home and so he would take it for her expenses." The uncle then, according to the defendant, directed defendant to tear up the memorandum, stating that if he (the uncle) needed the money, he would ask defendant for its return. Defendant destroyed the memorandum. The uncle died on 3 February 1979, and, although defendant was aware of a "Notice to Creditors" published by the estate, defendant has never repaid the money to the estate. Defendant denies that the transaction was a loan, stating that it was not a debt.

Defendant testified that the notations "Loan, building" and "Loan" were placed on the check because his uncle "did not want to have to pay gift tax on the money." Defendant admits, however, paying his uncle $800 in interest but testified that he was only to repay his uncle if his uncle needed the money. Defendant then stated that his characterization of the transaction as a "twelve-month renewable note with unlimited renewable privileges . . . was incorrect word usage on my part. . . . [I]t was not a twelve-month renewable note as a banker or lawyer would say it." As plaintiffs state in their brief: "Somewhere amidst this confusing paradox of testimony lies the true agreement between the parties; a factual determination which should be made only by a jury."

Further, defendants' four alternate positions convince us that this matter needs to be resolved by a jury. Defendant contends: (1) that his uncle made *inter vivos* gifts; or (2) that since the

$10,000 was to be repaid on the demand of his uncle, this suit brought in 1982 is barred by the three-year statute of limitations regarding breach of contract; or (3) that any alleged indebtedness was forgiven and a valid *inter vivos* gift was completed when his uncle, with donative intent, directed him to destroy the memorandum of the transaction; or (4) that the alleged loans were discharged since his uncle made no demand for payment prior to his death.

Only defendants' statute of limitations defense merits further discussion. When the facts are admitted or established, the determination of the expiration of the statute of limitations is a matter of law. *Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964). When the facts are in dispute and there is evidence justifying the inference that the statute of limitations has not run, however, the question whether the cause of action is barred is a mixed question of law and fact which should be decided by the jury. *Industrial Distrib. Inc. v. Mitchell*, 255 N.C. 489, 122 S.E. 2d 61 (1961). In this case there is a clear dispute regarding the existence of an agreement to repay the $10,000.

And if there is such an agreement, there is a clear dispute as to the terms of that agreement. Was defendant only to pay his uncle if his uncle needed the money? Or did the parties agree on a twelve-month renewable note with unlimited renewal privileges? These questions point out why this case was inappropriate for directed verdict. Significantly, the jury could find the existence of a valid debt; and, at the same time, find that the parties failed to designate a time frame for defendant's performance of his obligation to pay the money back. In that event, the determination of what constitutes a reasonable time for repayment is a mixed question of law and fact which should be resolved by the jury. *See Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E. 2d 516 (1981).

In short, a motion for directed verdict under Rule 50 should not be granted when facts are in dispute. Considering defendant's direct, cross and redirect examination testimony, there is considerable disagreement as to the nature of the transactions between the defendant and his uncle that resulted in the defendant receiving $10,000 from his uncle. Until the jury makes that factual

determination, the applicability of the three-year statute of limitations cannot be decided. We, therefore

Reverse.

Judges PHILLIPS and EAGLES concur.

FRANCES S. CAVIN v. DAVID W. OSTWALT

No. 8422SC1210

(Filed 6 August 1985)

Dedication § 4— dedication of subdivision street—acceptance unclear—purported withdrawal invalid—summary judgment improper

Plaintiff was not entitled to summary judgment as a matter of law enjoining defendant from using a street through plaintiff's subdivision to defendant's property where a plat with an offer to dedicate the street to public use had been recorded and approved by the County Commissioners; the county had erected a street sign; the state had not accepted the street for maintenance and had no plans to do so; the ten individuals who had purchased lots north of a cul-de-sac on the street recorded with the Register of Deeds a certificate purporting to rescind the dedication of the street south of the cul-de-sac; plaintiff, the owner of the lots south of the cul-de-sac, had not signed the certificate; and the County Commissioners rejected a motion to close the portion of the street south of the cul-de-sac. There was no evidence of a valid withdrawal of dedication and it was unclear whether the street dedication had ever been accepted or rejected by an appropriate authority. G.S. 153A-239, G.S. 1A-1, Rule 56(c), G.S. 153A-333.

APPEAL by defendant from *Collier, Judge.* Judgment entered 1 August 1984, in Superior Court, IREDELL County. Heard in the Court of Appeals 16 May 1985.

T. Michael Lassiter for plaintiff appellee.

Gary W. Thomas and Jack R. Harris for defendant appellant.

COZORT, Judge.

Plaintiff brought an action against her neighbor to enjoin his use of a road which ran across plaintiff's property to defendant's property. Defendant's answer contended the road was a public street, and, in the alternative, petitioned for a cartway pro-

ceeding. After receiving affidavits and minutes of various proceedings before the County Commissioners, the trial court found the property not to be a public street and granted summary judgment for the plaintiff, enjoining defendant's use of the road. We reverse and remand. The facts and proceedings necessary to an understanding of our ruling follow.

Plaintiff owned a tract of land adjacent to State Road 1322 in Iredell County. On 8 December 1977, she filed with the Register of Deeds a map showing a proposed subdivision to be known as Cedar Wood, consisting of 20 lots and a street called Old Spring Way. The plat had been "approved" by the County Commissioners on 6 December 1977. The map included an offer to "hereby dedicate to public use as street forever all areas so shown or indicated." The proposed street ran the entire length of the subdivision from S.R. 1322, in a southerly direction past a short cul-de-sac, and between lots nine and ten to the boundary line at the south end of the subdivision. Plaintiff conveyed all of the lots north of the cul-de-sac to ten individuals; she retained the four lots, numbered eight, nine, ten and eleven, south of the cul-de-sac and at the end of the subdivision farthest from S.R. 1322. On 27 July 1978, the defendant purchased a 13-acre tract of land which adjoined the land retained by plaintiff at the south end of the subdivision. During 1977 and 1978, the proposed road through Cedar Wood was constructed, with the part from S.R. 1322 to the cul-de-sac being paved. According to the defendant, he participated, at plaintiff's request, in the construction of the road. He placed gravel on the portion of the road going south from the cul-de-sac between plaintiff's lots numbered nine and ten to the defendant's property line. The defendant used the road for access to his property. Plaintiff began to object to the defendant's use of the road. She demanded that he discontinue using it; the defendant refused her demand.

On 24 May 1983, the ten individuals who had purchased the lots north of the cul-de-sac recorded with the Register of Deeds a "Certificate of Withdrawal and Rescission of Street," purporting to withdraw and rescind the dedication of the part of Old Spring Way south of the cul-de-sac by plaintiff's lots to the defendant's property. The plaintiff's signature did not appear on the certificate. On 3 June 1983 plaintiff filed this action. The defendant's answer and counterclaim was filed 5 August 1983, and the plain-

tiff's reply 19 August 1983. On 5 June 1984, the County Commissioners rejected by a 3-2 vote a motion to "close the portion of public street . . . being that portion of the street referred to as Old Spring Way, South of the cul-de-sac . . . to the boundary line of the subdivision." The record does not reflect precisely how this matter came before the Commissioners; however, it does show that both counsel for plaintiff and counsel for the defendant addressed the Board concerning the motion. On 20 June 1984, the plaintiff moved for summary judgment, and later filed an affidavit from a State Highway Engineer which said that the State had not accepted Old Spring Way for maintenance and had no plans to do so. On 25 July 1984 defendant filed an affidavit stating, among other things, that the County has placed a sign for "Cedarwood Road" at the beginning of the road in question. The trial court granted plaintiff's motion for summary judgment, finding that "the property in question is not a public street," and enjoined the defendant from using the road. Defendant appealed.

Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment shall be granted "if the pleadings, depositions . . . and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. *Communities, Inc. v. Powers, Inc.*, 49 N.C. App. 656, 272 S.E. 2d 399 (1980).

In North Carolina, a public road is "any road, street, highway, thoroughfare, or other way of passage that has been irrevocably dedicated to the public or in which the public has acquired rights by prescription, without regard to whether it is open for travel." G.S. 153A-239. In this case, the ultimate question is whether Old Spring Way has been irrevocably dedicated as a public road.

To establish the dedication of a road for public use, a party must show by competent evidence that the dedication was offered to the general public and accepted by the appropriate authority. *Ramsey v. N. C. Dept. of Transportation*, 67 N.C. App. 716, 313 S.E. 2d 909, *disc. rev. denied*, 311 N.C. 306, 317 S.E. 2d 681 (1984). Here plaintiff recorded Cedar Wood subdivision in 1977, offering

to dedicate as a public street Old Spring Way. The plat was approved by the Board of Commissioners, and plaintiff sold 16 of the 20 lots. While the sale of lots in a subdivision with reference to a map showing the street constitutes a dedication of the street to the purchasers of the lots, as to the public it is but a revocable offer of dedication which is not complete unless and until the offer of dedication is accepted in some recognized legal manner by the proper public authorities. *Owens v. Elliott*, 258 N.C. 314, 128 S.E. 2d 583 (1962). The offer to the public may be revoked at any time prior to acceptance. *Wofford v. Highway Commission*, 263 N.C. 677, 140 S.E. 2d 376, *cert. denied*, 382 U.S. 822, 86 S.Ct. 50, 15 L.Ed. 2d 67 (1965).

In order to affirm the trial court's granting of summary judgment for the plaintiff, we must find that the undisputed facts prove that the dedication was withdrawn before legal acceptance by the county or that there has never been a legal acceptance by the county.

Defendant contends that the approval of the Cavin plat by the Iredell County Commissioners was an act of acceptance. This argument is wholly without merit. G.S. 153A-333 plainly states that

> [t]he approval of a plat does not constitute or effect the acceptance by the county or the public of the dedication of any street . . . shown on the plat and shall not be construed to do so.

Iredell County has an identical ordinance. Therefore, on the record before us, there is no evidence that the county accepted the dedication of Old Spring Way prior to 24 May 1983, when the "Certificate of Withdrawal and Rescission of Street" was recorded by the ten landowners north of the cul-de-sac. Thus, we must now consider whether the filing of that certificate was indisputably a revocation of the dedication. The ten landowners north of the cul-de-sac have attempted to rescind the dedication of the part of the road south of the cul-de-sac, over land still owned by plaintiff. We hold that a revocation of a dedication of a public street must be made by the owner or owners of the property affected. In this case, there is no evidence that plaintiff, the original "dedicator" of Old Spring Way and still owner of the land affected by the part sought to be closed, ever recorded any withdrawal of

dedication. Therefore, the purported withdrawal of dedication of 24 May 1983 is of no legal effect. We also hold that the County Commissioners' vote of 5 June 1984 rejecting a motion to close the road did not constitute acceptance of the dedication. Thus, on the record before us, there is no evidence of a valid withdrawal of dedication, and it is unclear whether the street dedication has ever been accepted or rejected by an appropriate authority. In any event, on the facts shown plaintiff was not entitled to summary judgment as a matter of law enjoining defendant from using the road in question.

Reversed.

Judges WELLS and JOHNSON concur.

MAGGIE HUBBARD, EMPLOYEE v. BURLINGTON INDUSTRIES, EMPLOYER; AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 8410IC909

(Filed 6 August 1985)

1. **Master and Servant § 95.1— appeal to full Commission—mailed fourteen days after notice—filed sixteen days after notice—timely**

An appeal to the full Industrial Commission from the opinion and award of a Deputy Commissioner was timely where defendants received notice of the award on 19 April, mailed notice of appeal to the full Commission fourteen days later on 3 May, and the notice of appeal was filed in the office of the full Commission on 5 May, sixteen days after after defendants received notice of the Deputy Commissioner's opinion and award. The application was made to review the appeal on the day it was mailed to the full Commission. G.S. 97-85.

2. **Master and Servant § 77.1— changing condition—partial disability to total disability**

There was no error in finding a change of condition from partial disability to permanent disability and modifying the award of compensation accordingly where a Deputy Commissioner found a permanent partial disability in 1978 due to exposure to cotton dust, there was evidence in 1982 that plaintiff's lung capacity had decreased, and there had been ample evidence in 1978 for the Deputy Commissioner to have found plaintiff totally disabled. If the Industrial Commission finds a fact and the evidence in a subsequent hearing shows the finding was not correct, this will support a finding of a different fact which supports a finding of a change in condition. G.S. 97-47.

Hubbard v. Burlington Industries

APPEAL by defendants from an Opinion and Award of the Industrial Commission entered 6 April 1984. Heard in the Court of Appeals 16 April 1985.

This is an appeal from the Industrial Commission which affirmed an award of a deputy commissioner who had amended an award to give additional benefits. Maggie Hubbard worked in the textile industry for forty years. On 1 March 1979 a deputy commissioner found that Ms. Hubbard "has been disabled from any kind of employment involving strenuous work because of her breathing problem" and was "permanently partially disabled as a result of chronic obstructive lung disease contracted in and aggravated by cotton dust exposure in her employment with defendant-employer." The deputy commissioner awarded Ms. Hubbard "$80.00 per week from April 18, 1975, until such time as plaintiff sustains a change in condition (medical or employment) subject to a maximum period of 300 weeks." Neither plaintiff nor defendants appealed from this opinion and award.

On 26 October 1981 Ms. Hubbard requested another hearing on the ground there had been a change of her condition. At a hearing in 1982 Ms. Hubbard testified that her breathing was much worse in 1982 than it had been at the time of the first hearing in 1978. Dr. Herbert Sieker testified that he had examined Ms. Hubbard in 1978 and on 8 January 1982. He testified that Ms. Hubbard's lung volume decreased between 1978 and 1982 which could be a consequence of the progression of her chronic obstructive lung disease. He testified that in his opinion Ms. Hubbard was disabled for most physical activity and could be expected only to do those things which are fairly sedentary. He testified that in his opinion Ms. Hubbard's impairment was permanent. On cross examination Dr. Sieker testified that he had given as his opinion at the 1978 hearing that she was totally disabled for any kind of activity that would require strenuous or continuous work which was the same opinion he expressed in 1982.

Dr. Francis Fallon, a general practitioner, testified that Ms. Hubbard's breathing problems were worse in 1982 than they had been in 1978. On cross examination he said this was based on what Ms. Hubbard told him when he took her history. He had no objective studies done of her lung function.

On 13 April 1983 Deputy Commissioner Angela R. Bryant filed an opinion and award in which she found Ms. Hubbard's "lung volumes and air flow rates have decreased, and she now has evidence of restrictive lung disease. Both those changes are due to a progressive worsening of her chronic obstructive pulmonary disease." Deputy Commissioner Bryant also found that Ms. Hubbard's condition had "worsened from partial disability to total disability since her benefits were discontinued pursuant to the previous award herein." Deputy Commissioner Bryant awarded Ms. Hubbard compensation for her lifetime.

The opinion and award of Deputy Commissioner Bryant was received by the defendants' attorney on 19 April 1983. The defendants' attorney mailed a notice of appeal to the full Commission on 3 May 1983. The notice of appeal was filed in the office of the full Commission on 5 May 1983. The plaintiff made a motion to the full Commission to dismiss the appeal as not being timely made.

The full Commission affirmed and adopted the opinion of Deputy Commissioner Bryant. The full Commission also found that the defendants had failed to file a timely appeal and allowed the plaintiff's motion to dismiss. The defendants appealed.

Charles R. Hassell, Jr. for plaintiff appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons and Steven M. Sartorio, for defendant appellants.

WEBB, Judge.

[1] The first question raised by this appeal is whether the full Commission was correct in dismissing the appeal from the Deputy Commissioner. G.S. 97-85 says in part:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and if proper, amend the award. . . .

The defendants received notice of the award on 19 April 1983. The defendants' attorney mailed the notice of appeal to the full

Commission on 3 May 1983 which was fourteen days after the defendants received the notice. The notice of appeal was filed in the office of the full Commission on 5 May 1983 which is sixteen days after the defendants received the notice of the Deputy Commissioner's opinion and award. We hold that the application was made to review the appeal on the day it was mailed to the full Commission. This would be within fifteen days of the time the defendants received the notice of the award from the Deputy Commissioner. It was error for the full Commission to dismiss the appeal.

[2] The appellants argue that it was error to find there was a change in Ms. Hubbard's condition under G.S. 97-47. They say this is so because the test for disability under our Workers' Compensation Act is not physical injury but diminution of wage earning capacity. *See Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). They argue that a change in condition thus means a change in a person's capacity to earn wages. There was substantial evidence including the opinion testimony of Dr. Sieker that Ms. Hubbard was permanently incapacitated at the time of the first hearing. The defendants contend that there was no more evidence of her permanent disability to earn wages in 1982 than there had been in 1979. For this reason they argue there can be no finding of a change in condition.

We believe that the answer to the defendants' argument is that whatever the evidence showed at the 1978 hearing, the deputy commissioner found Ms. Hubbard to be permanently partially disabled. There was evidence at the 1982 hearing that her lung capacity had decreased. Deputy Commissioner Bryant found that Ms. Hubbard was totally disabled, which finding was affirmed by the full Commission. When the Industrial Commission finds on one occasion that a person is permanently partially disabled and on a later occasion finds based on additional evidence that the person is totally disabled this supports a finding of a change in condition. We agree with the defendants that there was ample evidence for the deputy commissioner to have found in 1979 that Ms. Hubbard was totally disabled. However, she did not do so.

Although not on all fours with this case we believe we are supported in our reasoning by *West v. Stevens Co.*, 12 N.C. App. 456, 183 S.E. 2d 876 (1971). In that case the Industrial Commission

found the plaintiff had a 12.5 percent permanently partial disability of the leg. At a later hearing there was testimony that the condition of the leg was the same as at the time of the first hearing and had not improved as anticipated. The Industrial Commission held there had been a change in condition of the leg and gave additional benefits. There was no change in the physical condition of the leg in that case. In affirming, this Court said that the Industrial Commission attempted to anticipate the degree of recovery. When later events showed the Commission had not anticipated correctly this supported a finding of a change in condition. We believe *West* stands for the proposition that if the Industrial Commission finds a fact and the evidence in a subsequent hearing shows the finding was not correct this will support a finding of a different fact which supports a finding of a change in condition. We believe this is what was done in this case.

For the reasons stated in this opinion, we reverse that part of the opinion and award of the Industrial Commission which dismissed the defendants' appeal. We affirm that part of the opinion and award that orders the payment of benefits for life to the plaintiff.

Reversed in part; affirmed in part.

Judges BECTON and PARKER concur.

BERTON HYDER, D/B/A HYDER PLUMBING v. JOHN J. DERGANCE AND DOROTHY P. DERGANCE; AND RALPH J. SHERER, D/B/A ARCHITECTURE UNLIMITED, AS AGENT AND INDIVIDUALLY

No. 8429DC1340

(Filed 6 August 1985)

Rules of Civil Procedure § 15— amendment of right to complaint—30 days to file answer—improper default judgment

When plaintiff amended his complaint as a matter of right without leave of court, defendants had thirty days from the date of the amendment in which to file an answer even though the amendment was minor and did not itself require a response by defendants. Therefore, the clerk erred in entering default judgment only nine days after plaintiff's complaint was amended. G.S. 1A-1, Rule 15(a).

Hyder v. Dergance

APPEAL by defendants from *Greenlee, Judge.* Judgment entered 11 November 1984 in District Court, POLK County. Heard in the Court of Appeals 7 June 1985.

Frank B. Jackson, for defendant appellants, John J. Dergance and Dorothy P. Dergance.

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

BECTON, Judge.

I

Plaintiff Berton Hyder (Hyder) instituted this action on an account for materials furnished and labor performed in the installation of plumbing in a house constructed by defendant builder, Ralph Sherer (Sherer), for defendant homeowners, John Dergance (Mr. Dergance) and Dorothy Dergance (Mrs. Dergance). The Complaint was filed and summons issued on 26 July 1984. Hyder attempted service of process on the Dergances by mail. On 27 July 1984, Mrs. Dergance accepted copies of the summons and Complaint for both herself and her husband, as evidenced by her signature on the certified mail receipt. Before a responsive pleading was filed, Hyder filed and served an "Amendment to Complaint" on 29 August 1984. The amendment corrected an obvious error, changing the word "defendant" to "plaintiff" at one point in the original Complaint.

On 7 September 1984, upon Hyder's motion, the Clerk of Polk County Superior Court entered default and default judgment against the Dergances. On 22 September 1984 the Dergances filed and served a "Motion, Answer and Cross Action." On 26 September 1984, the Dergances filed and served a motion to set aside the default judgment pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. This motion was heard on 11 November 1984. From the trial court's judgment denying the motion to set aside the default judgment, the Dergances appeal. (The record does not indicate that a default judgment was ever entered against Sherer; he is not involved in this appeal.)

On appeal, the Dergances contend that the court committed reversible error in denying their motion to set aside the default judgment by raising three mutually exclusive issues: (1) that their

Answer was timely filed; (2) that it was improper for the Clerk of Superior Court to enter judgment when it was not for a sum certain or susceptible of calculation; and (3) that the failure of the Dergances to timely file their Answer constituted excusable neglect. We conclude that by filing their Answer within thirty days of Hyder's amended complaint, the Dergances' Answer was timely filed, and it was error to award a default judgment against them. As this resolves the case, we need not consider the Dergances' second and third assignments of error.

II

Rule 15 of the North Carolina Rules of Civil Procedure governs amendments to pleadings, and the portion pertinent to this case reads as follows:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . . A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. Sec. 1A-1, Rule 15(a) (1983).

It is uncontested that the Complaint was amended "as a matter of course" without leave of court. The parties disagree as to whether the Dergances gained additional time to file an answer as a result of this action. The Dergances contend that once Hyder amended his Complaint, Rule 15 gave them 30 days from the date the amendment was filed in which to file their Answer. Hyder, however, maintains that since the amendment to the Complaint *per se* required no response on the part of the Dergances, the last sentence of Rule 15(a) is not applicable.

Neither party cites any case law for their respective contentions, nor have we discovered a North Carolina case on point. We commence our analysis by examining the statute itself. In our opinion, Rule 15(a) is clear—once a party amends a pleading without leave of the court, the opposing party has 30 days in which to respond. The rule simply does not distinguish between minor and major amendments, as Hyder maintains.

Our interpretation receives support from the general principle that an amended complaint has the effect of superseding the

original complaint. *Hughes v. Anchor Enterprises, Inc.*, 245 N.C. 131, 95 S.E. 2d 577 (1956). This principle is also accepted by the federal courts. *See Fritz v. Standard Sec. Life Ins. Co.*, 676 F. 2d 1356 (11th Cir. 1982) (amended pleading remains in effect throughout the action unless subsequently modified).

A comparison of North Carolina's Rule 15(a) with the federal version of that rule further supports our conclusion. The official Comment to North Carolina Rule 15 states that "[t]he last sentence of section (a) involves a departure of obvious import from the federal rule timetable." The last sentence of Federal Rule 15(a) provides:

> A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Plaintiff Hyder's interpretation of the North Carolina rule would require the responding party to respond to the amended pleading "within the time remaining for response to the original pleading" —thus relying on the very language of the federal rule excluded from our own. As the official Comment makes clear, the last sentence of North Carolina's Rule 15(a) was expressly intended to depart from the federal rule.

We now apply our holding to the case at hand. Hyder filed and served his amended complaint on 29 August 1984. The Dergances' Answer was filed on 22 September 1984. Thus, as the Answer was filed within 30 days of the amended complaint, it was timely. Hyder obtained a default judgment on 7 September 1984. Judgment by default is not available until the time to file the appropriate responsive pleading has run. N.C. Rules Civ. Proc., Rule 55(a) (failure to plead as provided by the rules is basis for default). Although the Dergances had not yet answered, 30 days had not yet elapsed since the filing of the amended complaint. The default judgment was therefore void, and it was error as a matter of law for the court to refuse to set it aside. *See Quaker Furniture House, Inc. v. Ball*, 31 N.C. App. 140, 228 S.E. 2d 475 (1976) (default judgment rendered after defendant has served answer by mailing same to plaintiff within 30 day period void).

Reversed.

Judges PHILLIPS and EAGLES concur.

JAMES K. CARSON AND WIFE, BELINDA McCALL CARSON v. LEE REID

No. 8429SC878

(Filed 6 August 1985)

Boundaries § 14— surveyor's opinion of boundary location—improperly admitted

The trial court erred in a boundary dispute by allowing a surveyor to testify as to where the boundary line ran, and the error was prejudicial because there was no other evidence upon which the trial court, sitting without a jury, could have made the finding of fact and conclusion of law on where the boundary ran.

Judge PHILLIPS dissenting.

APPEAL by petitioners from *Snepp, Judge.* Judgment entered 19 April 1984 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 16 April 1985.

Ramsey and Cilley by Robert S. Cilley for petitioner appellants.

Jack H. Potts and Paul B. Welch, III, for respondent appellee.

COZORT, Judge.

Petitioners filed an action pursuant to Chapter 38 of the North Carolina General Statutes seeking to establish the boundary line between their property and the property of respondent. The trial court, sitting without a jury, found that the petitioners had failed to prove the existence of the boundary line as contended in the petition and entered judgment for respondent. From that judgment the petitioners appeal, contending the court erred in receiving, considering, and basing judgment upon opinion evidence from respondent's expert witness on where the boundary line ran. We reverse and order a new trial.

This dispute arose in the fall of 1981 when petitioners began construction of a house on property which had been deeded to them by their parents, who had acquired the land from Cecil Robinson. Respondent informed petitioners that the house was being built on property he had acquired in 1951 from the heirs of L. E. Reese, the original common owner of both properties. Respondent contends the boundary separating his property from petitioners' property is north of the house, which would place the house constructed by petitioners on respondent's land. Petitioners contend the boundary is south of the house, placing the house on petitioners' land.

During the course of the trial, respondent's surveyor, Perry Raxter, was permitted to testify, over petitioners' objections, that he had located some of the "corners" of the tracts in question. During the course of his testimony, the following transaction occurred, again over petitioners' objection:

> Question: "Does that line, in your opinion, accurately represent the dividing line between the two grants?"
>
> Counsel for Petitioners: "Objection, *Combs v. Woodie*; he may not express an opinion."
>
> The Court: "Overruled."
>
> The Witness: "Yes, Sir."

In its judgment, the trial court found as fact:

> 5. That Perry Raxter, a registered land surveyor, testified that he located the southwest corner of Grant No. 12122 and the northwest corner of Grant No. 10879 on the ground in an actual survey, and that said corner is presently memorialized by a hickory. Said hickory appears on his plat.

In its conclusions of law, the trial court stated:

> 3. That said (boundary) line was located on the ground by Raxter, and runs between a hickory and a white oak.

The court then ordered:

> Based on the foregoing conclusions of law, it is ordered, adjudged and decreed that the true boundary line between the tracts of petitioners and respondent is hereby declared to

be the solid blue line shown on the northern boundary of the Lee Reid tract on the plat prepared by Perry R. Raxter, RLS.

Where the trial judge serves as the trier of fact, our scope of review is limited. "The trial court's findings of fact have the force and effect of a verdict by jury and are conclusive on appeal if there is evidence to support them, even though evidence might sustain findings to the contrary." *Dixon v. Kinser*, 54 N.C. App. 94, 96, 282 S.E. 2d 529, 531, *disc. rev. denied*, 304 N.C. 775, 288 S.E. 2d 805 (1981). Our review of the record before us reveals no competent evidence to support the court's findings.

It is well established in this State that a land surveyor, even as an expert witness, cannot give his opinion as to where a true boundary is. "Where the true boundary is is a question of fact for the jury. What the boundary is is a question of law for the court . . . . That the surveyor may not give his opinion as to where the boundary is was early declared to be the rule in this jurisdiction in *Stevens v. West*, 51 N.C. 49 (1858)." *Combs v. Woodie*, 53 N.C. App. 789, 790, 281 S.E. 2d 705, 706 (1981). Thus, it was error for the court to allow Raxter's testimony on where the boundary line runs. However, in a trial by the court sitting as factfinder, "we presume that the trial judge disregards incompetent evidence. [Citation omitted.] On appeal, it must be shown that the trial judge was affirmatively influenced by the incompetent matter to justify a finding of prejudicial error." *Spencer v. Spencer*, 70 N.C. App. 159, 167, 319 S.E. 2d 636, 643 (1984).

It is clear from the judgment below that the trial court was affirmatively influenced by the incompetent opinion testimony of the expert surveyor. In declaring as a conclusion of law that the boundary "line was located on the ground by Raxter and runs between a hickory and a white oak," the trial judge based the resolution of the ultimate issue not on his own findings, but rather on the incompetent testimony alone. In our review of the record before us, we find no other evidence upon which the court could have made the disputed finding of fact and conclusion of law on where the boundary runs. Thus, the trial court's error was prejudicial and the petitioner is entitled to a new trial.

New trial.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I dissent. In my view the line that Judge Snepp found is supported by competent evidence and I vote to affirm. The monuments that the line follows as a matter of course were established by competent testimony that was not objected to.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENT v. ROANOKE VOYAGES CORRIDOR COMMISSION, COMPLAINANT

No. 8410UC1317

(Filed 6 August 1985)

Utilities Commission § 5— Corridor Commission regulations—underground electric facilities—no jurisdiction by Utilities Commission

The Utilities Commission did not have jurisdiction to order VEPCO to comply with the Roanoke Voyages Corridor Commission's regulations requiring underground electric facilities and to absorb the costs of placing the facilities underground.

APPEAL by complainant from the North Carolina Utilities Commission. Order entered 20 September 1984. Heard in the Court of Appeals 6 June 1985.

In March 1984, Norman Brantley, following the procedure set forth by the General Assembly, applied to the Roanoke Voyages Corridor Commission (hereinafter Corridor Commission) for a certificate of appropriateness to construct a motel and restaurant on property adjacent to the Corridor. Mr. Brantley's application required service from Virginia Electrical Power Company (hereinafter VEPCO).

The Corridor Commission, complainant on appeal, was created by the North Carolina General Assembly in 1982. 1981

N. C. Sess. Laws (1982 Reg. Sess.) ch. 1194. The purposes of the Commission are to effect and encourage restoration, preservation, and enhancement of the appearance and aesthetic quality of the U. S. Highway 64 and 264 travel corridor through Roanoke Island for the benefit and enjoyment of local citizens and visitors to the historic, educational, and cultural attractions on the Island. *Id.* To accomplish its purposes, the Commission was given enumerated powers by the General Assembly, the one pertinent to this appeal is set forth below.

> (1) To establish reasonable standards of appropriateness and provide rules, regulations, and guidelines as follows:
>
> c. For the aboveground and underground location and installation of wires and cables, including poles, conduit and other supporting structures therefor, used for the transmission of electrical power or telephonic and other electronic communication which are placed or are to be placed on the right-of-way of the highway or within 50 feet of the right-of-way of the highway.

Pursuant to the power conferred upon it by the General Assembly, the Corridor Commission in 1983 adopted regulations requiring that new and upgraded utility facilities along the corridor be placed underground. No funds were appropriated by the General Assembly to enable the Corridor Commission to effectuate this policy nor did the General Assembly give the Corridor Commission state police power to force the utility or anyone to bear the expense of placing these new or upgraded facilities underground.

VEPCO, in providing electrical services to Mr. Brantley's motel and restaurant would have to convert to three-phase service from the present single-phase service which would be considered an upgraded service according to the Corridor Commission's regulations. The Corridor Commission required VEPCO to put the upgraded service underground. VEPCO's terms and conditions for electrical service which have been filed with and approved by the North Carolina Utilities Commission (hereinafter Utilities Commission) provide that VEPCO charge the cost of extraordinary or enhanced service to the customer who receives such services. Customers who receive underground service must pay the additional cost since underground service is not VEPCO's standard mode of service. VEPCO indicated that it would require

reimbursement for the difference between the cost of adding above-ground facilities (its normal mode of service) and the cost of placing the facilities underground. The difference in cost amounted to $14,000. Realizing it did not have the power to force VEPCO to absorb the cost, the Corridor Commission filed a complaint against VEPCO on 11 May 1984 with the Utilities Commission pursuant to G.S. 62-73. The Corridor Commission requested that the Utilities Commission require VEPCO to bear the additional expense of supplying electrical service through underground facilities along the U. S. Highway 64-264 corridor or Roanoke Island. On 15 August 1984, the complaint was heard by the Utilities Commission which entered an order declining to require VEPCO to bear the additional expense and dismissed the complaint. From this order, the Corridor Commission appealed.

Attorney General Lacy H. Thornburg, by James B. Richmond, Special Deputy Attorney General, and Evelyn M. Coman, Assistant Attorney General, for complainant appellant.

Hunton & Williams, by Edward S. Finley, Jr. and Guy T. Tripp, III, for respondent appellee.

JOHNSON, Judge.

The Corridor Commission presents several related assignments of errors which embrace one central issue; whether the Utilities Commission erred in dismissing the Corridor Commission's complaint and in not ordering the relief sought by it. For the following reasons, we believe the Utilities Commission was correct in dismissing the complaint.

The Utilities Commission is a creature of the Legislature. It may exercise only such authority as is vested in it by statute. And such authority must be exercised by it in accord with the standards prescribed by law. *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. 598, 242 S.E. 2d 862 (1978). "The clear purpose of chapter 62 of the General Statutes is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in G.S. 62-133." *Utilities Comm. v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405 (1970), *reaffirmed*, 278 N.C. 235, 179 S.E. 2d 419 (1971).

The Corridor Commission does not argue or allege inadequate service or unreasonable rates. Rather, in this complaint proceeding filed pursuant to G.S. 62-73, its purpose in proceeding before the Utilities Commission was to obtain an order which would have required VEPCO to comply with the Corridor Commission's regulations requiring underground utility facilities and to absorb the costs of placing the facilities underground. Since the complaint did not seek enforcement of the Utility Commission's rules or regulations, but sought enforcement of the Corridor Commission's regulations, we hold that the Utilities Commission was without jurisdiction to grant the relief sought. Therefore, the complaint was properly dismissed. The Order of the Utilities Commission dismissing the complaint is

Affirmed.

Judges WELLS and COZORT concur.

SPERRY CORPORATION v. MARK G. LYNCH, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 8410SC892

(Filed 6 August 1985)

Taxation § 15— mandatory maintenance charge in lease—derived from rentals of machines—taxable

Payments received by plaintiff for maintaining leased machines and equipment were derived from a lease or rental of tangible personal property and were taxable under G.S. 105-164.4 where the maintenance payments were made because the leases required them; that the charges for using the different articles and maintaining them were stated separately on the various invoices or bills was immaterial.

APPEAL by plaintiff from *Brewer, Judge*. Judgment entered 10 April 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 16 April 1985.

Sperry Corporation, which designs, manufactures, leases and sells computers and other business machines and equipment, brought this action to recover $268,925.15 in sales taxes, penalties, and interest that it paid the Revenue Department under pro-

test in 1982. The only phase of plaintiff's business that is involved in this action is its leasing of machines and equipment to various North Carolina lessees during the audit period 1 October 1975 through 31 August 1978. In each of the many leases in question Sperry agreed to furnish the equipment and to maintain it during the lease period and for each item leased the different lessees agreed to pay both a "monthly equipment charge" and a "base monthly maintenance charge." If the lessees had not agreed for Sperry to maintain the machines and equipment and to pay Sperry's charges therefor Sperry would not have leased the machines and equipment to them. No lessee was given the option of doing its own maintenance or contracting therefor with a third party. Sperry billed its various lessees monthly and on each bill or invoice the rental and maintenance charges were stated separately. The taxes that plaintiff sues to recover were levied on the total amount that Sperry's various North Carolina lessees paid it for maintaining the leased articles during the audit period involved. After discovery was completed summary judgment was entered upon defendant's motion and plaintiff's action was dismissed.

Hunton & Williams, by Edgar M. Roach, Jr. and David Dreifus, for plaintiff appellant.

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

PHILLIPS, Judge.

The taxation statute that governs this appeal, G.S. 105-164.4, in pertinent part reads as follows:

> There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of . . . renting or furnishing tangible personal property . . . in this State, the same to be collected and the amount to be determined by the application of the following rates against gross . . . rentals, to wit:
>
> . . . .
>
> (2) At the rate of three percent (3%) of the *gross proceeds derived from the lease or rental of tangible per-*

sonal property as defined herein, . . . (Emphasis supplied.)

The solitary question before us is whether the payments plaintiff received for maintaining the machines and equipment leased to its various lessees were "derived from the lease or rental of tangible personal property" within the contemplation of the above statute. We believe that they were and that the tax applied to them as a matter of course. The maintenance payments Sperry received were made because its leases required the lessees to make them; if the payments had not been made the lease agreements would have been broken and probably would have been cancelled. That the charges for using the different articles and maintaining them were stated separately on the various invoices or bills is immaterial; the obligation to pay both charges was established by the leases. In maintaining the leased articles Sperry did only what the lease and rental agreements required it to do and the lessees received only what the different leases entitled them to. Under the circumstances it seems plain to us that the maintenance payments plaintiff received from its many lessees were part of the gross proceeds *derived* from the renting of machines and equipment, and we affirm the judgment of the trial court.

Plaintiff's reliance upon a ruling to the contrary that it obtained from the Georgia courts in *Strickland v. Sperry Rand Corporation,* 248 Ga. 535, 285 S.E. 2d 1 (1981) is misplaced. The Georgia statute is less inclusive than ours. § 92-3402a(c) (1974) and § 92-3403a (1979 Supp.) of the Georgia Code taxes "the gross lease or rental *charge*," or "gross lease or rental proceeds." (Emphasis supplied.) Whereas G.S. 105-164.4 taxes all "proceeds *derived* from the lease or rental" of personal property. (Emphasis supplied.) The wider scope of our Act is self-evident, we think, and the trial judge simply applied it as the legislature wrote it.

Affirmed.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; THE PUBLIC STAFF; THE CITIES OF WILSON, ROCKY MOUNT, MONROE AND GREENVILLE, NORTH CAROLINA AND THE ALUMINUM COMPANY OF AMERICA v. NORTH CAROLINA NATURAL GAS CORPORATION

No. 8410UC946

(Filed 6 August 1985)

Gas § 1; Utilities Commission § 24— natural gas rates—consideration of payments in lieu of contract amount

When the Utilities Commission found that a natural gas company had received payments in lieu of what it would have received under a service contract and that customers of the gas company are bearing the company's service contract costs, the Commission had the authority under G.S. 62-32(b) and G.S. 62-130(a) and (d) to take these payments into account in setting a reasonable rate for the gas company.

APPEAL by North Carolina Natural Gas Corporation from an order of the North Carolina Utilities Commission entered 11 May 1984. Heard in the Court of Appeals 6 May 1985.

North Carolina Natural Gas Corporation (NCNG) has appealed from an order of the Utilities Commission requiring it to use certain proceeds it received in the settlement of a contract dispute to reduce its rate. On 10 November 1967 NCNG entered into a contract agreement with Farmers Chemical Association, Inc. a predecessor corporation to C. F. Industries, Inc. (CFI) to supply Farmers Chemical with natural gas. On 20 September 1982 CFI notified NCNG that it would no longer take the gas for which its predecessor had contracted. The two corporations negotiated a settlement of their contract rights and duties, which settlement was completed on 26 January 1983. Pursuant to the settlement CFI agreed to make quarterly payments to NCNG for one year and assigned to NCNG certain refunds which it was to receive from other corporations.

In an order entered on 6 January 1984 in a general rate case the Commission ordered that one-half the amount NCNG had received until that time pursuant to the settlement be used to reduce the cost of service to the customers of NCNG over a five year period. The other one-half would be retained by NCNG as below the line income. The Commission ordered that payments received by NCNG after 6 January 1984 be placed in a deferred

account pending further order by the Commission. On 11 May 1984 the Commission entered an order in which it found that the payments to NCNG by CFI were in lieu of payments CFI would have made under the contract. The Commission also found that the present customers of NCNG are bearing the costs of the CFI service contract including the cost of the plant constructed to serve CFI which remains in the rate base. The Commission ordered that the payments to NCNG by CFI after 6 January 1984 be considered above the line items which would reduce the cost of service to NCNG's customers. NCNG appealed.

Robert P. Gruber, Executive Director of the Public Staff, by Antionette R. Wike, for appellee North Carolina Utilities Commission.

Donald W. McCoy and Alfred E. Cleveland, for appellant North Carolina Natural Gas Corporation.

WEBB, Judge.

The appellant argues that there is no statutory authority for the Commission to enter the order of 11 May 1984. G.S. 62-32(b) says:

> The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service.

G.S. 62-130(a) and (d) provide that the Commission shall fix and from time to time adjust rates so that they will be just and reasonable. We hold that pursuant to this statutory authority when the Commission found that NCNG had received payments in lieu of what it would have received under a service contract and the customers of NCNG are bearing NCNG's contract costs, it was within the power of the Commission under G.S. 62-32(b) and G.S. 62-130(a) and (d) to take these payments into account in setting a reasonable rate. We believe we are supported in this conclusion by *Utilities Comm. v. Edmisten, Attorney General*, 26 N.C. App. 662, 217 S.E. 2d 201 (1975), *affirmed*, 291 N.C. 361, 230 S.E. 2d 671 (1976) and *Utilities Comm. v. Edmisten, Attorney General*, 29 N.C. App. 258, 224 S.E. 2d 219, *affirmed*, 291 N.C. 327,

230 S.E. 2d 651 (1976). In those cases it was held that the statutory authority of the Utilities Commission was adequate to allow the implementation of a fuel adjustment clause although the statute did not specifically provide for it.

The Commission did not order the distribution of a refund to the customers of NCNG. G.S. 62-136(c) does not apply.

The appellant also contends that no finding of an excessive rate of return was made pursuant to G.S. 62-136(a) so that its rate could be adjusted prospectively to bring its revenues down. The Commission was not acting under G.S. 62-136(a). That section refers to rate fixing as envisioned by G.S. 62-133. *See Utilities Commission v. Edmisten*, 30 N.C. App. 459, 227 S.E. 2d 593 (1976), *rev'd on other grounds*, 291 N.C. 451, 232 S.E. 2d 184 (1977). This is not a general rate case.

The appellant argues that the decision of the Commission is arbitrary and capricious and unsupported by competent, material and substantial evidence in view of the entire record. It contends specifically that the Commission found that the settlement proceeds were "in lieu of payments that would have been required of CFI pursuant to the Service Agreement" when all the evidence showed that NCNG could not have required CFI to pay anything. It says this is so because NCNG was able to sell the gas to other customers which it would have delivered to CFI under the service contract. We do not know why CFI agreed to make the payments to NCNG. It was a settlement of its contract obligations, however, and this supports the finding of the Commission.

The appellant also argues that the Commission ignored undisputed evidence that the customers of NCNG received substantial benefits from the contract settlement. This was not the question before the Commission. If the customers of NCNG realized substantial benefits from the contract settlement they should nevertheless not pay more for natural gas from a public utility than allows the utility a reasonable return.

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

CITY OF LEXINGTON AND THE LEXINGTON UTILITIES COMMISSION v. SUMMIT COMMUNICATIONS, INC.

No. 8422SC737

(Filed 6 August 1985)

Municipal Corporations § 23— ordinance taxing cable revenues—HBO not included

Revenues received by defendant from HBO satellite service were not subject to a franchise tax under an ordinance which taxed compensation received for use of an improved television reception service where HBO satellite service was not available when the franchise was granted, does not originate from a television station, and cannot be received through a television except through a cable system. The words "improved television reception service" do not include a signal that does not originate from a television station and cannot be received on a television set that is not connected to a CATV cable. G.S. 160A-319.

APPEAL by defendant from *Helms, Judge*. Judgment entered 10 April 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 7 March 1985.

The dispute in this case arose from a cable franchise agreement between the plaintiffs and the defendant. The plaintiffs alleged that the defendant had breached the agreement and asked for money damages and injunctive relief.

The case was tried before the court without a jury. The evidence showed that in 1972 the City of Lexington granted to Triangle Broadcasting Corporation a franchise to operate a cable television system within the City. Triangle Broadcasting Corporation later changed its name to Summit Communications, Inc. The City ordinance under which the franchise was granted and which was made a part of the franchise agreement imposes a franchise tax on the "gross subscriber revenues" of the defendant. The ordinance says: "Gross subscriber revenues shall mean any and all compensation received by a grantee from subscribers or users in payment for the community antenna television service received within the city." The ordinance also says: "Community antenna television service or CATV service shall mean the business of providing an improved television reception service to the public for compensation, by means of a master antenna and cables."

The defendant offers three tiers of service to its customers. The third tier is an HBO satellite service. The satellite service

does not originate from a television station but is beamed from a location in New Jersey to an extraterrestrial satellite and transmitted from the satellite to cable systems in this country including the defendant, which send it by cable into the homes of customers. It cannot be received on a television set except through a cable system. It was not available in 1972 when the franchise was granted. The defendant paid the franchise tax based on gross receipts for the first two tiers of services but refused to pay the tax based on the HBO satellite service.

The court found facts based on the evidence. It refused any injunctive relief but entered a judgment for the plaintiffs for a tax based on the HBO satellite service. The defendant appealed.

Smith and Penry, by Robert B. Smith, Jr., for plaintiff appellees.

Tharrington, Smith & Hargrove, by Wade H. Hargrove and Randall M. Roden, and Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., for defendant appellant.

WEBB, Judge.

The City of Lexington has adopted an ordinance, a part of which was written into a contract with the defendant. The resolution of this case depends on the interpretation of that part of that ordinance. The ordinance imposes a tax on the cable system's annual "gross subscriber revenues" which is defined as "any and all compensation received by a grantee from subscribers or users in payment for the community antenna television service." "Community antenna television service" is defined as "the business of providing an improved television reception service to the public for compensation, by means of a master antenna and cables." The question posed by this appeal is whether the third tier of service offered by the defendant which is the HBO satellite service is an "improved television reception service."

The HBO satellite service was not available when the franchise to the defendant was granted. The question is whether the ordinance written into the franchise covers this service. We believe, based on the plain words of the ordinance, that it does not. We do not believe the words "improved television reception service" include a signal that does not originate from a television sta-

tion and cannot be received on a television set that is not connected to a CATV cable. We hold it was error to enter a judgment against the defendant based on revenues it received for the HBO satellite service.

The plaintiffs argue that in another section of the ordinance a community antenna television system is defined as any facility which in part amplifies television station signals. They say this shows that whatever type signal the defendant receives by HBO satellite the defendant is operating a community antenna system. Whatever type system the defendant is operating, the franchise tax is based on the community antenna television service and the ordinance does not include within this the HBO satellite service. The plaintiffs also argue that G.S. 160A-319, which governs the City's right to grant the franchise, includes the HBO satellite. If the statute gives the City the right to include the gross receipts from the HBO satellite service in the franchise tax, the City did not do so.

The plaintiffs also argue that if the furnishing of the HBO satellite service is not a part of the CATV system the defendant has exceeded its franchise right and is illegally offering this service. This question has not been presented in this case and we do not pass on it.

For the reasons stated in this opinion, we reverse and remand.

Reversed and remanded.

Judges PHILLIPS and MARTIN concur.

McCombs v. Kirkland

BARBARA KIRKLAND McCOMBS, RICKY DALE KIRKLAND AND BOBBY GENE KIRKLAND, BY HIS GUARDIAN AD LITEM v. ENOCH KIRKLAND

No. 8427DC730

(Filed 6 August 1985)

Social Security and Public Welfare § 2— dependent spouse payments to husband— no right of recovery by wife and children

Defendant's ex-wife and her children had no legal or equitable right to recover the proceeds of dependent spouse payment checks issued by the Social Security Administration to defendant in the mistaken belief that defendant and his ex-wife were still lawfully married to each other.

APPEAL by plaintiffs from *Carpenter, Judge.* Order entered 18 April 1984 in District Court, GASTON County. Heard in the Court of Appeals 12 March 1985.

Rankin & Stancil, by James W. Stancil, for plaintiff appellants.

Harris, Bumgardner & Carpenter, by Don H. Bumgardner and R. Dennis Lorance, for defendant appellee.

PHILLIPS, Judge.

Plaintiffs sued to recover $9,488.90 of defendant because he received the benefit of certain social security checks in that amount rather than them. After discovery was completed both parties moved for summary judgment and upon the motions being heard the court granted defendant's motion and dismissed plaintiffs' action. In our judgment the order was correct, for the evidence recorded contains no material conflict and shows that plaintiffs had no right to the checks involved.

Plaintiff Barbara Kirkland McCombs is the former wife of defendant, who she divorced in July 1978. Plaintiffs Ricky Dale Kirkland, born in 1962, and Bobby Gene Kirkland, born in 1965, are their children. Defendant was disabled in 1976 and each month beginning in February 1977 the Social Security Administration issued three checks in the amount of $120 for the benefit of his dependents; one check was made out to "Barbara Kirkland for Bobby Gene Kirkland," one to "Barbara Kirkland for Ricky Dale Kirkland," and the other to "Barbara Kirkland for the children of Enoch Kirkland." At first the Social Security Ad-

ministration routinely sent all three checks to the Independence National Bank (now Branch Bank & Trust Co.) in Stanley, where they were automatically deposited to a joint checking account that the parents, Enoch Kirkland and Barbara Kirkland, had there. But in September 1977, the parents separated and agreed, among other things, that "the monthly payment from the Social Security Administration currently in the amount of $120.00 for each child shall go to the wife, to be used for the support and maintenance of said children. Husband will cause said payments from the Social Security Administration to be deposited to the account of the wife." After that, as the separation agreement required, the monthly checks to Barbara Kirkland for Ricky Dale Kirkland and Bobby Gene Kirkland were sent to her bank and automatically deposited to her personal account, and these checks no longer concern us.

The checks that do concern us are those issued to "Barbara Kirkland for the children of Enoch Kirkland." These checks, notwithstanding their wording, were dependent spouse payments issued under the authority of 42 U.S.C. 402(b)(1)(c), and plaintiffs concede in their brief that under the Social Security Act Barbara Kirkland ceased to be a dependent spouse after the "divorce on July 14, 1978 and Mrs. Kirkland's benefits should have terminated." But being unaware of the divorce, the Social Security Administration continued to send the checks to the parent's joint checking account until July 1982 and defendant used the funds as he saw fit. Barbara Kirkland McCombs knew nothing about these checks until shortly after they stopped and the Social Security Administration notified her that she had been receiving payments that she was not entitled to. She then contacted defendant and when he refused to pay the funds involved over to her, plaintiffs sued to recover them. Though the plaintiffs allege in the complaint that the checks were issued for the support of the minor children and thus equitably belonged to them, no evidence to support this theory was presented. Instead, the evidence indisputably shows that the checks were issued as dependent spouse payments in the mistaken belief that Barbara Kirkland was still the lawful wife of the defendant. That this evidence also establishes that defendant had no right to receive and spend the checks breathes no life into plaintiffs' claim. To win their case plaintiffs must prove that they had a legal or equitable right to

receive the checks or their proceeds, and their own evidence shows that they had no such right.

Affirmed.

Judges ARNOLD and COZORT concur.

CLEMENTINE S. SESSOMS, INDIVIDUALLY, AND CLEMENTINE S. SESSOMS, TRUSTEE v. ARNOLD S. SESSOMS

No. 8418DC1302

(Filed 6 August 1985)

Appeal and Error §§ 28.1, 40— order appealed from not included—exceptions not included—appeal dismissed

Plaintiff's appeal was dismissed where the ruling of the trial court was apparently never reduced to a written order, the record on appeal consisted of copies of various pleadings, documents, exhibits and the complete stenographic transcript of the hearing, but did not include a copy of the order appealed from, and plaintiff attached to her brief twenty pages of the transcript on which she had penciled in five exceptions, although her brief referred to exceptions 6 and 7 which did not appear in the transcript submitted with the record or with the copy submitted with her brief. Rules of App. Procedure 2, 9 and 10.

APPEAL by plaintiff from *Daisy, Judge*. Orders entered 7 August 1984 in District Court, GUILFORD County. Heard in the Court of Appeals 6 June 1985.

Alexander Ralston, Pell & Speckhard by Elreta Alexander Ralston for plaintiff appellant.

Hatfield & Hatfield by Kathryn K. Hatfield for defendant appellee.

COZORT, Judge.

Plaintiff filed a motion in the District Court of Guilford County on 13 July 1984 requesting enforcement of a 24 January 1984 Consent Order entered into by her and defendant, her former husband, which settled the alimony, child support and custody, and division of property issues between the two of them resulting

from their separation and divorce. On 17 July 1984, the defendant filed a motion concerning visitation rights. The motions were heard on 7 August 1984. The trial court ruled on several issues in open court; however, its rulings were apparently never reduced to a written order. On 17 August 1984, the plaintiff filed a notice of appeal from the "Orders of the Court, orally entered in open Court on August 7, 1984."

The record on appeal filed in this Court consists of copies of various pleadings, documents and exhibits, and the complete stenographic transcript of the 7 August 1984 hearing. The record does not contain a copy of the order appealed from. The verbatim transcript does not contain any exceptions to the trial court's rulings or orders entered. The plaintiff has attached to her brief an appendix which includes some twenty (20) pages of the transcript. On the last two pages of the part of the transcript submitted with her brief, plaintiff has penciled in five (5) exceptions. In her brief, plaintiff makes reference to exceptions numbers six (6) and seven (7), which do not appear to be in the transcript submitted with the record or the copy submitted with her brief.

The plaintiff's failure to submit a copy of the purported order from which she appeals is a violation of Appellate Rule 9(a)(1)(viii), which states in clear language that the record on appeal in civil actions shall contain "a copy of the judgment, order or other determination from which appeal is taken." In this case, submission of the transcript of the trial court's statements as to what he will find and order is not sufficient. Likewise, the plaintiff's failure to include any exceptions in the record on appeal or verbatim transcript filed with the record violates Appellate Rule 10(a), which provides that "the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed . . . and made the basis of assignments of error in the record on appeal." The plaintiff fails in her attempt to raise exceptions by writing some of them in by hand in the portion of the transcript attached to her brief.

" '[O]nly those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions.' [Citation omitted.] The Rules of Appellate Procedure are mandatory. [Citation omitted.] They are designed to keep the process of perfecting

an appeal flowing in an orderly manner. [Citation omitted.]" *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E. 2d 357, 361 (1979). Our examination of the record and briefs convinces us that plaintiff's appeal lacks merit and that there is no basis under Appellate Rule 2 upon which we should waive plaintiff's violations of Appellate Rules 9 and 10. Accordingly, plaintiff's appeal is

Dismissed.

Judges WELLS and JOHNSON concur.

WILLIAM CHARLIE WILKINS, AND MORSEY LEE WILKINS, GUARDIAN AD LITEM FOR TERESA DIANE WILKINS AND DEBORAH ANNETTE WILKINS v. MATTHEW HAROLD GREEN

No. 847SC887

(Filed 6 August 1985)

Appeal and Error § 24.1— broadside assignments of error—dismissal of appeal

Appeal is dismissed for failure to comply with App. Rule 10(c) where appellant attempted to present several different questions of law in each assignment of error.

APPEAL by plaintiffs from *Allsbrook, Judge*. Judgment entered 13 April 1984 in Superior Court, NASH County. Heard in the Court of Appeals 16 April 1985.

Farris and Farris by Thomas J. Farris and Robert A. Farris, Jr., for plaintiff appellants.

Battle, Winslow, Scott & Wiley by Robert L. Spencer for defendant appellee.

COZORT, Judge.

The defendant was driving along Rural Paved Road 1717 in Nash County at approximately 8:15 p.m. on 1 September 1980, when his car struck Teresa Diane Wilkins, then age 13, and Deborah Annette Wilkins, then age 16, who were walking along the road in the same direction as defendant. Both girls suffered serious injuries resulting in medical treatment. Both of the girls,

either by herself or by Guardian Ad Litem, sued the defendant, alleging careless and negligent operation of his automobile. The jury returned a verdict for the defendant. Plaintiffs appealed.

In their first assignment of error, plaintiffs ask this Court to review 22 exceptions taken to the trial court's overruling plaintiffs' objections dealing with a variety of evidentiary issues to see whether the sum total of the overruled objections "rise to the level of reversible error." Some exceptions deal with alleged leading of the witness, others with alleged hearsay, and others with non-responsive answers, opinion evidence, and the use of exhibits and diagrams. Plaintiffs' second assignment of error is similar, requesting a review of the trial court's sustaining of several objections of the defendant to plaintiffs' attempts at the introduction of evidence. The exceptions relate to claims of hearsay, opinion evidence and leading the witness. In what appears to be a third assignment of error, unnumbered in the record, plaintiffs challenge several portions of the trial court's charge to the jury, based on a variety of issues, including children on highways, time of sunset and use of headlights, and use of due caution. This assignment also includes exceptions dealing with the trial court's failure to set aside the verdict as being contrary to the evidence and with taking exhibits into the jury room.

Each purported assignment of error brought forward by the plaintiffs is clearly in violation of Rule 10(c), N.C. Rules App. Proc., which provides, in pertinent part, that "[e]ach assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based." We find nothing in the record to justify plaintiffs' grouping of exceptions in a manner clearly in violation of Rule 10(c). " '[O]nly those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions.' [Citation omitted.] The Rules of Appellate Procedure are mandatory. [Citation omitted.] They are designed to keep the process of perfecting an appeal flowing in an orderly manner. [Citation omitted.]" *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E. 2d 357, 361 (1979). "An assignment of error which 'attempts to present several different questions of law in one assignment [is]

. . . broadside and ineffective.' [Citations omitted.]" *State v. McCoy*, 303 N.C. 1, 19, 277 S.E. 2d 515, 529 (1981).

We have examined the record and briefs, and we are convinced that plaintiffs' appeal lacks merit and that there is no basis under Appellate Rule 2 upon which we should waive plaintiffs' violations of Appellate Rule 10. For failing to comply with the Rules of Appellate Procedure, plaintiffs' appeal is

Dismissed.

Judges ARNOLD and PHILLIPS concur.

HULCHER BROTHERS & CO., AND CHARLES HULCHER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8410IC1251

(Filed 6 August 1985)

State § 8; Automobiles and Other Vehicles § 72— asphalt truck driven by State employee—brake failure—failure to down-gear and run against retaining wall

The Industrial Commission did not err by finding that a State employee was negligent in failing to down-gear his asphalt truck and run it against a retaining wall after its brakes failed where the facts in the case permitted the fact finders to conclude that the driver did or did not act with due care in the sudden emergency created by the brake failure. G.S. 143-291 *et seq.*

APPEAL by defendant from the decision and order of the North Carolina Industrial Commission filed 13 September 1984. Heard in the Court of Appeals 5 June 1985.

W. G. Mitchell for plaintiff appellees.

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

PHILLIPS, Judge.

This suit for property damage and personal injury, brought under the provisions of the State Tort Claims Act, G.S. 143-291, *et seq.*, arose out of a collision between a large truck owned by the defendant and a Pontiac station wagon owned by the cor-

porate plaintiff and operated by the individual plaintiff. The defendant's appeal is from the decision of the Industrial Commission, which awarded damages to both plaintiffs. The only question presented is whether the Industrial Commission erred in finding that defendant's truck driver negligently caused the collision involved.

The evidence relating to this question was as follows: Defendant's truck, loaded with 1,200 gallons of asphalt, was being driven by Gary Parlier in the center lane of a three-lane roadway in North Wilkesboro. Parlier had driven the truck before on several occasions. When defendant's truck approached the intersection of CBD Loop and Sixth Street, a four-lane, two-way road, at approximately 25 M.P.H., Parlier applied his foot brakes to slow for a red traffic light, but the brakes failed. Seeing a car stopped for the red light ahead of him in his lane, he swerved into the left lane and avoided the stopped car, and staying in the left lane of CBD Loop he continued steering the brakeless truck toward the Sixth Street intersection without shifting down into a lesser gear until the truck crashed into plaintiff's Pontiac, which was on Sixth Street waiting for traffic to clear before turning left at the intersection. Adjacent to the route traveled by defendant's brakeless truck was an 8 foot high concrete retaining wall. The Commission found that Parlier was negligent in failing to down-gear the truck and run it against the retaining wall.

That Parlier did not down-gear the truck and run it into the retaining wall before running into the intersection of a busy city street against a red light, as the Commission found and competent evidence showed, is not disputed. What is disputed is the Commission's finding that a reasonably prudent person would have done so under the same or similar circumstances. Defendant contends that faced with the sudden emergency that admittedly arose that it follows as a matter of law that the driver was not negligent in doing as he did. We disagree. What a reasonably prudent person will or will not do under various circumstances, including emergency circumstances, is nearly always a question of fact, not of law. Only when the facts are such that reasonable minds can reach but one conclusion does the question become one of law. *Patton v. Southern Railway Co.*, 82 F. 979 (4th Cir. 1897); *Brown v. Durham*, 141 N.C. 249, 53 S.E. 513 (1906). The facts in this case did not require the fact finders to conclude that the

defendant's driver acted with due care; they also permitted them to conclude that he did not. Though the sudden brake failure certainly created an emergency, such incidents often occur, particularly with heavily loaded trucks in mountain areas, and do not always lead to a collision with other vehicles on the highway. It is as reasonable to conclude, we believe, that trying to stop the heavily loaded truck by the means that were readily available was the driver's first duty in the circumstances that developed as it is to conclude that permitting the truck to run the red light into the much traveled intersection without trying to stop it constituted due care. Since the Commission's finding of fact is supported by the evidence, it is binding upon us, even though a finding to the contrary could have been made. *Tanner v. State Department of Correction*, 19 N.C. App. 689, 200 S.E. 2d 350 (1973).

Affirmed.

Judges BECTON and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 AUGUST 1985

BIRMINGHAM STEEL v. BUTLER No. 8426DC820	Mecklenburg (83CVD2963)	Affirmed
BUTLER v. STEWART No. 8526SC13	Mecklenburg (82CVS12023)	Hold that the judgment of trial court is affirmed in part, judgment is remanded for modification consistent with opinion
DILLARD v. WILES No. 8523SC221	Wilkes (82CVS672)	No error
IN RE FORECLOSURE OF DEED OF TRUST No. 8429SC1204	Henderson (84SP98)	Affirmed
LOWE v. BRYANT No. 8417SC753	Surry (82CVS1037)	No error
MAYER ELECTRIC v. CURRY No. 8426DC819	Mecklenburg (83CVD9241)	Affirmed
MILLER WIRE v. BUTLER No. 8426DC821	Mecklenburg (82CVD10651)	Affirmed
PARKER v. COTTON PROCESSING No. 8427SC1123	Cleveland (83CVS99)	Affirmed
RUSSELL FORD v. CURRY No. 8526SC14	Mecklenburg (83CVS9240)	Affirmed in part and remanded for modification consistent with opinion
SMITH v. DILLS No. 8410IC1041	Industrial Commission TA-7291 TA-7300	Reverse and Remand for further proceedings consistent with this opinion
STATE v. BROWN No. 8419SC860	Cabarrus (83CRS10023)	No error
STATE v. McDONALD No. 8512SC179	Cumberland (84CRS25569)	No error
STATE v. MIDDLETON & KORNEGAY No. 858SC200	Wayne (83CRS18065) (83CRS18063)	No error

STATE v. MITCHELL No. 8510SC152	Wake (83CRS49596) (83CRS49597)	No error
STATE v. STEWART No. 8417SC625	Surry (83CRS1488) (83CRS1489) (83CRS1490) (83CRS1492) (83CRS3099) (83CRS3100)	No error
STATE v. TAYLOR No. 8510SC230	Wake (83CRS88267)	No error
STATE v. THOMPSON No. 8515SC172	Orange (82CRS4726)	No error
TROTTER v. TROTTER No. 8418DC1179	Guilford (83CVD579)	Appeal Dismissed
US LEASING v. McELYEA No. 8426DC806	Mecklenburg (82CVD2880)	Reversed & Remanded

FALLSTON FINISHING, INC., AND GEORGE T. RUPPE v. FIRST UNION NATIONAL BANK

FIRST UNION NATIONAL BANK OF NORTH CAROLINA v. GEORGE T. RUPPE AND GAYNELLE RAMSEY RUPPE

L & L HOSIERY MILL, INC.; GAY HOSIERY MILL, INC.; RUPPE, DIXON, AND SPEARS, INC. v. FIRST UNION NATIONAL BANK v. GEORGE T. RUPPE, GAYNELLE RAMSEY RUPPE, HAROLD DEAN SPEARS, AND BETTY SPEARS, THIRD-PARTY DEFENDANTS

No. 8426SC1019

(Filed 20 August 1985)

1. **Banks and Banking § 13— loan commitment agreement—insufficient evidence of breach**

The trial court correctly directed a verdict for defendant bank on the issue of the bank's breach of a commitment to loan $100,000 to a hosiery finishing company where commitment letters revealed that the company was promised at most a loan of $100,000 and that the bank loaned such amount to the company.

2. **Damages § 11.1— punitive damages—insufficient evidence**

The trial court properly dismissed plaintiffs' claims for punitive damages where no evidence was presented from which the jury could find that defendant bank's actions, though willful, were malicious.

3. **Banks and Banking § 13— breach of loan commitment—sufficiency of evidence**

Plaintiffs' evidence was sufficient for submission of an issue to the jury as to whether defendant bank breached its commitment to lend the three plaintiff corporations money toward the purchase of a hosiery manufacturing company where plaintiffs produced two letters showing that the bank had agreed to lend plaintiffs some sum of money, and questions of fact remained as to exactly how much money the bank agreed to lend each plaintiff.

4. **Accord and Satisfaction § 1— letter as accord and satisfaction**

The trial court properly decided as a matter of law that, if valid, a letter signed by the parties stating that such agreement and loans to the individual and corporate plaintiffs mentioned therein replaced "any and all loans or commitments now outstanding" constituted an accord and satisfaction of plaintiff corporations' claims against defendant bank for breach of loan commitments.

5. **Cancellation and Rescission of Instruments § 10.2— mental incapacity—sufficiency of evidence**

Plaintiffs' evidence was sufficient for submission to the jury of an issue as to the mental capacity of the individual plaintiff to enter into an accord and satisfaction agreement with defendant bank for himself and as a representative of plaintiff corporations.

6. Duress § 1— economic duress—sufficiency of evidence

Plaintiffs' evidence was sufficient for submission of an issue as to whether an accord and satisfaction of plaintiffs' claims against defendant bank for breach of a commitment to lend the individual and corporate plaintiffs money toward the purchase of a hosiery manufacturing company was procured by economic duress where it tended to show that, after defendant bank made it known that it would not lend the money as promised, plaintiffs had the choice of entering the agreement releasing the bank of its previous loan obligations and receiving a portion of the promised money or watching the three corporate plaintiffs and the hosiery manufacturing company collapse.

7. Duress § 1— simple duress—insufficient evidence

The trial court did not err in failing to submit to the jury the issue of whether an accord and satisfaction was obtained by defendant bank by simple duress where there was no evidence that defendant at any time owed plaintiffs any fiduciary duty.

8. Cancellation and Rescission of Instruments § 3.1; Duress § 1— agreement obtained by economic duress—issue of ratification

An issue as to whether an accord and satisfaction agreement allegedly obtained by economic duress was ratified by plaintiffs should have been submitted to the jury where there was evidence that plaintiffs accepted loans pursuant to that agreement and had those loans extended, and where there was also evidence that the individual plaintiff, who signed the agreement for himself and for plaintiff corporations, did not have the mental capacity to understand the consequences of his actions when he signed the agreement, and that the circumstances constituting the economic duress continued at the time the individual plaintiff signed the agreement.

APPEAL by plaintiffs and defendant from *Burroughs, Judge.* Judgments entered 5 December 1983 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 June 1985.

Hamrick and Hamrick by J. Nat Hamrick for plaintiff appellants-appellees.

Hamel, Hamel & Pearce by Reginald S. Hamel for defendant appellant-appellee, First Union National Bank.

COZORT, Judge.

This case involves a series of complicated business transactions between the parties. The controversy in a nutshell relates to the failure of a business due to the bank's refusal to lend money it allegedly agreed to lend. First Union National Bank is the defendant in two of the above entitled actions and is the plaintiff in the third action. However, for convenience, First

Union National Bank was treated as the defendant at trial and will be hereafter denominated as such on appeal. The other parties to this litigation were treated as plaintiffs at trial and will likewise be designated as such on appeal.

The trial in this consolidated action was tried intermittently, without objection from the parties, from 19 September 1983 through 23 September 1983 and 31 October through 9 November 1983. At the close of the plaintiffs' evidence and again at the close of all the evidence, the defendant made a motion for a directed verdict with regard to several of the plaintiffs' claims for relief. Based on the trial court's partial granting of the defendant's motion, two separate sets of issues were submitted to the jury on different dates. The first set of issues contained four questions regarding the mental capacity of plaintiff, George T. Ruppe. The second set of issues concerned the existence of a contract between the defendant and a plaintiff corporation, the defendant's alleged breach, and the amount of damages, if any.

In response to the jury's answers to the issues submitted, the trial court entered two judgments in favor of the defendant. The plaintiffs, George T. Ruppe and wife, Gaynelle R. Ruppe, and the plaintiff corporations have appealed. For the reasons that follow, we hold the trial court erred in refusing to submit certain questions of fact raised at trial to the jury, and we remand this case for a new trial. The facts follow.

In 1950, plaintiff George T. Ruppe formed a partnership with his brother and entered the hosiery business. In 1958, Ruppe and others, including W. K. Mauney, Jr., and Charles F. Mauney of Mauney Hosiery Mill, formed Ideal Hosiery Corporation, a company which would produce socks.

Although Ideal was subsequently liquidated, Ruppe by 1977 was involved in six hosiery mills. He served as general manager for the three Mauney controlled mills, Cleveland Hosiery Mill, Inc., Can-Do Hosiery Mill, Inc., and Lyntex, Inc., and had controlling interest in plaintiff corporations Gay Hosiery Mill, Inc., Ruppe, Dixon, and Spears, Inc., and L & L Hosiery Mill, Inc.

These mills knitted socks in the greige, but did not have the ability to dye or finish hosiery. Ruppe became interested in acquiring dyeing and finishing equipment capable of handling the

greige production of the three plaintiff corporations which he controlled. Mauney Hosiery handled this part of the production process for the Mauney controlled mills. In the fall of 1977, Ruppe took the first step into the finishing business by starting Fallston Finishing Co., Inc., and purchasing the necessary equipment. Because at this time Ruppe did not have a dyeing operation, he was forced to knit the socks at his three mills, send them to a custom dyer, and bring them back to Fallston for boarding and packaging.

Ruppe soon realized that his operation costs could be substantially reduced if he had the capacity to dye his own socks. In the spring of 1978, Ruppe learned that Hutchens Hosiery Mill, a large hosiery manufacturing company, was for sale and discussed his purchase of the mill with Henkel Hutchens, its owner. Hutchens owned a dyeing facility as well as other machines capable of manufacturing a high quality sock. Ruppe immediately contacted L. E. Hinnant, vice president with the defendant bank, to obtain a loan for purchasing Hutchens. Hinnant claimed that by the first of May in 1978, besides wanting a dyeing facility, Ruppe was obsessed with severing his business relationship with the Mauneys, whom Ruppe believed "had Mafia connections." By acquiring Hutchens, their business ties would necessarily have to be broken because Ruppe's operation would be in competition with Mauney Hosiery Mill.

According to Ruppe, Hinnant stated that he could borrow the money he needed to purchase Hutchens and more if necessary. Ruppe testified that he looked at Mr. Hinnant, pointed his finger, and said: "If I don't get the money I'll go broke."

On 11 May 1978, the defendant bank issued Ruppe two letters signed by Hinnant. One letter stated that the bank would lend Ruppe on an individual basis the sum of $100,000, if needed. The other letter confirmed that the bank would extend to the plaintiff corporations the following lines of credit totaling $300,000:

To Gay Hosiery Mill, Inc.	$100,000.00
To L & L Hosiery Mill, Inc.	50,000.00
To Fallston Finishing, Inc.	100,000.00 and
To Ruppe, Dixon, and Spears, Inc.	50,000.00

On 15 May 1978, the bank sent Ruppe four additional letters signed by Hinnant, committing to extend short-term lines of credit for one year, also totaling $300,000, to Ruppe and the following corporations:

To George T. Ruppe and wife	$100,000.00
To Gay Hosiery Mill, Inc.	100,000.00
To L & L Hosiery Mill, Inc.	50,000.00 and
To Ruppe, Dixon, and Spears, Inc.	50,000.00

Each of these 15 May letters required and received either a signed acceptance from Mr. and Mrs. Ruppe as to their individual line of credit or from Ruppe as an officer of each corporation.

At trial, Ruppe contended that under these letters the bank committed itself to lend him $200,000 and his companies $500,000. Hinnant testified, however, that the 11 May letters were not letters of credit, but merely confirmation letters concerning the subject matter of Ruppe's 11 May conversation with Hinnant and that Ruppe was only promised a $100,000 loan and a $300,000 line of credit among his companies. According to Hinnant, from May until Ruppe bought Hutchens Hosiery in June of 1978, Ruppe would visit the bank six to eight times a day. Hinnant explained that the 11 May letters were issued to assuage Ruppe's fears that the money would be available. Hinnant testified:

> [Ruppe was afraid that] . . . if he got too big, [the Mauneys] might rub him out, and that's the reason he needed these letters to show to his creditors in case something happened to him Mrs. Ruppe could come to the bank and we could work out a loan.
>
> * * * *
>
> I was on the way to a County Commissioners' meeting that morning and I was running late. I got the secretary to type [the 11 May letters] out real quick and I waited to sign them and I told him I would have his regular letters of credit no later than the 15th or 16th.

Hinnant also explained that because the line of credit offered to Fallston on 11 May was made the subject of an actual loan of $100,000 to Fallston on 15 May 1978, no formal commitment letter like those issued on 15 May was necessary.

On 13 June 1978, Fallston Finishing, Inc., entered into a written agreement to purchase the assets of Hutchens Hosiery Mill, Inc., for $590,000. The terms of the sale agreement provided that $45,000 would be paid immediately as a down payment, $245,000 would be paid by 16 June 1978, and the $300,000 balance would be paid in three $100,000 installments every two months thereafter. On 14 June 1978, Ruppe approached the bank requesting a loan of $250,000 to cover the 16 June initial payment. His request was denied. Ruppe, however, raised $290,000 for the down payment and first payment to Hutchens by personally borrowing $100,000 from First Union, adding $18,000 of his own money, borrowing $63,000 from his other companies, and raising $109,000 from investors. The $100,000 was loaned to Ruppe by two separate $50,000 notes dated 13 June and 14 June 1978. According to Hinnant, this $100,000 loan fulfilled the bank's obligation contained in the 15 May 1978 letter. To secure the $300,000 balance owed on the purchase price, Fallston Finishing gave Hutchens a note and security agreement on the knitting, dyeing, and finishing equipment it purchased from Hutchens Hosiery.

Fallston Finishing, Inc., moved into the Hutchens Hosiery Mill on 19 June 1978. Its management began taking over the operation of the mill and began to knit, dye and finish socks. On 30 June 1978 Ruppe resigned as general manager from the three Mauney controlled mills, Cleveland, Can-Do, and Lyntex. The Mauneys eventually got out of Ruppe's three mills, L & L Hosiery, Gay Hosiery, and Ruppe, Dixon, and Spears, Inc.

Ruppe explained at trial that the transition from an operation which predominantly knitted and sold socks in the greige to an operation that sold dyed and finished ones was expensive because his mills were now in competition with former customers, including the Mauneys, who previously had bought his companies' socks in the greige.

On 8 August 1978, seven days before the first $100,000 installment under the Hutchens purchase agreement was due, a dispute arose between Ruppe and First Union as to whether First Union had agreed to lend Ruppe the funds to finance the purchase of the Hutchens Hosiery assets. Ruppe testified: "I asked him if I could get the money and [Hinnant] told me that they didn't have no more commercial money available."

Ruppe attempted to borrow the necessary funds to complete the purchase from three other banks. He requested from the First National Bank of Catawba County a loan of $800,000 to assume Hutchens' loan of $225,000 and $400,000 to pay Hutchens for inventory and equipment. First National, however, would agree to lend Ruppe only $400,000. Ruppe also approached First Citizens Bank and Trust Company for a loan, but was turned down. Independence Bank offered Ruppe a loan of $500,000. Ruppe testified that as a condition of the loan Independence requested the personal guaranty of the stockholders in all the mills, which Ruppe felt was impossible.

During this time the operating capital of the plaintiff corporations was beginning to dry up, making their continued operation difficult. Ruppe and his associates were still trying to find customers for their finished socks, and orders for socks in the greige from their former customers were few. Also, by this time, the first installment towards the Hutchens purchase was past due.

In early September of 1978, J. T. Staples, a First Union assistant vice-president and area loan administrator, circulated two interoffice memos revealing First Union's position. On 1 September, he wrote:

> Yesterday afternoon, we had a rather heated meeting, at which time, George [Ruppe] told me he had firm commitments from Josh [Hinnant] on Gay Hosiery for $100M, Ruppe, Dixon & Spears for $50M, and L & L Hosiery Mill for $50M . . . all dated May 15, 1978. These letters were in Josh's file, and the first time I was aware of their existence was yesterday afternoon. Based on this, I felt we were committed to try and work out some kind of amicable arrangement. Up until that time, I thought we had a relatively good chance of possibly backing out.
>
> . . . The only loophole that I can see at this time is that the funds were agreed to be loaned to the individual companies for short term needs, not for acquisition of capital assets, and this may have violated the good faith of the agreement.

On 11 September 1978, Staples further related:

> [The bank's attorney's] opinion was that we were legally obligated to fund these commitments if requested to do so by the related companies. It was acknowledged that the request for funding had already been made. However, he did state that we could renege on our commitments, but that we would be subject to actual plus punative [*sic*] damages and that the latter could easily hit seven figures.
>
> We explored the possibility of using falsified financial statements as a defense, but [our attorney] felt that was a very thin possibility. Eric's [Dunn, assistant regional loan administrator] idea about the purpose of the commitment (short term line) vs. the use of the funds (purchase of plant) was also discounted by [our attorney] as not being defendable.

During the latter part of September 1978, Ruppe suffered a nervous breakdown. He was hospitalized on 17 September 1978 for psychiatric help after attempting suicide by taking an overdose of Valium. Ruppe testified that when he realized he could not borrow the necessary money he "felt the whole world had come out from under [him]." George Ruppe's son, Jerry Ruppe, drove him to the hospital and observed: "He was just there. He couldn't talk, didn't know his name, couldn't write." Jerry Ruppe further related that when his father was released from the hospital two weeks later he was still in the same condition. According to Tony Ruppe, George Ruppe's other son, his father had not recovered as of the time of trial in September of 1983.

Ruppe's mills suffered further financially while Ruppe was in the hospital. Tony Ruppe testified that when the Hutchens Hosiery purchase collapsed he tried to find customers for their greige goods. However, his father was the only person who had ever done any selling. Tony Ruppe testified: "We tried to call up some of the people we had done business with in the past. Some of them we just begged. We told them the shape daddy was in. He was in the hospital. We just had to have something to run." With the mills on the verge of collapse and his father in the hospital, Tony Ruppe went back to First Union to work out some arrangement to save the mills.

On 27 September 1978, George Ruppe was released from the hospital to attend a meeting between the parties the next day. J. T. Staples, George Ruppe, Tony Ruppe and others were pres-

ent and an agreement was reached whereby First Union agreed to lend Ruppe and his companies certain sums of money in exchange for a release of all claims against the bank. This agreement was reduced to writing by a letter dated 29 September 1978 signed by Staples and Ruppe as an individual and in his corporate capacity. The next to the last paragraph in this letter stated:

> George, please understand that the loans offered in the preceding are subject to the conditions listed and the completion of Business Loan Agreements on each separate company similar to those already in effect. Additionally, when this letter is signed, acknowledging your acceptance of this offer, you understand that these are the only loans that will be made to you and your companies and that they will replace any and all loans or commitments now outstanding.

At trial, First Union contended this accepted and signed letter constituted an "accord and satisfaction." On 13 October 1978, the parties met, and various notes were signed and loans were made according to the 29 September letter. A summary of these loans follows:

George Ruppe—loaned $102,995.88 to pay off his two $50,000 notes;

Fallston Finishing, Inc.—loaned $103,723.28 to pay off its $100,000 note;

Gay Hosiery—loaned $125,000 to pay off its previous indebtedness of $53,637.61 and interest;

L & L Hosiery—loaned $100,000 to pay off its previous indebtedness of $50,436.17, plus interest owed;

Ruppe, Dixon, and Spears, Inc.—loaned $140,000 to pay off its previous indebtedness of $113,401.91.

In all, First Union loaned the various plaintiffs a total of $154,273.47 in new money under the 29 September agreement.

On 26 October 1978, realizing that Fallston would not be able to pay off its $300,000 purchase money note as agreed, Hutchens Hosiery agreed to cancel the indebtedness in exchange for its knitting equipment Ruppe had previously purchased. Fallston agreed to vacate the Hutchens Hosiery building by December of

1978. By the end of 1978, Ruppe and the plaintiff corporations had paid off the First Union loan to Fallston.

In January of 1979, Fallston Finishing was shut down and Ruppe's individual 13 October 1978 loan of $102,995.88 was renewed. In January of 1980, Ruppe and Fallston Finishing filed an action against First Union for damages for its refusal to loan the money it had agreed to loan in May of 1978. In April of 1980, Ruppe stopped making payments on his individual note. First Union unsuccessfully demanded payment of the loan in June of 1980 and again on 19 March 1981. First Union filed its action against Ruppe and his wife for payment of this note on 27 March 1981.

Gay Hosiery, L & L Hosiery, and Ruppe, Dixon, and Spears, Inc., had their 13 October 1978 loans extended on 14 June 1979 and made payments on their notes through 16 February 1981. First Union demanded payment of these loans on 4 May 1981. Later, on 30 July 1981, these plaintiff corporations filed an action against First Union alleging that they had been damaged due to the bank's failure to lend Fallston Finishing money to complete the Hutchens Hosiery purchase. First Union counterclaimed for the amount these corporations owed on the 13 October 1978 loans and impleaded Ruppe and his wife and Harold Spears and his wife as third-party defendants based on their execution of unconditional guaranties underwriting loans extended to Gay Hosiery and Ruppe, Dixon, and Spears, Inc.

At the close of all the evidence, the defendant bank moved to strike the plaintiffs' duress averments in the pleadings on the grounds that they were not specifically alleged as required under G.S. 1A-1, Rule 9(b). First Union also made a motion for a directed verdict under G.S. 1A-1, Rule 50, on several of the plaintiffs' claims and on some claims on which it carried the burden of proof. Although the trial judge and the parties discuss the bank's motion only in directed verdict terms, we note that several of the "claims" are in reality issues of fact that the bank felt should not be submitted, for various reasons, to the jury for consideration.

In the first place, the defendant bank moved for a directed verdict on all of the plaintiffs' claims against the bank. These included: (1) Ruppe's claim of breach of commitment to loan him personally $100,000; (2) Fallston Finishing's breach of commitment

claim to loan it $100,000; (3) Fallston's claims for punitive damages against the bank for maliciously conspiring to breach its loan commitment; (4) George and Gaynelle Ruppe's claims for punitive damages for maliciously and wrongfully bringing an action to recover on the 13 October 1978 note knowingly obtained under duress; (5) Gaynelle Ruppe's claim for actual damages for mental anguish suffered due to the bank's actions; and (6) the plaintiff corporations', Gay Hosiery, L & L Hosiery, and Ruppe, Dixon, and Spears, Inc., claims of breach of commitment to loan them money for the purchase of Hutchens Hosiery Mill.

The trial court granted the defendant bank's motion for a directed verdict with regard to all these claims, except as to whether the bank breached its contract to loan Ruppe and L & L Hosiery certain monies. The issue of whether the bank breached its loan contract with Ruppe and L & L Hosiery was later submitted to the jury and answered in the negative.

The defendant bank in its motion also asked for a directed verdict on several issues on which it had the burden of proof which is proper under certain circumstances according to *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). The bank requested that the trial court not submit the issue of whether the 29 September 1978 letter constituted an accord and satisfaction. Instead, the bank sought a ruling that under the evidence the letter complied with the requirements of G.S. 1-540 as a matter of law. The trial court agreed and decided to submit to the jury only the question of whether plaintiff George T. Ruppe had the requisite mental capacity to enter into this agreement. However, the trial judge refused to allow the jury to decide whether the agreement was signed by Ruppe under duress or economic duress, two other defenses to the accord and satisfaction issue presented by the plaintiffs.

Furthermore, the trial court, pursuant to the bank's motion, refused to submit the issue of whether the plaintiffs' acceptance of the loaned money under this agreement and their extension of these loans in January and in June of 1979 constituted a ratification of the 29 September 1978 agreement, regardless of Ruppe's mental capacity at the time.

Finally, the bank requested that directed verdicts be entered in its favor on the amounts due on the 13 October 1978 loans

made according to the 29 September 1978 agreement. When the jury answered the issue that Ruppe lacked sufficient mental capacity on 29 September 1978 to enter into the accord and satisfaction, the trial court nevertheless entered judgment against L & L Hosiery; Gay Hosiery; Ruppe, Dixon, and Spears, Inc.; and George and Gaynelle Ruppe on the balances due on the sums loaned to them on 13 October 1978.

Although the plaintiffs have presented eighty-eight questions for our review dealing with various alleged errors committed at trial, the overwhelming question to be determined on this appeal is whether the trial court erred in granting the defendant's motion for a directed verdict and refusing to submit to the jury virtually all the issues raised at trial.

A motion for a directed verdict questions "whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it." *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644, 272 S.E. 2d 357, 359 (1980). We are faced on appeal with "the identical question which was presented to the trial court . . . namely, whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury." *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 397 (1971). If the court finds more than a scintilla of evidence to support the plaintiff's *prima facie* case in all its constituent elements, the motion should be denied. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. at 644, 272 S.E. 2d at 360.

[1, 2] We agree that the trial court correctly directed a verdict in favor of the bank on the issue of the bank's breach of commitment to loan $100,000 to Fallston Finishing. The uncontroverted evidence at trial revealed that under the 11 May and 15 May 1978 commitment letters Fallston was only promised at most a loan of $100,000 and that on 15 May 1978, Fallston Finishing was loaned $100,000. Moreover, we hold that the trial court properly dismissed the plaintiffs' respective claims for punitive damages. There was no evidence presented at trial by the plaintiffs from which the jury could find that the bank's actions, although willful, were malicious. Similarly, since no evidence was presented at trial concerning Gaynelle Ruppe's claim for damages due to mental anguish, we hold the trial court properly dismissed this claim for relief.

[3] However, we think the trial court improperly refused to submit to the jury the issues of whether the bank breached its commitment to loan Ruppe, Gay Hosiery, and Ruppe, Dixon, and Spears, Inc., money towards the Hutchens Hosiery purchase. As noted earlier, the trial court did allow the jury to determine whether L & L Hosiery had a loan commitment from the bank and whether that commitment was breached. We take time to note at this point, however, that when this case is retried, the issues of whether the bank contracted to loan money to L & L Hosiery and whether it breached that contract must be resubmitted to the jury. These issues as framed are improper. They ask whether there was a contract and breach by the bank to loan "George T. Ruppe and L & L Hosiery" certain monies. From our review of the record, there was no evidence that Ruppe as an individual signed the loan commitment to L & L Hosiery from the bank. There was also no evidence presented that Ruppe ever personally guaranteed a loan for L & L Hosiery. Because under these facts the issues are ambiguous, we hold the issue of whether the bank breached its commitment to loan L & L Hosiery money must be submitted to the jury in proper form. *See* G.S. 1A-1, Rule 49(b).

In any event, our review of the evidence indicates that Ruppe, Gay Hosiery, and Ruppe, Dixon, and Spears, Inc., like L & L Hosiery, presented a *prima facie* case concerning the bank's loan commitments. By producing the actual 11 May and 15 May letters themselves, Ruppe and these plaintiff corporations showed that the defendant bank had agreed to lend some sum of money. Surely, questions of facts remained as to exactly how much money the bank promised to lend.

The plaintiffs asserted that under the 11 May and 15 May 1978 letters the bank agreed to lend Ruppe as an individual $200,000; Gay Hosiery, $200,000; Ruppe, Dixon, and Spears, Inc., $100,000; and L & L Hosiery, $100,000. The defendant bank contended that these letters referred to the same loans and that the bank had only agreed to lend $100,000, $100,000, $50,000, and $50,000 to Ruppe and the plaintiff corporations respectively. All of the plaintiffs were therefore entitled to have the jury pass on whether the bank contracted to lend them money, how much the bank promised to lend, and whether the bank breached its commitment to lend those amounts.

[4] We note that these issues would be rendered moot if the bank's accord and satisfaction defense were upheld. The bank introduced as evidence of an accord and satisfaction the 29 September 1978 letter signed by the requisite parties stating that this agreement and the loans mentioned therein replaced "any and all loans or commitments now outstanding." The defendant bank's "plea of accord and satisfaction 'is recognized as a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement.' . . . [Citation omitted.]" *Shopping Center v. Life Insurance Corp.*, 52 N.C. App. 633, 642-43, 279 S.E. 2d 918, 924-25, *disc. rev. denied*, 304 N.C. 196, 285 S.E. 2d 101 (1981). This concept is codified in G.S. 1-540. This statute provides:

> In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same.

The trial court found that the 29 September 1978 letter was "an accord and satisfaction on a compromise settlement." Although normally the existence of an accord and satisfaction is a question of fact for the jury, where the only reasonable inference is existence or nonexistence, accord and satisfaction is a question of law. *Shopping Center v. Life Insurance Corp.*, 52 N.C. App. at 643, 279 S.E. 2d at 925. We agree with the trial judge and hold that it properly decided as a matter of law that, if valid, this letter represented an accord and satisfaction of the plaintiff corporations' breach of loan commitment claims.

[5] We further hold, contrary to the defendant bank's position, that the trial court properly submitted to the jury the issue of Ruppe's mental capacity to enter into the agreement for himself and as a representative of his corporations. Although there was no question of fact that this accord and satisfaction agreement existed, there were questions of fact for the jury to determine relating to whether this agreement was valid. George Ruppe's mental capacity at the time the agreement was executed was one

such question. Our review of the record shows that the plaintiffs presented sufficient evidence to require the submission of the issue of Ruppe's mental capacity to the jury.

The jury answered the mental capacity issue in favor of the plaintiffs. The trial court, however, inconsistent with the jury's answer to this issue, ordered the plaintiffs to pay the balances then due on the 13 October 1978 loans. Nothing else appearing, because the loans were made pursuant to the 29 September accord and satisfaction agreement and as a result of the same conditions as those present at that time, we hold the trial court erred in directing a verdict in favor of the bank on those loans. We, therefore, vacate the 5 December 1983 judgment entered against L & L Hosiery, Gay Hosiery, Ruppe, Dixon, and Spears, Inc. and George and Gaynelle Ruppe on these loans.

[6] We also hold that the trial court erred in refusing to submit to the jury the issue of economic duress, another defense presented by the plaintiffs to the validity of the accord and satisfaction agreement. In *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973), the Supreme Court discussed the question of whether a threat of breach of contract could amount to economic duress. In *Rose*, the Supreme Court related:

> What are the essential characteristics of economic duress? "A threatened violation of a contractual duty ordinarily is not in itself coercive, but if failure to receive the promised performance will result in irreparable injury to business, the threat may involve duress." [Citation omitted.]
>
> "[A] threat to breach a contract, if it does create severe economic pressure upon the other party, can constitute duress where the threat is effective because of economic power not derived from the contract itself." [Citation omitted.]
>
> "It must also appear that the threatened party could not obtain the goods from another source of supply. . . ." [Citation omitted.] In addition, it must appear that there was "no immediate and adequate remedy in the courts" which would enable the buyer to resist the seller's demand. [Citation omitted.]

Id. at 665, 194 S.E. 2d at 536. Our review of the trial transcript indicates that the plaintiffs presented a *prima facie* case of economic duress. The plaintiffs offered substantial evidence of a breach or a threat of a breach by the bank of its loan commitments to the plaintiffs. According to the plaintiffs' evidence, this breach caused them great financial hardship which induced Ruppe, for himself and his companies, to enter into the accord and satisfaction agreement. Considering the plaintiffs' evidence in its most favorable light, it appears that, after the bank made it known that it would not lend the money as promised under the 11 May and 15 May 1978 letters, Ruppe and his companies had two choices: (1) enter the 29 September agreement, releasing the bank of its previous loan obligations, and receive some money, or (2) watch all four of the companies collapse. It is also evident that the bank's ability to destroy Ruppe's companies did not come as a result of their loan contracts alone. Surely, it was for the jury to determine whether the bank's actions amounted to economic duress and whether Ruppe had any other alternate sources from which he could get the necessary funds.

[7] The individual plaintiffs, George and Gaynelle Ruppe, further contend on appeal that the trial court erred by failing to submit the issue that the bank's actions amounted to simple duress. We disagree based on the fact that these plaintiffs presented no evidence that the bank owed them at any time any fiduciary duty. *See Housing, Inc. v. Weaver*, 37 N.C. App. 284, 246 S.E. 2d 219 (1978), *affirmed per curiam*, 296 N.C. 581, 251 S.E. 2d 457 (1979). We hold the trial court properly refused to submit this issue to the jury.

[8] Finally, the defendant bank contends that all of the trial judge's alleged errors are of no consequence in this case because he properly granted its motion for a directed verdict on the issue of ratification. Essentially, the bank argues that in spite of the plaintiffs' defenses, the validity of the accord and satisfaction agreement cannot be questioned because all the evidence at trial shows that the plaintiff Ruppe and the plaintiff corporations ratified the 29 September 1978 agreement by accepting the loans pursuant to that agreement on 13 October 1978 and by having those loans extended in January and in June of 1979.

As a general proposition, a transaction procured by duress may be ratified by the victim so as to preclude a subsequent suit to set the transaction aside. *Id.* at 299, 246 S.E. 2d at 227. However, the victim's act will not constitute a ratification unless at the time of the act, the victim had full knowledge of the facts and was then capable of acting freely. *Link v. Link*, 278 N.C. 181, 197, 179 S.E. 2d 697, 706-07 (1971). Thus, there would be no ratification if at the time of the plaintiffs' acts the circumstances constituting the economic duress remained and Ruppe's mental capacity had not yet returned. *See Housing, Inc. v. Weaver*, 37 N.C. App. at 300, 246 S.E. 2d at 228.

We hold that in the present case the question of whether the plaintiffs ratified the accord and satisfaction by their actions was for the jury. There was sufficient evidence from which the jury could find that in October of 1978 or even at the time of trial Ruppe did not have the mental capacity to understand the consequences of his actions. Also, by virtue of the fact that the plaintiffs had to have the October 1978 loans extended, there was ample evidence that the conditions which gave rise to the economic duress in the first place continued. The trial court, therefore, improperly refused to submit this issue to the jury.

Finally, although the defendant bank also technically gave notice of appeal at trial, we fail to see how it can be viewed as an aggrieved party and decline to review its assignments of error which have not been intermittently discussed within.

In summary, we affirm (1) the entry of directed verdict for the defendant bank on Fallston Finishing's claim of breach of the loan commitment; (2) the dismissal of the plaintiffs' claims for punitive damages; (3) the dismissal of Gaynelle Ruppe's claim for damages for mental anguish; and (4) the court's refusing to submit to the jury the issue of whether the defendant bank's actions constituted simple duress as to George Ruppe and Gaynelle Ruppe. We reverse (1) the entry of directed verdict against George Ruppe; Gay Hosiery; and Ruppe, Dixon, and Spears, Inc., on their claims that the bank breached its commitment to loan money to them; (2) the trial court's wording of the issue of whether the bank breached its commitment to loan money to L & L Hosiery; (3) the trial court's order to L & L Hosiery; Gay Hosiery; Ruppe, Dixon & Spears, Inc.; and George and Gaynelle Ruppe to pay to

the bank the balances owed on the 13 October 1978 loans; (4) the trial court's refusal to submit to the jury the issue of economic duress; and (5) the trial court's refusal to submit to the jury the issue of ratification of the 29 September 1978 agreement. Accordingly, we order a

New trial.

Judges WELLS and JOHNSON concur.

NANCY R. PASOUR v. JOSEPH S. PIERCE, JR., ROBERT L. HEAVNER, JOHN E. JENKINS, JAMES I. COX, AND LARRY L. BRITTAIN, INDIVIDUALLY, AND D/B/A FIVE STAR DEVELOPERS; JOSEPH S. PIERCE, JR., ROBERT L. HEAVNER, JOHN E. JENKINS, JAMES I. COX, LARRY L. BRITTAIN, AND EDWARD E. STEBBINS, INDIVIDUALLY, AND D/B/A HOSPITAL PLAZA ASSOCIATES; PIERCE, HEAVNER & JENKINS BUILDERS, INC., AND THE CITY OF GASTONIA, NORTH CAROLINA

No. 8427SC1233

(Filed 20 August 1985)

1. **Negligence §§ 1.3, 47— issuance of building permit—no inference of safety of building**

In an action arising from an injury suffered at a step-off outside the front doorway of defendants' building, the trial court did not err by refusing to allow defendants to argue that the issuance of a building permit by the City gave rise to an inference of safety of the building. Defendants did not introduce either the building code or the permit or offer the testimony of City inspectors or other officials; moreover, defendants sought to introduce not an inference from fact, but a new legal standard.

2. **Negligence § 48; Evidence § 48— architect qualified to testify concerning causation and safety conditions of a building**

In an action arising from an injury suffered at a step-off outside the entranceway to defendants' building, plaintiff's expert witness was qualified to testify concerning causation and safety conditions of the building where she had been certified by the court as an expert in the field of architecture; her testimony as a whole demonstrated considerable breadth of education, experience, and knowledge; and her testimony was well within the bounds of her area of specialized knowledge.

3. Negligence § 58— fall at step-off in entranceway—contributory negligence—properly submitted to jury

In an action arising from plaintiff's fall at a step-off in the entranceway of defendants' building, the trial court properly refused defendants' motions for directed verdict and judgment n.o.v. based on plaintiff's contributory negligence where reasonable minds could differ on the facts of this case as to plaintiff's negligence.

4. Negligence § 58.1— fall at entranceway of building—instructions on contributory negligence—no error

In an action arising from plaintiff's fall in an entranceway to defendants' building, the trial court did not err in its instructions by refusing to include plaintiff's knowledge as a factor to consider for contributory negligence where such an instruction would be contrary to North Carolina law.

APPEAL by defendants from *Kirby, Judge.* Judgment entered 28 August 1984 in Superior Court, GASTON County. Heard in the Court of Appeals on 4 June 1985.

Harris, Bumgardner & Carpenter by R. Dennis Lorance and Tim L. Harris; and Gray and Hodnett by James C. Gray for plaintiff appellee.

Stott, Hollowell, Palmer & Windham by Douglas P. Arthurs and Grady B. Stott for defendant appellants.

COZORT, Judge.

Plaintiff brought this personal injury action against the designers and owners of an office building. Upon leaving the building, plaintiff suffered a broken ankle when her heel caught on a step-off at the front entranceway. Defendants denied negligence and alleged that the plaintiff had been contributorily negligent. After a jury trial, plaintiff was awarded $25,000. On appeal, defendants' assignments of error concern the trial court's refusal to allow argument regarding certain evidentiary inferences, the admissibility of certain expert opinion testimony, the trial court's denial of defendants' motions for directed verdict and judgment notwithstanding the verdict, and the trial court's instruction to the jury to apply an objective standard for contributory negligence. For reasons stated herein, we find no prejudicial error.

The building, known as Hospital Plaza Building, was designed by defendant Robert L. Heavner, a partner in defendant Hospital

Plaza Associates in 1974. Although Heavner had received no formal training as an architect or engineer, his drawings for the Plaza Building were submitted to the City of Gastonia, which subsequently issued a building permit to the partnership. The drawings indicated a step-off of approximately four inches, located outside the front doorway. After the building was constructed in accordance with the drawings, the City issued a certificate of occupancy to the partnership. Defendant Hospital Plaza Associates retained ownership of the building and rented out office space to various tenants, including Snelling and Snelling, an employment agency. As owner of the building, the partnership also remained responsible for maintaining the common areas, including the front entrance.

On 3 August 1978, plaintiff Nancy R. Pasour went into the Plaza Building for an interview at Snelling and Snelling. It is stipulated that 3 August was "a bright sunshiny day." Plaintiff entered the building at the main entrance. There were double glass doors at this entrance and a metal frame with a "kickplate" or rail approximately four inches wide at the bottom of the doors. The entrance was designed in such a way that the doors swung out at the level of the step-off over and into the sidewalk. Plaintiff stepped up to the level of the doors and entered the building, where she remained approximately one hour.

After her interview the plaintiff came down the inside stairway to exit by the same doorway she had entered. It was approximately ten feet from the stairs to the doorway. Plaintiff testified that as she approached the entrance, she was unable to see the step-off because of the kickplate. The edge of the step-off is not visible until a person, looking down, is roughly "one to one and a half steps away" from the door.

Plaintiff testified that she had no conscious memory of the step and was not thinking about it, and that she was looking out through the door for passersby instead of looking down. As the plaintiff stepped out the door, her heel caught on the step, causing her to fall and break her ankle. Plaintiff then filed this action to recover for her injury.

The six named individuals and their partnership, Hospital Plaza Associates, are the only remaining defendants in this action. Defendants Five Star Developers and Pierce, Heavner, and

Jenkins Builders, Inc., were granted a directed verdict at trial on 10 April 1984. The trial court had previously granted a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), in favor of the defendant City of Gastonia. The plaintiff's appeal from this ruling was later dismissed by this Court. A mistrial was declared as to remaining defendants after the jury was unable to reach a verdict.

This case was retried on 20 August 1984. The jury answered the issues in favor of plaintiff and awarded her damages of $25,000. Upon motion of defendants, the amount of expenses paid was set off and judgment was entered 28 August 1984 in the amount of $23,672.85. Defendants now appeal.

[1] Defendants' first assignment of error concerns the trial court's refusal to allow defendants to argue that the issuance of a building permit by the City gave rise to an inference of safety of the building. This argument is without merit, and further, it is unsupportable on the record before us.

Defendant Robert L. Heavner testified that upon submission of his plans to the City of Gastonia, a building permit was issued to defendants. Yet defendants have not corroborated this testimony by introducing either the Building Code or the permit into evidence or by offering the testimony of City inspectors or other officials.

Moreover, under our law it is the undoubted right of counsel to argue every phase of the case supported by the evidence and to deduce from the evidence offered all reasonable inferences therefrom. *Lamborn v. Hollingsworth*, 195 N.C. 350, 142 S.E. 19 (1928); *see also*, G.S. 84-14. Yet the trial court has the duty, upon objection, to censor remarks not warranted by either the evidence or the law, and the court's discretion will not be reviewed upon appeal unless grossly abused. *Id.; State v. Potter*, 69 N.C. App. 199, 316 S.E. 2d 359, *disc. rev. denied*, 312 N.C. 624, 323 S.E. 2d 925 (1984). Defendants seek to introduce not an inference from fact, but a new legal standard. Defendants are unable to support their view with any legal authority. To say that the mere issuance of a building permit for a structure not designed by an architect is evidence of the safety of the finished building is contrary to both sound judicial policy and to related existing authority.

While not directly contested here, a violation of the Building Code in North Carolina is negligence *per se*. *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 189 S.E. 2d 749, *cert. denied*, 287 N.C. 757, 191 S.E. 2d 361 (1972). This Court has also held that the Legislature intended the Building Code Council to adopt a Code regulating *construction* of buildings, not the *buildings* themselves. *Carolinas-Virginias Assoc. v. Ingram, Comr. of Insurance*, 39 N.C. App. 688, 251 S.E. 2d 910, *disc. rev. denied*, 297 N.C. 299, 254 S.E. 2d 925 (1979). Therefore, even a permit which may have been issued in accordance with Building Code procedures is not necessarily evidence of the safety of a building. We reject defendants' contentions on this issue as contrary to the evidence presented and existing law.

[2] Defendants' second assignment of error concerns the admissibility of certain opinion testimony by plaintiff's expert witness, architect Mary Olive Johnson. In addition to testifying that in her opinion, the entranceway of the Hospital Plaza Building did not meet the safety standards in effect in 1978, Ms. Johnson was also of the opinion that defendants should have placed a warning sign near the entranceway, and further, that the failure to post such a warning could have caused plaintiff's injury. Defendants contend: (1) that the opinion testimony was beyond the area of the expert's specialized knowledge; and (2) that it was mere speculation regarding an ultimate issue of fact for which expert testimony was not required.

Because this action was commenced prior to 1 July 1984, the North Carolina rules governing the admission of evidence before the adoption of the North Carolina Evidence Code control. *See* Editor's Note, G.S. 8C-1. Under the law which existed at the time, the trial court was afforded a wide latitude of discretion when making a determination about the admissibility of expert testimony. A finding by the trial judge that the witness possesses the requisite skill would not be reversed on appeal unless there was no evidence to support it. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Basically, testimony in the form of an opinion was admissible if the expert witness's specialized knowledge would assist the trier of fact to understand the evidence or determine a fact in issue. *In re Grad v. Kaasa*, 68 N.C. App. 128, 314 S.E. 2d 755, *reversed on other grounds*, 312 N.C. 310, 321 S.E. 2d 888 (1984).

In the case *sub judice*, the court certified Ms. Johnson as an expert in the field of architecture. Her testimony as a whole demonstrated considerable breadth of education, experience, and knowledge. The trial court found her duly qualified to render the opinions she gave on the conditions of the building and on questions of causation. Our review of the record reveals that the expert's opinion testimony was well within the bounds of her area of specialized knowledge. Furthermore, since the admissibility of expert opinion testimony does not depend on whether it invades the province of the jury, but whether it will aid the jury's understanding of the issue, the defendants' contention that her testimony relates to an ultimate issue of fact is without merit. *See Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981). Therefore, we hold the trial court properly admitted the opinion testimony of plaintiff's expert concerning causation and safety conditions of the building.

[3] Defendants next assign as error the trial court's refusal to grant defendants' motions for directed verdict at the close of plaintiff's evidence and for judgment notwithstanding the verdict. Under North Carolina law, the standards for granting each motion are the same. This Court must consider the evidence in the light most favorable to the nonmoving party. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

The proprietor of a place of business open to public patronage is obligated to keep the approaches and entrances to his establishment in a reasonably safe condition for the use of customers entering or leaving the premises and to give warning of hidden perils or unsafe conditions insofar as they are known or can be ascertained by reasonable inspection. *Hedgepeth v. Roses's Stores*, 40 N.C. App. 11, 251 S.E. 2d 894 (1979). A proprietor has no duty to warn invitees of an obvious condition or of a condition of which the plaintiff had equal or superior knowledge. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967). Also, a premise's construction is not deemed negligent unless by its character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it. *Reese v. Piedmont, Inc.*, 240 N.C. 391, 82 S.E. 2d 365 (1954). Whether a plaintiff is contributorily negligent as a matter of law and before a motion for directed verdict may be granted, plaintiff's evidence must establish plaintiff's negligence so clearly that reasonable

minds may not differ or so clearly that no other reasonable inferences may be drawn therefrom. *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702, *disc. review denied*, 305 N.C. 300, 290 S.E. 2d 702 (1981). The trial court, in considering reasonable inferences to be drawn from the surrounding conditions and the plaintiff's prior knowledge (or lack thereof), submitted the issues of defendants' negligence and plaintiff's contributory negligence to the jury. If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to plaintiff and others to the defendants, it is a case for the jury to determine. *Prevette v. Hospital*, 37 N.C. App. 425, 246 S.E. 2d 91 (1978). The determination of contributory negligence cannot be predicted on the automatic application of *per se* rules which do not take into account the particular state of facts presented. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). Because on the facts of this case reasonable minds may differ as to the plaintiff's negligence, we hold the trial court properly denied defendants' motions.

[4] Defendants' remaining assignment of error concerns the trial court's instruction on contributory negligence. Defendants contend that in evaluating plaintiff's own negligence, her own subjective appreciation or knowledge of the danger should have been taken into account, and that the instruction given effectively precluded this consideration. We find no merit in this contention.

Defendants request for inclusion of plaintiff's own knowledge as a factor to consider for contributory negligence is contrary to North Carolina law.

> The existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of dangers; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior . . . the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Lenz v. Ridgewood Associates, 55 N.C. App. at 122, 284 S.E. 2d at 707 (emphasis in original). The trial court may properly refuse a requested instruction which is not a correct statement of the law applicable to the evidence. *King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967). This assignment of error is therefore overruled.

For the foregoing reasons, we find no prejudicial error in the proceedings of the trial court below.

No error.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. HARRISON NELSON, JR.

No. 847SC949

(Filed 20 August 1985)

1. **Constitutional Law § 46— appointed counsel discharged over defendant's objection—error**

The trial court erred in a prosecution for second degree murder by discharging defendant's court-appointed counsel where defendant's family had hired private counsel to assist appointed counsel, appointed counsel was not in court on the day the trial was scheduled to begin because his daughter was seriously ill in the hospital, private counsel moved to withdraw because defendant did not want him for a lawyer and refused to cooperate with him, and defendant stated in support of the motion that he could not communicate with private counsel and wanted to be represented by appointed counsel. When an indigent defendant has confidence in and is satisfied with the appointed lawyer who has handled his case to the eve of trial, he should not be deprived of that counsel's services during the trial except for justifiable cause.

2. **Criminal Law § 5— insanity—failure to file notice—evidence admissible**

The trial court erred in a second degree murder prosecution by refusing to allow defendant to introduce evidence of insanity even though he failed to file a timely notice of intent to rely on the defense of insanity in accord with G.S. 15A-959. An accused may prove any affirmative defense, including insanity, under the general plea of not guilty.

3. **Criminal Law § 138— aggravating factor—especially cruel—improper**

The trial court in a second degree murder prosecution improperly found as a factor in aggravation that the offense was especially cruel where the evidence was that the unsuspecting victim was shot one time in the back.

Judge ARNOLD concurs in the result.

Judge COZORT concurs in part and dissents in part.

ON writ of certiorari to review proceedings before *Winberry, Judge.* Judgment entered 27 October 1982 in Superior Court, WILSON County. Heard in the Court of Appeals 2 April 1985.

Attorney General Edmisten, by Associate Attorney General Doris J. Holton, for the State.

Farris and Farris, by Robert A. Farris and Nora Henry Hargrove, for defendant appellant.

PHILLIPS, Judge.

[1] This appeal from defendant's conviction of second degree murder presents a facet of the court appointed counsel problem that we have not seen before. On 12 February 1982, immediately after his arrest and several months before trial, defendant was found to be indigent and Attorney Milton Fitch, Jr. was appointed to represent him. Shortly thereafter, exactly when the record does not show though the indication is that it was also several months before trial, defendant's mother, wife and sister hired Attorney Robert A. Farris to assist appointed counsel. On 25 October 1982, the day the trial was scheduled to begin, Mr. Fitch was not in court because his daughter was seriously ill in the hospital. Upon learning of these developments the court refused to continue the case, and *ex mero motu* entered an order permitting Fitch, who was unaware of the order until the next day, to withdraw from the case. At the same time the court denied Mr. Farris' motion to withdraw as counsel, though the grounds therefor were that defendant did not want him for a lawyer and refused to cooperate with him, and defendant stated in support of the motion that he and Farris could not communicate with each other, and he wanted to be represented by Fitch. Later Fitch filed an affidavit, which is uncontradicted, verifying the medical emergency referred to, and stating that he worked on defendant's case off and on from the time he was appointed until the Friday before the trial was scheduled to begin on Monday. Defendant contends that discharging his court appointed lawyer was unjustified and deprived him of his rights to effective assistance of counsel and due process. We agree.

Once counsel has been appointed to represent an indigent defendant, the appointment of substitute counsel at the request of either the defendant or the original counsel is constitutionally required only when it appears that representation by original counsel could deprive defendant of his right to effective assistance of counsel. *United States v. Young,* 482 F. 2d 993 (5th

Cir. 1973); *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980). Substitute counsel is required and must be appointed when defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. *United States v. Young, supra; United States v. Grow*, 394 F. 2d 182 (4th Cir.), *cert. denied*, 393 U.S. 840, 21 L.Ed. 2d 111, 89 S.Ct. 118 (1968); *State v. Hughes*, 54 N.C. App. 117, 282 S.E. 2d 504 (1981). While counsel in this case was removed upon the court's own motion it was not for any of the reasons that have been judicially approved heretofore. The court stated that counsel was being removed because defendant's family had retained private counsel to represent him and representation by appointed counsel, at public expense, was no longer necessary. But, according to the record: Retained counsel was employed "*to assist*" appointed counsel, rather than to handle the case; defendant's relatives selected and employed counsel without either seeking or obtaining defendant's approval; defendant had utilized the services of retained counsel but little, if at all, because they did not talk the same language and he could not understand him; and he was relying on appointed counsel to handle the case to a conclusion. That Mr. Farris may be a very splendid lawyer, as the court told defendant was the case, and, so far as the record indicates, represented defendant during the trial to the best of his considerable ability, does not alter the fact that the trial court had no justifiable grounds for depriving defendant of appointed counsel's services.

Whether a defendant in a criminal case receives effective assistance of counsel does not depend entirely upon counsel's ability. The ablest lawyer at the bar cannot effectively and satisfactorily represent a defendant who does not want his assistance and cannot understand or communicate with him. The quirks of human nature are such that some people simply cannot communicate well with some others, and for no good reason will confide in and trust one lawyer, but not others of like or superior ability. This does not mean, of course, that an indigent defendant has the right to have the court appoint for him the counsel of his choice. *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). But it does mean, we think, that when an indigent defendant has confidence in and is satisfied with the appointed lawyer that has handled his case to the eve of trial, that he should not be deprived of that counsel's services during the trial except for

justifiable cause, and none existed in this instance. There was no finding that defendant's status as an indigent had changed and no evidence is recorded that would support such a finding. Nor was there any finding as to the extent, if any, that retained, assistant counsel had participated in preparing the case for trial or that appointed counsel's continued services would not be beneficial to defendant. Since appointed counsel had handled and worked on the case for months, according to the record, in the absence of evidence to the contrary it must be assumed that his services during the trial would have benefited defendant to some extent, otherwise the constitutional right to counsel would be pointless. Even if the benefit had been only to allay defendant's anxieties about receiving a fair trial, that is no small and inconsequential thing beyond the concern of our law; for the purpose of our criminal jurisprudence is not only to deal fairly with those tried for crime, but to also make it appear that defendants' rights have been fairly and fully enforced. The latter purpose was frustrated, it seems to us, by the court's unjustified termination of an attorney-client relationship that had existed for many months and was entirely satisfactory to the client, and which deprived defendant of the services of a lawyer that had handled his case from the outset. Defendant is therefore entitled to a new trial and it is so ordered. A contrary holding, it seems to us, would permit relatives of indigent defendants to arbitrarily select their lawyers and deprive them of counsel appointed by the court; a course we cannot sanction since it could obviously lead to many abuses and is not compatible with the right that all defendants have to the effective assistance of counsel under the Constitution.

[2] The court also committed prejudicial error in refusing to allow defendant to introduce evidence of his insanity, even though a timely notice of "intent to rely on the defense of insanity" had not been filed in accord with G.S. 15A-959. Notwithstanding the statutory mandate, our Supreme Court has ruled that an accused may prove any affirmative defense, including insanity, under the general plea of not guilty. *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977); *State v. Johnson*, 35 N.C. App. 729, 242 S.E. 2d 517, *rev. denied, appeal dismissed*, 295 N.C. 263, 245 S.E. 2d 779 (1978).

[3] In sentencing the defendant under the Fair Sentencing Act the trial court also erred in finding as a factor in aggravation that the offense was especially cruel. In determining whether an of-

fense was especially heinous, atrocious or cruel "the focus [is] . . . on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983). (Emphasis theirs.) The evidence in this case, *that the unsuspecting victim was shot one time in the back*, is insufficient to support a finding that the offense was especially cruel. So far as the record shows this shooting was no crueler than any other fatal shooting; indeed, since the victim did not know he was going to be shot it might have been less cruel than the usual face-to-face shooting.

New trial.

Judge ARNOLD concurs in the result.

Judge COZORT dissents in part and concurs in part.

Judge COZORT concurs in part and dissents in part.

I concur in holding that the trial court erred in finding as a factor in aggravation that the offense was especially cruel. However, I believe the case should be remanded for resentencing only because I find no error in either the trial court's order substituting family-retained counsel for appointed counsel or its refusal to allow the defendant to introduce evidence of his insanity.

On the facts of this case, the trial court's decision to enter an order substituting family-retained counsel for appointed counsel, who could not be present when the trial began, did not deny defendant the effective assistance of counsel. There is no allegation that Mr. Farris' representation of defendant was in any way insufficient or that he did not have adequate time to prepare for trial. Defendant's only apparent objection to Mr. Farris was that he did not like him because, in defendant's words at trial, "he ain't communicated with me in a form of my ability and my class. . . . I am in another religion. . . . I can't understand him." Defendant further stated that he wanted "the best. I get eleven hundred dollars a month. I got six or seven thousand dollars in the bank. I can hire me a lawyer from Raleigh." Given the circumstances present here, I believe the trial court properly exer-

cised its discretion in accordance with the rules established by *State v. Williams*, 34 N.C. App. 408, 238 S.E. 2d 668, *appeal dismissed*, 293 N.C. 743, 251 S.E. 2d 515 (1977), *cert. denied*, 436 U.S. 906, 56 L.Ed. 2d 404, 98 S.Ct. 2237 (1978), and did not err in substituting family-retained counsel for court-appointed counsel who could not be present for trial.

I also believe the trial court did not err in sustaining the State's objections to questions regarding the defendant's mental condition at the time of the offense. It is uncontroverted that the defendant failed to comply with G.S. 15A-959. I disagree with the statement that *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977); and *State v. Johnson*, 35 N.C. App. 729, 242 S.E. 2d 517, *disc. rev. denied, appeal dismissed*, 295 N.C. 263, 245 S.E. 2d 779 (1978), have conclusively settled the issue that the defendant can still offer evidence of insanity when he fails to give timely notice. In *Mathis*, Justice Lake wrote: "Thus, under the plea as entered, evidence of the defendant's insanity, *if otherwise competent*, would have been admissible. *We do not reach the point upon the present appeal as to whether, by virtue of lack of notice to the state of intent to rely upon insanity as a defense, the defendant could be properly precluded from offering evidence of insanity.*" (Emphasis added.) 293 N.C. at 673, 239 S.E. 2d at 253. In *Johnson*, this Court's opinion erroneously assumes that *Mathis* stands for the proposition that evidence of insanity *must always* be admitted. In *State v. Byrd*, 39 N.C. App. 659, 251 S.E. 2d 712 (1979), this Court implied that the issue was still undecided: "We do not reach or express an opinion on . . . whether defendant waived any right he might once have had to rely on the defense of insanity by failing to avail himself of the procedures provided by G.S. 15A-959." *Id.* at 661, 251 S.E. 2d at 714. I believe a defendant can waive his right to rely on the defense of insanity by failing to follow G.S. 15A-959. I believe the defendant in this case waived that right and that the trial court committed no error by sustaining the State's objections to defendant's questions about his mental condition.

In re Vanhorn v. Bassett Furniture Ind.

IN THE MATTER OF: FRANKLIN VANHORN, ROUTE 8, BOX 472, HICKORY, NC 28601; SSN: 244-46-7643 AND WILLARD J. WHISENANT, 49 33RD AVENUE NW, HICKORY, NC 28601; SSN: 240-30-5741, APPELLANTS v. BASSETT FURNITURE INDUSTRIES, INC., P. O. BOX 1608, HICKORY, NC 28601 AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, P. O. BOX 25903, RALEIGH, NC 27611; DOCKET NO. 83(G)1191 & 83(G)0925, APPELLEES

No. 8425SC1137

(Filed 20 August 1985)

Master and Servant § 108.1— unemployment compensation—sale of employer's property—misconduct

Claimants were discharged for misconduct connected with their work and were thus not entitled to unemployment compensation where the Employment Security Commission found that claimants had participated in a sale of their employer's surplus property without specific approval or authorization by the employer, that claimants never attempted to see that the employer received the proceeds of the sale, and that claimants knew or should have known that converting their employer's property to their own benefit was not permitted.

APPEAL by claimants from *Ferrell, Judge.* Judgment entered 24 May 1984 in Superior Court, CATAWBA County. Heard in the Court of Appeals 14 May 1985.

Oma H. Hester, Jr., for the claimant appellants.

Jane H. Dittmann and T. S. Whitaker, for the respondent appellee, Employment Security Commission of North Carolina.

Frank Snyder for respondent appellee, Bassett Furniture Industries, Inc.

COZORT, Judge.

On 3 September 1982, Howard H. White, Vice President of Bassett Furniture Industries, fired claimants Franklin Vanhorn and Willard Whisenant for converting Bassett property to their own use. When claimants filed for unemployment benefits with the Employment Security Commission, an adjudicator determined that both men were entitled to benefits. Respondent Bassett Industries appealed the adjudicator's determination, and an appeals referee held a separate evidentiary hearing for each claimant on 18 November 1982. The referee determined that claimant Vanhorn qualified for benefits but claimant Whisenant did not. Ap-

peal was made to the Employment Security Commission; Bassett appealed the Vanhorn decision, and Whisenant appealed the decision denying him benefits. On 17 June 1983, the Commission entered findings of fact based upon the transcripts from the evidentiary hearings and memoranda of law concluding that both claimants were disqualified for unemployment benefits. Claimants joined in giving timely notice of appeal to the superior court where the two cases were combined for review. Judgment was entered 24 May 1984 affirming the decisions of the Commission disqualifying both claimants for benefits. On appeal to this Court, we affirm.

There is no dispute about the events leading up to the dismissals. Claimants worked at the Hickory plant of Bassett Industries, Whisenant as plant manager, and Vanhorn as a supervisor of operations. Both men had been working at this particular plant when Bassett acquired it in 1974 and had continued in their positions until they were fired on 3 September 1982.

In February 1982, Bassett purchased a used molder machine and had it shipped directly to the Hickory plant. When the machine was delivered it was accompanied by two boxes of molder knives of a type which, for safety reasons, were not used by Bassett. The driver who delivered the machine refused to return the two boxes of molder knives, and the boxes were set near the back door of the plant to facilitate their removal. Whisenant, as plant manager, directed Vanhorn to get rid of the knives in any way he saw fit.

In late June 1982, Fred Cochran of Drexel Heritage Furnishings, Inc., which had a plant "two doors below" the Bassett plant, learned that Bassett had some molder knives they were not using. He and another Drexel employee went to the Bassett plant and asked Whisenant if they could look at the knives. Vanhorn was told to show the men the boxes of discarded molder knives. Vanhorn and Cochran agreed upon a $200.00 purchase price for the knives. A Drexel employee picked up the knives during regular working hours. Drexel issued a check for $200.00 made out to Vanhorn which was delivered to the business office at the Bassett Hickory plant. The business office gave the check to Whisenant who gave it to Vanhorn. Vanhorn cashed the check and offered some of the proceeds to Whisenant who at first refused and then accepted the offered sum.

In early September 1982, Bassett Vice President White, who was responsible for the Hickory plant among others, learned that some "surplus" molder knives had been sold to Drexel. White traveled from corporate headquarters in Virginia to the Hickory plant, and on 3 September 1982 questioned Vanhorn and Whisenant about the matter. Claimants explained to White that Whisenant had told Vanhorn to "throw the knives in the trash" and the men had considered the knives scrap. The men admitted the knives had been sold to Drexel for $200.00 and that the men had shared the money. White fired the men on the spot.

The claimants' argument before this Court is that the conduct described above did not constitute "misconduct" so as to disqualify them for unemployment benefits. Claimants excepted only to the judgment of the trial court, taking no exceptions to any findings of fact. On appeal from a decision of the Employment Security Commission, the findings of fact made by the Commission are conclusive if they are supported by competent evidence. G.S. 96-15(i). Where no exception is taken to the findings, they are presumed to be supported by the evidence and are binding on appeal. *In re Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E. 2d 308 (1982).

The Commission made the following pertinent findings of fact with regard to claimant Whisenant.

> 2. The claimant was discharged from this job for wilfully and without good cause participating in the sale of surplus employer property (molder knives) for $200. He, the plant manager, was aware of the transaction and subsequently accepted $90 or $95 of it from the supervisor, his subordinate, who arranged it. The molder knives were sold to Drexel Heritage, a neighboring business. As soon as the employer, through its Group Vice President, learned of this transaction, both this claimant and the supervisor were discharged. Before September 3, 1982, this claimant never had attempted to see that the employer received the proceeds from the sale of its property.
>
> 3. While the molder knives were considered by the employer as surplus to it since they were not used in its operations, this claimant knew or should have known that converting the employer's property to his personal benefit

was not permitted. He knew the molder knives were the employer's property and value was received from their sale, and has offered nothing to show that the employer had approved or authorized the sale of its property with the proceeds going to employees.

and the following findings with regard to claimant Vanhorn:

2. The claimant was discharged from this job for wilfully and without good cause participating in the sale of surplus employer property (molder knives) for $200. He, a supervisor, received the entire sum and subsequently gave $90 or $95 of it to his supervisor, the plant manager. The molder knives were sold to Drexel Heritage, a neighboring business. As soon as the employer, through its Group Vice President, learned of this transaction, both this claimant and the plant manager were discharged. Before September 3, 1982, this claimant never had attempted to see that the employer received the proceeds from the sale of its property.

3. While the molder knives were considered by the employer as surplus to it since they were not used in its operations and while the plant manager had told this claimant to get rid of them, this claimant knew or should have known that converting the employer's property to his personal benefit was not permitted. He knew the molder knives were the employer's property and value was received from their sale, and has offered nothing to show that the employer had approved or authorized the sale of its property with the proceeds going to employees.

With no exception taken to these findings of fact, the sole question to be considered is whether these findings sustain the Commission's conclusion that the claimants were disqualified from receiving unemployment compensation benefits by virtue of G.S. 96-14, which provides in pertinent part:

An individual shall be disqualified for benefits:

* * * *

(2) . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work.

Misconduct as defined by case law and as codified subsequent to the filing of this case at G.S. 96-14(2) is:

> [C]onduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of 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 interests or of the employee's duties and obligations to his employer.

See In re Collingsworth, 17 N.C. App. 340, 194 S.E. 2d 210 (1973).

Claimants argue that their actions were not misconduct and that it was not unusual at the Hickory plant to dispose of surplus or scrap material by giving it to employees. Claimants point to evidence presented at the hearing that unused material and equipment had been given to employees of the plant in the past. They argue that the exchange in question was not conversion because the knives had been given to Vanhorn prior to the sale to Drexel and were his property, not Bassett's.

This Court is bound by the facts as found by the Commission and may not consider the evidence for the purpose of finding additional facts. *See In re Bolden*, 47 N.C. App. 468, 267 S.E. 2d 397 (1980). Here, the Commission found as facts that claimants had participated in a sale of their employer's surplus property without specific approval or authorization by the employer, that claimants never attempted to see that the employer received the proceeds of the sale, and that claimants knew or should have known that converting their employer's property to their own benefit was not permitted. From these findings the Commission logically concluded that claimant's conduct was "misconduct connected with work" as defined by case law and properly decided that claimants were disqualified from unemployment benefits. We hold that the findings of fact adequately support the conclusion and decision of the Commission.

Affirmed.

Judges WELLS and JOHNSON concur.

DR. TERRY C. CLAYCOMB v. HCA-RALEIGH COMMUNITY HOSPITAL

No. 8410SC1322

(Filed 20 August 1985)

1. **Hospitals § 6— application for hospital staff privileges**

G.S. 131-126.11A (now G.S. 131E-85) does not grant a medical practitioner the right to have his application for staff privileges considered by a hospital if the hospital's governing board has made a decision to deny further staff privilege requests which is reasonably related to the operation of the hospital, consistent with its responsibility as a community hospital, and administered fairly.

2. **Hospitals § 6— denial of hospital staff privileges—judicial review**

G.S. 131-126.11A (now G.S. 131E-85) requires that the denial of hospital staff privileges be "based upon . . . the reasonable objectives and regulations of the hospital" and thus allows judicial review of the reasonableness of a hospital's denial of such privileges.

3. **Hospitals § 6— denial of staff privileges to podiatrists—burden of proving unreasonableness**

Plaintiff podiatrist had the burden of proving that defendant hospital's denial of staff privileges to additional podiatrists because "the services of one podiatrist were adequate to meet . . . the podiatric needs of the community" was arbitrary, capricious or discriminatory, and that the hospital's decision to close the medical staff to additional podiatrists was (1) not reasonably related to the operation of the hospital, (2) not rationally compatible with the hospital's responsibility, or (3) based on irrelevant considerations.

Judge WELLS concurring.

APPEAL by plaintiff from *Barnette, Judge.* Order entered 25 October 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 6 June 1985.

J. Melville Broughton, Jr., and William Woodward Webb for plaintiff appellant.

Jordan, Brown, Price & Wall by John R. Jordan, Jr., and Joseph E. Wall for defendant appellee.

COZORT, Judge.

The question raised by this appeal concerns whether G.S. 131-126.11A, recodified at G.S. 131E-85, requires a privately owned hospital to review the qualifications of a podiatrist applying for staff privileges even though the hospital administration has decided to close the medical staff to additional podiatrists.

The trial court ruled that G.S. 131-126.11A confers no right to a practitioner to have his application for staff privileges reviewed and dismissed this action for lack of subject matter jurisdiction.

The facts underlying the present controversy are as follows: On 31 July 1979, the Board of Trustees of the defendant hospital decided to close the medical staff to podiatrists. The hospital at the time had extended staff privileges to one podiatrist. The Board's decision was based on the determination that the services of one podiatrist were adequate to meet the hospital's commitment to meet the podiatric needs of the community.

On 30 November 1979, the plaintiff podiatrist, Dr. Terry C. Claycomb, applied for staff privileges at the defendant hospital. Because the medical staff was closed to additional podiatrists, Dr. Claycomb's application was not accepted for processing though it remained on file.

In 1981, the General Assembly enacted the Hospital Licensing Act and in pertinent part provided:

> The granting or denial of privileges to practice in hospitals to licensed physicians and other practitioners licensed by the State of North Carolina to practice surgery on human beings, and the scope and conditions of such privileges, shall be determined by the governing body of the hospital based upon the applicant's education, training, experience, demonstrated competence and ability, judgment, character and the reasonable objectives and regulations of the hospital in which such privileges are sought. Nothing in this Article shall be deemed to mandate hospitals to grant or deny to any parties privileges to practice in said hospitals.

G.S. 131-126.11A (1981). This Act was repealed by Session Laws 1983, c. 775, s. 1, effective 1 January 1984, and replaced by the Hospital Licensure Act, G.S. 131E-75, *et seq.* The corresponding statute, G.S. 131E-85, differs from the repealed statute, G.S. 131-126.11A, by specifically extending its application to "physicians . . . dentists and podiatrists" rather than generally to "licensed physicians and other practitioners."

Following the passage of G.S. 131-126.11A, Dr. Claycomb renewed his application for staff privileges with the defendant hospital. By this time, the Board of Trustees had also adopted a

three-year residency requirement for all users of the hospital's operating rooms, including podiatrists. By letter in October of 1982, the plaintiff was informed that the medical staff was still closed to podiatrists and that in any event the hospital required a three-year surgical residence by podiatric applicants. In May of 1983, the plaintiff again attempted to obtain staff privileges but learned that his application had never been processed and that he had no right of appeal or right to a hearing on the hospital's decision not to review his application.

Dr. Claycomb filed this action in August of 1983, seeking a declaratory judgment construing G.S. 131-126.11A, injunctive relief, and actual damages. Pursuant to the defendant's Rule 12(b)(6) motion, the plaintiff's claim for damages was dismissed on the grounds that it was barred by the statute of limitations, G.S. 1-52. Later, pursuant to the defendant's Rule 12(b)(1) motion, the plaintiff's remaining claims were dismissed on the grounds that the court lacked subject matter jurisdiction. The trial court concluded as a matter of law that the State had "no legitimate interest in the denial of medical staff privileges by a private hospital to any individual practitioner" and that G.S. 131-126.11A "does not mandate that a private hospital follow any particular procedure or reach any particular result as to an application for staff privileges."

The plaintiff on appeal contends that the police power of this State extends to the regulation of private hospitals, including the granting of staff privileges. The defendant argues that G.S. 131-126.11A does not impose a requirement that practitioners be granted privileges or even that their applications be reviewed, but merely establishes a framework to insure that if staff privileges are granted they are extended only to qualified practitioners.

In *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 449, 293 S.E. 2d 901, 922, *cert. denied*, 307 N.C. 127, 297 S.E. 2d 399 (1982), this Court, construing G.S. 131-126.11A, stated no court should substitute its judgment for that of the hospital board which is charged with the responsibility of providing a competent staff of doctors. The *Cameron* court further related that as long as staff selections were administered with fairness, geared by a rationale compatible with hospital responsibility, and unencum-

bered with irrelevant considerations, a court should not interfere. *Id.* We believe these *Cameron* principles are applicable in the instant case.

[1] Surely, the State has a legitimate interest in seeing the health, safety and general welfare of the public promoted and protected. *A-S-P Associates v. City of Raleigh,* 298 N.C. 207, 258 S.E. 2d 444 (1979). Thus, the operation of a hospital, whether publicly or privately owned, is subject to State regulation. *Foster v. Medical Care Commission,* 283 N.C. 110, 195 S.E. 2d 517 (1973). However, the State's involvement in the operation of a hospital should extend only to the point of insuring that the community's medical needs are competently and sufficiently being met. As recognized in *Cameron,* the right to enjoy staff privileges is not absolute, but is subject to the standards and objectives set by the hospital's governing body. *Id.* at 453, 293 S.E. 2d at 924. Therefore, we hold that G.S. 131-126.11A does not grant a medical practitioner the right to have his application for staff privileges considered by a hospital if the hospital's governing board has made a decision to deny further staff privilege requests which is reasonably related to the operation of the hospital, consistent with its responsibility as a community hospital, and administered fairly.

In the present case, the court below dismissed the action on the basis that it lacked subject matter jurisdiction over the complaint. We hold this ruling was in error. As a matter of procedure, the question of whether G.S. 131-126.11A confers a right upon the plaintiff to have his application considered is not an issue of subject matter jurisdiction, but involves whether the complaint states a claim upon which relief can be granted. *See generally 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). Therefore, the granting of the defendant's Rule 12(b)(1) motion was improper.

[2, 3] In any event, the plaintiff's action should not have been dismissed, even on a proper Rule 12(b)(6) motion. Although G.S. 131-126.11A does not require that the plaintiff's qualifications for staff privileges be reviewed, it does require that the denial of those privileges be "based upon . . . the reasonable objectives and regulations of the hospital." G.S. 131E-85. Thus, the statute does allow the reasonableness of a hospital's actions to be re-

viewed. Because North Carolina courts have been charged with this narrow responsibility of determining whether a hospital's actions and objectives are reasonable, *Cameron, supra,* at 449, 293 S.E. 2d at 922, we hold the complaint does state a claim upon which relief can be granted. We, therefore, reverse the trial court's conclusion of law that it lacked jurisdiction over the matter and remand this case for further proceedings not inconsistent with this opinion. The plaintiff will have the burden of proving that the hospital's conclusion that "the services of one podiatrist were adequate to meet . . . the podiatric needs of the community" was arbitrary, capricious or discriminatory, and that its decision to close the medical staff to additional podiatrists was: (1) not reasonably related to the operation of the hospital; (2) not rationally compatible with the hospital's responsibility; or (3) based on irrelevant considerations. *See Davidson v. Youngstown Hospital Assoc.*, 19 Ohio App. 2d 246, 250 N.E. 2d 892 (1969). If the defendant hospital's actions are determined to be unreasonable or irrational, the plaintiff is entitled under the statute to have his application for staff privileges reviewed and a decision, granting or denying him staff privileges, based on the other criteria provided in the statute such as his "education, training, experience, demonstrated competence and . . . character." G.S. 131E-85.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

Judge WELLS concurring.

In my opinion, the important and dispositive question in this case is whether governing boards of licensed hospitals may deny staff privileges to licensed practitioners except upon finding that such practitioners applying for staff privileges do not meet the hospital's standards for "education, training, experience, demonstrated competence and ability, judgment, character, and the reasonable objectives and regulations of the hospital, including, but not limited to appropriate utilization of hospital facilities, *see* N.C. Gen. Stat. 131E-85A (1983 Cum. Supp.). Accordingly, appellant in this case is entitled to have his application considered against such standards.

NANCY SWAIM COCKMAN v. PAMELA A. WHITE

No. 8418DC1315

(Filed 20 August 1985)

1. **Unfair Competition § 1— misunderstanding with insurance agent—not a deceptive representation**

In an action arising from defendant insurance agent's alleged failure to provide collision insurance on plaintiff's automobile, the trial court correctly granted defendant's motion for a directed verdict on an unfair trade practice claim where plaintiff had been denied collision insurance because of the number of points she and her daughter had accumulated, plaintiff told defendant that her daughter had her own coverage and that her points should be removed from plaintiff's policy, plaintiff assumed defendant was going to attempt to get collision insurance for her, defendant testified that plaintiff's call related to removing the daughter's points from the policy, defendant told plaintiff that she would take care of that, defendant sent a memo to the insurance company to take the daughter off the policy, and plaintiff never asked defendant during their telephone conversation to obtain collision insurance for her.

2. **Evidence § 45— value of demolished automobile—witness not familiar with automobile—properly excluded**

In an action arising from defendant insurance agent's alleged failure to provide collision insurance on an automobile which was demolished in a collision with a train, the trial court did not err in excluding testimony about the value of the car from an employee of the bank which financed the car where the employee admitted that he had never seen the car, did not know what kind of shape it was in, and that his estimate of value was what the average car of the same make and model would have been worth at that time. The witness could not testify from personal knowledge and plaintiff failed to present any foundation from which he could have offered an opinion of the automobile's value.

3. **Insurance § 2.2— failure to procure insurance—no evidence of damages—directed verdict proper**

In an action arising from defendant insurance agent's alleged failure to provide collision insurance coverage on an automobile which was demolished in a collision with a train, the trial court properly granted defendant's motion for a directed verdict on the negligence claim predicated upon plaintiff's inability to prove damages where plaintiff produced no competent evidence of market value before the collision and no evidence of the cost of repairs.

APPEAL by plaintiff from *John, Judge.* Judgment entered 6 August 1984 in District Court, GUILFORD County. Heard in the Court of Appeals 6 June 1985.

R. Horace Swiggett for plaintiff appellant.

Nichols, Caffrey, Hill, Evans & Murrelle by Richard L. Pinto for defendant appellee.

COZORT, Judge.

Plaintiff sued defendant, her insurance agent, to recover damages for defendant's alleged failure to provide collision insurance coverage on plaintiff's automobile, which was totally demolished in a collision with a train. After the jury had reached an eleven to one impasse, the trial court declared a mistrial, reconsidered defendant's motion for directed verdict based on plaintiff's failure to put on evidence of damages to the car, and granted defendant's motion. Plaintiff appeals that action, as well as the court's striking of testimony on the value of the auto prior to the crash and its granting of defendant's motion for directed verdict on plaintiff's unfair trade practice claim under Chapter 75 of the General Statutes of North Carolina. We affirm.

Plaintiff purchased a 1981 Datsun 200SX for $9,120 in October of 1981. She had liability insurance with State Farm Insurance through defendant's agency and had collision coverage with a different agent. When it came time to renew her collision insurance, plaintiff called defendant to get her collision insurance through defendant so that her liability and collision coverage would be with the same agent. Defendant provided temporary collision coverage pending a final decision from the underwriter at State Farm. In a letter dated 13 October 1982, plaintiff was notified by an underwriter from State Farm that her collision insurance would be cancelled 29 October 1982 because of the number of motor vehicle violations and accidents accumulated by plaintiff and her daughter, who was also covered under the collision policy. On about 15 November 1982, plaintiff called defendant to discuss the points which had been assigned to her because of the number of violations and accidents. She told defendant her daughter had moved from her home and had her own coverage and that her points should be removed from plaintiff's policy. Defendant said words to the effect that she "would take care of it." Plaintiff contends the "taking care of it" meant providing collision insurance, though she did not ask defendant specifically to obtain collision coverage for her. Defendant contends that all

plaintiff asked her to do was to remove plaintiff's daughter's points from her policy and that only the removal of those points from the policy was what she said she would take care of. She did not attempt to get collision insurance for plaintiff, and from 29 October 1982, plaintiff had no collision insurance. On 11 December 1982, plaintiff's car was demolished whan a friend of hers drove the car into a train. What was left of the car was repossessed and sold for $1,100 by the bank which had financed its purchase.

Plaintiff sued defendant to recover damages "of at least $8000." Although plaintiff sued under four causes of action, the only two at issue on appeal are her claims that the defendant's failure to provide coverage constituted negligence and that defendant's statements to plaintiff constituted an unfair trade practice in violation of G.S. 75-1.1.

[1] We first address the plaintiff's contention that it was error for the trial court to grant defendant's motion for directed verdict on the unfair trade practice claim. Plaintiff claims that defendant's statements misled her into believing she had collision insurance. She argues that it is sufficient to show that defendant's words had a capacity to mislead or create a likelihood of deception, with no requirement to show bad faith by the defendant. While plaintiff's analysis of the legal standard is correct, *see Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981), her conclusion that defendant's statement is a deceptive practice under Chapter 75 is misplaced. The evidence shows only a misunderstanding between plaintiff and defendant. Plaintiff never specifically asked defendant during their phone conversation to obtain collision insurance for her. She testified that by discussing her daughter's points and their removal from her policy, she *assumed* defendant was going to attempt to get collision insurance for her. Defendant testified that plaintiff's call related to removing plaintiff's daughter's points from the policy, that she told plaintiff she would take care of that, and that she sent a memo to State Farm to take the daughter off the policy. We do not believe the misunderstanding between plaintiff and defendant constituted a deceptive representation, and we hold that plaintiff's claim under Chapter 75 was subject to directed verdict for defendant.

[2] We next consider plaintiff's contention that the trial court erred in striking testimony about the value of the Datsun from an

employee of the Northwestern Bank. Plaintiff called as a witness Bob Reed, an employee of the bank which financed the car in question when it was purchased by plaintiff in October of 1981. Plaintiff attempted to solicit his opinion on the value of plaintiff's car in December of 1982. He testified that his best estimate of the value of the car would be "[b]etween $7,000 and $8,000. . . . Probably closer to seven—$7,300 or $7,400." On cross-examination, he admitted that he had never seen plaintiff's automobile, did not know what kind of shape it was in, and that his estimate of value was what the average car of the same make and model as plaintiff's would have been worth in December of 1982. In response to a question about plaintiff's car in particular, he replied, "Not having seen the automobile, no sir, I can't, you know, give you an opinion on that car." The trial court then granted defendant's motion to strike Reed's testimony about the value of plaintiff's automobile.

"To introduce evidence on valuation, a proper foundation must be laid. First, it must be shown 'that the witness is familiar with the thing on which . . . [he] professes to put a value and [second] that he has such knowledge and experience as to enable him intelligently to place a value on it.' [Citation omitted.]" *Broughton v. Broughton*, 58 N.C. App. 778, 784, 294 S.E. 2d 772, 777, *disc. review denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). Plaintiff testified that she did not know what the car was worth. She did not describe its condition in December of 1982. She did testify that it had been involved in one accident before the collision with the train and that her car had approximately 25,000 miles on it. Plaintiff offered no other evidence on the value of the car or of its condition. We hold the trial court correctly struck the testimony of Reed. He could not testify from personal knowledge, and the plaintiff failed to present any foundation from which he could have offered an opinion of the auto's value.

[3] Lastly, we consider whether the court properly granted defendant's motion for directed verdict on the negligence claim, predicated upon plaintiff's inability to prove damages due to her failure to offer any evidence of the value of the car immediately prior to its destruction. Either evidence of the difference in market value before and after the injury or evidence of the cost of repairs would have been sufficient proof of damages. *See, e.g., Light Co. v. Paul*, 261 N.C. 710, 136 S.E. 2d 103 (1964). Plaintiff

produced no competent evidence of market value before and no evidence of cost of repairs. Thus, there was no evidence from which a finder of fact could have determined any measure of damages. We hold the granting of a directed verdict was proper.

Affirmed.

Judges WELLS and JOHNSON concur.

ELAINE CAROLINE PIERARD APPELBE v. RONALD WRIGHT APPELBE

No. 8421DC1091

(Filed 20 August 1985)

1. **Divorce and Alimony § 30— equitable distribution—court's distribution of property proper**

There was no error in an equitable distribution judgment which distributed to plaintiff more than half of the marital property where the court's conclusion was supported by findings of fact and evidence that plaintiff had furthered defendant's career and sacrificed her own career opportunities by being a homemaker, that defendant's earnings and retirement benefits greatly exceeded plaintiff's, and that plaintiff's ability to work regularly at gainful employment was much impaired by chronic ill health. Nothing in the record indicates that the circumstances were not given their proper weight by the court or that the distribution made was inequitable.

2. **Divorce and Alimony § 18.14— equitable distribution—order that house be sold—defendant's offer to purchase denied by court**

The trial court erred by denying defendant's offer to buy a house at the fair market value set by the court where the court's equitable distribution judgment had ordered that the house be sold by a licensed real estate agent and the proceeds divided. Although the court's discretion in equitable distribution cases is very broad, it does not encompass taking a course that will inevitably waste the marital assets and cause one of the parties to incur substantial expense and inconvenience but is not likely to accomplish any corresponding benefit for either party.

3. **Divorce and Alimony § 30; Judgments § 55— equitable distribution—prejudgment interest improperly awarded**

The trial court erred in an equitable distribution judgment by ordering defendant to pay prejudgment interest from the time the parties separated on a portion of the funds he was ordered to deliver to plaintiff. No provision in the Equitable Distribution Act authorizes payment of prejudgment interest on an equitable distribution and G.S. 24-5 is limited to sums due by contract and

to sums designated by the jury or other fact finder as compensatory damages in certain non-contract cases.

4. **Divorce and Alimony § 27— findings as to attorney fees—no prejudicial error**

There was no error prejudicial to defendant in an equitable distribution judgment from findings as to the value of the services rendered by plaintiff's counsel where the judgments appealed from made no provision for attorney fees and the record does not show what bearing, if any, the fees had upon the court's decision to divide the marital property.

APPEALS by plaintiff and defendant from *Harrill, Judge.* Judgments entered 22 May 1984 and 7 June 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 8 May 1985.

Plaintiff and defendant both appealed from an equitable distribution judgment and an amended judgment entered pursuant to G.S. 50-20. In pertinent part, the judgments (1) distributed about 75% of the marital non real property, worth $61,081.46, to plaintiff and about 25% to defendant; (2) directed defendant to pay plaintiff prejudgment interest on $14,686.25 of the $21,500 in cash that he was ordered to deliver to her; and (3) directed that the marital real property, consisting of a dwelling house worth $110,000 on which there is a mortgage balance of about $36,000, be sold by a licensed real estate agent and the net proceeds divided equally, though defendant moved that he be permitted to buy plaintiff's equity based on the values found by the court.

Randolph and Tamer, by Clyde C. Randolph, Jr. and Rebekah L. Randolph, for plaintiff appellant-appellee.

David B. Hough for defendant appellee-appellant.

PHILLIPS, Judge.

[1] One of defendant's many contentions on appeal is that the court erred in distributing to plaintiff more than half of the marital property; on the other hand plaintiff's only contention is that the court erred in failing to give her an even larger share of the marital assets. Neither contention has merit in our opinion. The court's conclusion that more than half of the property should be distributed to plaintiff is supported by findings of fact and evidence that during their eighteen years of marriage plaintiff had furthered defendant's career and sacrificed her own career

opportunities by being a homemaker; that defendant's earnings and retirement benefits greatly exceed plaintiff's; and that plaintiff's ability to work regularly at gainful employment is much impaired by chronic ill health. These same circumstances, so plaintiff argues, required the court to give plaintiff an even larger share of the marital assets. But equitable distribution, as the term suggests, is not distribution according to some fixed schedule or formula; it requires the exercise of judgment and discretion according to the circumstances involved, and nothing in the record indicates that the circumstances relied upon by plaintiff were not given their proper weight by the court or that the distribution made is inequitable to her.

[2] When the parties separated in October, 1981 plaintiff moved out of the marital homeplace, where they had lived since 1974, and defendant has occupied the house since then. After the court first entered judgment ordering that the place be sold by a licensed real estate agent, defendant moved, pursuant to Rules 59 and 60 of the N.C. Rules of Civil Procedure, that the judgment be amended to permit him to purchase plaintiff's interest in the property "at the fair market value set by the Court of $110,000.00." In denying defendant's motion the court erred, in our opinion. According to defendant's uncontradicted affidavit, and from the very nature of things, selling the property through a licensed real estate agent, as the court ordered, instead of to the defendant, would unnecessarily cost both parties a sales commission amounting to several thousand dollars; and would put defendant to the considerable expense and inconvenience of moving out of the house where he has been situated for ten years, of searching for other quarters to live in, and of moving into and getting situated in them. Nothing in the record before us justifies any such a wasteful and burdensome course and we reverse the order requiring it. The price defendant offered to pay for the property is the very amount that the court found it is worth and his offer was to pay that amount within a reasonable time designated by the court. If the property is sold through an agent, however, a buyer able and willing to pay the parties' price may not be obtained for a long while, if at all. Though the court's discretion in equitable distribution cases is very broad, *White v. White*, 64 N.C. App. 432, 308 S.E. 2d 68 (1983), *modified and aff'd*, 312 N.C. 770, 324 S.E. 2d 829 (1985), it does not encompass taking a

course that will inevitably waste the marital assets and cause one of the parties to incur substantial expense and inconvenience, but is not likely to accomplish any corresponding benefit for either party. Under the circumstances recorded the best interests of both parties will be served by defendant purchasing plaintiff's interest in the house at its fair market value within a reasonable time; but since more than a year has passed since the property was last appraised, upon remand the court will have to determine its fair market value anew. If, after doing so, defendant is still willing and able to buy plaintiff's interest based thereon within a reasonable time, the court should permit him to do so.

[3] In our opinion the court also erred in requiring defendant to pay prejudgment interest on $14,686.25 from October 4, 1981 when the parties separated, and that part of the judgment is reversed. When the parties separated plaintiff's right to any of the funds or things of value held by defendant had not been established and was not established until May 22, 1984, more than two and a half years later. The order to pay interest on any sum of plaintiff's that defendant retained *after* May 22, 1984 when it was adjudged that those funds were hers is authorized by law and defendant does not contest it. But no provision in the Equitable Distribution Act authorizes the payment of prejudgment interest on an equitable distribution, nor does any other statute of which we are aware. G.S. 24-5, which authorizes prejudgment interest in certain instances, is limited to sums due by contract and to sums designated by the jury or other fact finder as compensatory damages in certain non-contract cases; but the sum involved here is neither due plaintiff by contract, nor is it compensatory damages.

[4] Finally, defendant argues that the court erred in finding as facts that the services rendered by plaintiff's counsel during the entire course of the litigation, including the alimony and child support phase, was reasonably worth $16,000 and that in paying the fees ordered in the alimony part of the case, some $5,424.27 altogether, defendant was merely discharging his own legal obligation. This contention is without merit. Even if these findings are unsupported by evidence, as defendant contends, it does not appear that defendant has been harmed by them. The judgments appealed from made no provision for attorney fees and the record does not show what bearing, if any, the fees theretofore in-

curred or paid had upon the court's decision to divide the marital property. Error cannot be presumed, nor can it be established by surmise; it must be shown by the record, and we see none in this regard.

As to plaintiff's appeal—affirmed.

As to defendant's appeal—affirmed in part; reversed in part; and remanded.

Judges BECTON and EAGLES concur.

OTELIA L. KNIGHT v. WILLIAM LESTER KNIGHT

No. 8417DC1221

(Filed 20 August 1985)

1. **Divorce and Alimony § 30; Husband and Wife § 11— validity of separation agreement—bar to equitable distribution**

The trial court's findings that plaintiff wife was not coerced into signing a separation agreement and was not under any other disability which would warrant setting aside the agreement supported the court's determination that the separation agreement was duly executed and a bar to plaintiff's petition for equitable distribution.

2. **Husband and Wife § 12.1— validity of separation agreement—finding of fairness not required**

A separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. Thus, in determining the validity of a separation agreement, the trial court is not required to make an independent determination as to whether the agreement is fair to the wife. G.S. 52-10; G.S. 52-10.1.

APPEAL by plaintiff from *McHugh, Judge*. Judgment entered 14 August 1984 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 4 June 1985.

Benjamin R. Wrenn for plaintiff appellant.

Robinson and Murray by Norwood E. Robinson for defendant appellee.

COZORT, Judge.

Plaintiff and defendant were married on 26 November 1960. They separated on 1 January 1982, filing a deed of separation with the Rockingham County Register of Deeds 17 days later. That deed of separation provided for the distribution of all marital property. On 24 June 1983, plaintiff filed an action for divorce and for equitable distribution of the marital property. The defendant answered, pleading the deed of separation as a bar to the action for equitable distribution. The plaintiff's reply alleged that she was not in a stable mind when she signed the deed of separation; that she was not advised of the consequences of her action; that she was under the domination of her husband; and that the terms of the deed of separation were so one-sided as to "shock the conscience of the Court." In an order filed 14 August 1984, the trial court found the separation agreement to be valid and thus a bar to plaintiff's claim for equitable distribution. Plaintiff appealed.

Plaintiff's sole assignment of error is based on one exception to the entry of the judgment denying her request for equitable distribution. Under Appellate Rule 10(a), our standard of review is limited to whether the judgment is supported by the findings of fact and conclusions of law. *In re Rumley v. Inman*, 62 N.C. App. 324, 302 S.E. 2d 657 (1983).

[1] In its order of 14 August 1984, the trial court found, among other things, that the plaintiff was not under coercion or under other disabilities either before or at the time of the signing of the agreement; that plaintiff had ample opportunity to discuss the matter with her family or with an attorney and that she had decided she did not want to do so and wanted the property settlement exactly as in the agreement; that plaintiff is a high school graduate who is intelligent and articulate in her speech and manner; that she was fully cognizant and fully understood everything concerning the property settlement; that plaintiff stated that at the time she signed the deed of separation and executed the deed it was one of the happiest days of her life. In its conclusions of law, the trial court held the separation agreement to be duly executed and a bar to plaintiff's petition for marital distribution.

These findings and conclusions support the judgment entered. A valid separation agreement intended as a property set-

tlement bars any action for equitable distribution. *Dean v. Dean*, 68 N.C. App. 290, 314 S.E. 2d 305 (1984). Therefore, the conclusions of the trial court are in accordance with applicable law.

[2] In her brief, the plaintiff argues that the entry of judgment in favor of the defendant, denying her request for equitable distribution, was in error because the trial court failed to independently determine whether the separation agreement of the parties was fair. The plaintiff relies on several cases which provide that, among the requirements for a valid separation agreement, it must be shown that the agreement is "reasonable, just, and fair to the wife—having due regard to the condition and circumstances of the parties at the time it was made." *Smith v. Smith*, 225 N.C. 189, 194, 34 S.E. 2d 148, 151 (1945). *See also Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968). However, "[f]ew, if any, North Carolina cases have permitted an avoidance of the contract on the ground of the agreement's being unfair to the wife." 2 R. Lee, N.C. Family Law Sec. 190 (4th ed. 1980).

The cases relied upon by the plaintiff were decided under G.S. 52-6 before it was repealed in 1977. This statute provided in pertinent part that no separation agreement between a husband and wife shall be "valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land." The certifying officer was required to incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is "unreasonable or injurious to the wife." *Fletcher v. Fletcher*, 23 N.C. App. 207, 210, 208 S.E. 2d 524, 526 (1974).

At common law the wife by virtue of the marital relationship was presumed to be under the influence and control of the husband. *See Butler v. Butler*, 169 N.C. 584, 587, 86 S.E. 507 (1915). The purpose of the privy examination was to insure that the wife freely executed and consented to the terms of the agreement. *Smith*, 225 N.C. at 195, 34 S.E. 2d at 152. According to the *Butler* court, this statute governing contracts executed between a husband and wife was designed not for the wife's enslavement, but for her protection, "recognizing the gentler qualities of woman,

and knowing how she may be influenced to her own hurt when her affections are enlisted." *Id.* at 587, 86 S.E. at 509.

This concept of women belongs to "a ruder age," *id.*, "a relic of times that no longer exist. Such times ended with the passage of married women's property statutes." 2 R. Lee, N.C. Family Law, *supra.* This change in thought is reflected in the fact that G.S. 52-6 has been repealed and G.S. 52-10 and G.S. 52-10.1, the current statutes governing contracts between husbands and wives and separation agreements, were enacted without providing women any extra protection not offered to men.

Therefore, a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. Thus, we hold that a trial judge is not required to make an independent determination as to whether the agreement is fair. Of course, a court of equity will refuse to enforce a separation agreement, like any other contract, which is unconscionable or procured by duress, coercion, or fraud. *See generally Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981); *In re Estate of Loftin and Loftin v. Loftin*, 285 N.C. 717, 722, 208 S.E. 2d 670, 674 (1974).

In the present case, the trial court found as a fact that the plaintiff was not coerced into signing the separation agreement and was not under any other disability which would warrant setting aside the agreement. The plaintiff did not except to this finding of fact and therefore we are bound by it on appeal. *In re Rumley, supra.* Because the trial court did not err in failing to make a finding with regard to the separation agreement's fairness, the judgment and order of the trial court is

Affirmed.

Judges WELLS and JOHNSON concur.

Frost v. Robinson

LAWRENCE Y. FROST AND WIFE, HELEN M. FROST v. J. F. ROBINSON, WILLAREE B. ROBINSON, WILLIAM F. BERTHIEZ, AND BRIGITTE ERDMANN BERTHIEZ

No. 8424SC1097

(Filed 20 August 1985)

Easements § 3— driveway—appurtenant easement

The trial court correctly entered summary judgment for plaintiffs and correctly enjoined defendants Robinson from using or interfering with the use of any part of a 20-foot alley or driveway where the center line of the driveway was the property line between two lots owned by plaintiffs and two lots owned by defendants Berthiez, defendants Robinson owned a tract behind defendants Berthiez and were undertaking to convert it into a 23-unit housing development, the Berthiezes deeded to the Robinsons a 30-foot wide easement on the entire western boundary of their lots, including the western half of the 20-foot wide driveway, and the Robinsons had begun to use and alter parts of the driveway in attempting to construct a roadway along it to their housing development. The driveway was created for the stated purpose of serving the four lots owned by the plaintiffs and defendants Berthiez and was an appurtenant easement which could not be conveyed separately from the land to which it was appurtenant.

APPEAL by defendants Robinson from *Saunders, Judge.* Judgment entered 9 March 1984 in Superior Court, MADISON County. Heard in the Court of Appeals 10 May 1985.

Harrell and Leake, by Larry Leake, for plaintiff appellees.

Briggs and Ball, by Bruce B. Briggs, for defendant appellants.

PHILLIPS, Judge.

This suit challenges the right of the defendants Robinson to use, or interfere with the use of, any part of a 20-foot wide alley or driveway, the center line of which is the property line between two lots owned by the plaintiffs and two lots owned by the defendants Berthiez. The driveway starts at a public street and extends along the common boundary line—the eastern side of plaintiffs' property and the western side of the Berthiez property—a distance of approximately 366 feet. The lots, acquired by plaintiffs and the defendants Berthiez at different times between 1975 and February, 1981, came to them from or through a com-

mon source, and each deed received contains a provision relating to the driveway similar to the following:

> ALSO conveyed appurtenant to the above described tract of land is a perpetual easement for a roadway a width of 20 feet, extending 10 feet on each side of the Northwest margin of the above described tract of land. This easement is to be jointly used and maintained by Grantees herein and the adjoining landowners to the easement, their heirs and assigns.

Immediately behind the lots of the defendants Berthiez is a tract of land owned by the defendants Robinson, who are undertaking to convert it into a 23-unit housing development. The tract has no access to a public street and in August, 1981 the Berthiezes deeded to the Robinsons a 30-foot wide easement along the entire western boundary of their lots, 10 feet of which is the western half of the 20-foot wide alley or driveway earlier created. The purported easement runs from the public street to the northern boundary line of the Robinsons' property; and in attempting to construct a roadway along it to their housing development the Robinsons began to use and alter parts of the alley or driveway and plaintiffs sued to enjoin them. Thereafter, the defendants Robinson moved for summary judgment and upon the motion being heard the court entered summary judgment for the plaintiffs and permanently enjoined the Robinsons from using or interfering with the use of any part of the 20-foot alley or driveway.

The judgment appealed from is in accord with long-established law and we affirm it. The alley or driveway in question, created for the stated purpose of serving only the four lots owned by the plaintiffs and defendants Berthiez, is an *appurtenant* easement, which cannot be conveyed separate from the land to which it is appurtenant. *See* Black's Law Dictionary 599 (rev. 4th ed. 1968); *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925). An appurtenant easement adheres to the land, cannot exist separate from it, and can be conveyed only by conveying the land involved; its use is limited to the land it was created to serve and cannot be extended to other land or other landowners without the consent of all owners of the easement. *Wood v. Woodley*, 160 N.C. 17, 75 S.E. 719 (1912). Thus, the defendants Robinson have no interest in the appurtenant easement and have been properly enjoined from interfering with it; for the defendants Berthiez were

incapable of conveying an interest in the easement to them and the deed purporting to do so is a nullity.

Affirmed.

Judges BECTON and EAGLES concur.

WILLIAM C. FRYKBERG v. NANCY C. FRYKBERG

No. 8426DC1333

(Filed 3 September 1985)

1. **Divorce and Alimony § 19.5— separation agreement—alimony provisions not modifiable**

The trial court erred in treating a separation agreement as a court order, subject to modification of its alimony provisions, under the terms of a 1981 consent judgment where it is clear that the separation agreement was not incorporated into such judgment.

2. **Divorce and Alimony § 24.5— separation agreement—child support—increases based on Consumer Price Index—validity**

A provision in a separation agreement not incorporated into a court order for automatic increases in child support based on the Consumer Price Index is not void as against public policy.

3. **Divorce and Alimony § 19.5; Husband and Wife § 10.1— separation agreement—provision prohibiting modification of alimony—validity**

A provision in a separation agreement prohibiting a modification of the amount of alimony was not void as against public policy where the provisions of the separation agreement never became part of a court order.

APPEAL by defendant from *Sherrill, Judge.* Judgment entered 26 July 1984 in District Court, MECKLENBURG County. Heard in the Court of Appeals 21 August 1985.

This is a civil action wherein plaintiff seeks an absolute divorce. On 28 May 1980 defendant answered and counterclaimed. In addition to attorney fees and custody of the minor child adopted by the parties on 10 June 1977, defendant sought to recover alimony and child support in accordance with a separation agreement entered into by the parties on 12 October 1978. On 16 February 1981, the court entered a consent judgment containing the following pertinent provisions:

1. The Separation Agreement signed by the parties on October 12, 1978, is confirmed and is acknowledged by Plaintiff and Defendant to be the operative document governing their rights and liabilities arising from their former marital relationship. It is not necessary that their Separation Agreement be incorporated as part of this Court Order.

2. In the event of any future disagreements which may arise under the Separation Agreement, the parties acknowledge that they may, by filing an appropriate Motion in this suit, bring to the Court's attention such problems. It shall not be necessary for either Plaintiff or Defendant to file a separate lawsuit but rather by motion in the cause in this suit those matters can be dealt with. Any such motions shall be filed in accordance with the North Carolina Rules of Civil Procedure with ample notice to either Plaintiff or Defendant by service upon their attorneys of record.

. . .

4. Plaintiff acknowledges that he is in arrears with respect to alimony payments in the amount of $800.00. At the time this Order is signed, Plaintiff shall deliver to Defendant that amount plus interest as may be accrued from the due date of each payment.

. . .

6. Child support payments for the benefit of the minor child in Defendant's custody are determined by the Separation Agreement of October 12. Monthly payments are subject to an increase based upon the Consumer Price Index. For the period November, 1979, through October, 1980, Defendant was entitled to a 12.4% increase in child support payments, or the total sum of $37.20 per month in increased support. Plaintiff actually paid $30.00 per month in increased support and he thus owes Defendant $86.40 in increased support for the aforesaid time period. This amount shall be paid by Plaintiff to Defendant at the signing of this Order. For the twelve month period commencing November, 1980, through October, 1981, Plaintiff's obligations for child support shall be governed by Paragraph 3 of the Separation Agreement. The October Consumer Price Index is 254.1. That generates a 26.6%

increase in comparison with the October, 1978 base CPI index of 200.7. Plaintiff's monthly support obligation, effective November, 1980, through October, 1981, is thus $379.80. At the signing of this Order, Plaintiff shall pay to Defendant the additional sums due for the month of November and December, 1980.

On 6 March 1981 the court entered judgment granting the parties an absolute divorce. On 20 December 1982 defendant filed a motion in the cause, wherein she contended that plaintiff had breached certain provisions of the separation agreement pertaining to alimony and medical expenses incurred on behalf of the minor child. In her motion defendant asked that the court direct plaintiff to specifically perform the separation agreement, including payment of arrearages.

On 25 May 1983 plaintiff filed a motion to dismiss and response to defendant's motion in the cause, in which he set out as an "additional further defense" facts tending to show changes in his employment situation and economic status. Based on these contentions, plaintiff asked that "defendant's motion for specific performance of the separation agreement of the parties be denied, or in the alternative that the amount that the plaintiff be ordered to specifically perform be based upon the assets of the plaintiff and his ability to comply with any order of specific performance entered."

On 26 July 1984, following a hearing conducted approximately a year earlier, Judge Sherrill entered an order containing the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT:

1. Plaintiff and Defendant were married on June 11, 1966.

2. The parties separated on June 9, 1978.

3. During the course of the marriage, the parties adopted a minor child, Jennifer Jo Frykberg, born November 3, 1975.

4. The parties entered into a separation agreement on October 12, 1978, which provided for child custody, support,

alimony payments to the Defendant, and other matters of property settlement arising from the marital relationship.

5. Plaintiff filed a Complaint for absolute divorce based on one year's separation on March 18, 1980.

6. On May 28, 1980, Defendant (represented by counsel other than his present attorneys) filed an Answer and Counterclaim requesting child custody and support and specifically requested that the prior separation agreement entered into by the parties be incorporated into any judgment of divorce which might be entered. . . .

7. On October 8, 1980, Plaintiff replied to the Counterclaim. . . .

8. After resolving the matters in controversy themselves, the parties brought their agreement before the Court for entry of a Consent Judgment which was so entered on February 16, 1981.

9. This Consent Judgment, in Paragraph 1, "ordered, adjudged and decreed" that, "1. The Separation Agreement signed by the parties on October 12, 1978 is confirmed and is acknowledged by Plaintiff and Defendant to be the operative document governing their rights and liabilities, arising from their former marital relationship. It is not necessary that their Separation Agreement be incorporated as part of this Court Order." It further *ordered* that, "In the event of any future disagreements which may arise under the Separation Agreement. . . . It shall not be necessary for either Plaintiff or Defendant to file a separate lawsuit but rather by motion in the cause in this suit those matters can be dealt with."

. . .

11. The separation agreement provides in Paragraph 11, that ". . . the husband (Plaintiff) shall provide to the wife (Defendant) as alimony for her support and maintenance the sum of $1,000.00 per month." It states further that, "This payment is a fixed payment and shall not be subject to change except as provided in this paragraph."

12. Paragraph 3 provides, "The husband (Plaintiff) shall pay to the wife (Defendant) the sum of $300 per month on the

Friday following the execution of this agreement, and a like amount (as adjusted annually as set forth below) on the first Friday of each month thereafter, said sum for the partial support of the minor child, Jennifer Jo Frykberg, of the marriage." The agreement provided for an adjustment in the amount of child support based on the Consumer Price Index, to be made October 1 of each year, beginning in 1979, and to become effective with the November child support payment each year. It went on to provide for an adjustment in child support to at least $500 per month at such time that the wife is no longer receiving alimony. Accordingly, from November, 1981 through October, 1982, Plaintiff was obligated to pay $415 per month, and from November, 1982 through October, 1983, $436 per month as child support.

13. Paragraph 9 of the separation agreement provides, "The husband agrees to be responsible for all medical and dental and drug expenses incurred on behalf of the child not covered by insurance, until her 18th birthday."

14. At the time the separation agreement was entered into, the Plaintiff was working for E. F. Braswell Co. as a salesman of educational tools. . . . Defendant was working part-time for Crown Realty. The record is devoid of any evidence of what either of their incomes were at that time.

15. At the time of trial, Defendant still worked part-time for Crown Realty, but was receiving little income. She also worked part-time for commissions for Paul Revere Insurance Co.

16. At the time of trial, Plaintiff has ceased to work for E. F. Braswell due to the slowdown in business resulting from school budget cuts. He testified that in the Fall of 1980, he began working part-time with Carolina Alternative Energy (known as South Oaks). . . . He became full-time in February of 1982 and is currently President and chief salesman for the company. Since 1982, Plaintiff has expended most of this time and money to help make the business a success. He owns no interest in the company, but since October of 1982, Plaintiff has obligated himself on several loans to South Oaks and holds several promissory notes amounting to $47,226.46 which is owed him by the company. Plaintiff testified also

that his salary had been accruing and he had received no salary from South Oaks since February of 1983. He further testified that he owned no . . . assets of value. He is provided a car, maintenance-free, by South Oaks.

17. May 23, 1981, Plaintiff remarried, a little more than two months after the parties divorced. Plaintiff's wife is director of Freedom Mall branch of CPCC and had an income of about $18,000.00 for 1982.

18. Since April, 1982, Plaintiff has accumulated an arrearage in the child support and alimony payments he agreed, and later was ordered, to make.

19. From April, 1982, until the time of hearing, Plaintiff paid $14,082 to Defendant for alimony and child support, whereas under the separation agreement he should have paid some $22,850.00 to Defendant, leaving an arrearage of $8,769.00.

20. During this same period of time, Defendant made the loans referred to above to South Oaks, in excess of $47,000.00. His cancelled checks which Defendant offered into evidence demonstrate the consistency with which Plaintiff made these loans monthly, while falling behind in his support payments.

21. Defendant also incurred medical expenses for Jennifer in the amount of $235 during this period of time. These were unreimbursed expenses which Plaintiff refused to pay when requested by Defendant.

22. Plaintiff, in his pleading in response to Defendant's motion, prays that the Court not order specific performance, but if it does, to modify the amount of alimony to a level that he can more reasonably afford.

Based on the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW:

1. Defendant is entitled to a judgment against Plaintiff for past due alimony and child support payments.

2. The provision in the separation agreement allowing for an automatic increase in child support based upon the Consumer Price Index of the previous [sic] is unenforceable and void as being against public policy since it is automatic with no consideration being given to the needs of the child nor the means or abilities of the parties.

3. The provision which purports to "fix" alimony at $1,000 per month is void and unenforceable for public policy reasons.

4. Defendant is entitled to recover $235 in unreimbursed medical expenses.

. . .

6. The Consent Judgment is an order of the Court and is enforceable and modifiable by the Court just as other orders of the Court, to the extent provided by law.

7. Plaintiff should have paid some $20,800.00 in alimony and child support and only paid $14,082.00. The arrearage of $6,718.00 is due and owing and Defendant is entitled to have the same reduced to Judgment against Plaintiff.

. . .

9. Plaintiff presented insufficient evidence to support a modification of the alimony provisions of the Consent Judgment.

Based on these findings and conclusions, Judge Sherrill entered an order awarding defendant $6,953.00 with interest and attorney fees. The court's order also contained the following pertinent provisions:

3. As of this date, and until such time that circumstances may require modification of this Order, as provided by law; Plaintiff is hereby ordered to pay to Defendant as child support the amount of $300 per month.

4. As of this date, Plaintiff is hereby ordered to pay to Defendant as alimony the amount of $1,000 per month.

5. Plaintiff's request for modification is denied.

. . .

7. The Court will retain jurisdiction over this matter for further orders as time and circumstances may dictate.

Defendant appealed.

No counsel for plaintiff, appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

[1] The central issue on this appeal is whether the court erred in treating the separation agreement as a court order, subject to modification, under the terms of the consent judgment entered 16 February 1981. For the reasons set forth below, we hold that the court erred in its ruling, and accordingly vacate in part the judgment entered.

Because of "great confusion" generated by the "dual consent judgment approach," our Supreme Court recently abolished the traditional distinction in domestic law between consent judgments in which the court merely approves or sanctions a contractual agreement between the parties, and those in which the court adopts as its own, and thus incorporates into the judgment, the parties' agreement. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338, 342 (1983). Prior to the Court's decision in *Walters*, a separation agreement that was not incorporated into the consent judgment was treated as a court-approved contract, rather than a judgment, and was thus modifiable only by consent of the parties or through other traditional contract channels. *See 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). *Walters* expressly overruled *Bunn* and *Levitch*, however, and held that "whenever the parties bring their separation agreements before the court for the court's approval," the agreement will thereafter be treated not as a contract but rather as a "court ordered judgment . . . modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case." *Walters* at 386, 298 S.E. 2d at 342.

Were *Walters* applicable to the facts of the instant case, we would have no difficulty in affirming the order appealed from. The Court in *Walters*, however, expressly limited the application

of the new rule adopted to that case "and all such judgments entered after this decision." *Id. See also Doub v. Doub*, 68 N.C. App. 718, 315 S.E. 2d 732 (1984), *modified and aff'd*, 313 N.C. 169, 326 S.E. 2d 259 (1985). *Walters* thus has no application in the instant case, in which the consent judgment was entered in 1981, and we must thus examine the court's order in light of the law prior to *Walters*.

We note at the outset that, under the clear terms of the 1981 consent judgment, the separation agreement was not incorporated into that judgment. Where a separation agreement is merely approved, rather than adopted, by the court under the terms of a consent judgment, it may not be modified or set aside by the court unless the parties consent. *Bunn* at 69, 136 S.E. 2d at 242. Thus the court erred in concluding that the provisions of the separation agreement regarding alimony were modifiable.

Defendant also assigns error to the court's conclusions that two provisions of the separation agreement were unenforceable and void as against public policy. We agree that the court erred in these conclusions, noting that the error in each case arose from Judge Sherrill's initial mischaracterization of the type of consent judgment before him.

[2] In the first instance, the court concluded that the provision in the separation agreement that child support payments would increase automatically based on the Consumer Price Index was void because such automatic variations give no consideration to the means or abilities of the parties and the needs of the child. It was for precisely this reason that this Court, in *Falls v. Falls*, 52 N.C. App. 203, 278 S.E. 2d 546, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981), refused to sustain a similar provision in a *court order* for child support. The *Falls* Court also said, however:

> [W]e do not seek to discourage parties who, with a spirit of fairness and concern for their children, stipulate to a COLA formula for child support [since such a stipulation would seem to minimize] the risks of yearly resistance to increased support, with attendant legal expense and animosity.

Id. at 221, 278 S.E. 2d at 558 (citation omitted). We thus hold that the provision for automatic increases in child support as a function of the Consumer Price Index, contained in the contractual

agreement of the parties and not incorporated into the consent judgment, is not void as against public policy. Consequently, the court's calculation of arrearages owed by plaintiff to defendant, based on its holding that plaintiff's monthly child support obligation is in the amount of $300, is erroneous, and defendant is entitled to recover the full amount due under the terms of the separation agreement. Our holding in this regard in no way affects or lessens the court's well-recognized inherent authority to modify the separation agreement upon a showing that such modification is necessary to insure protection of the interests and welfare of the minor child. *McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

[3] The court also struck as void the provision in the separation agreement "which purports to 'fix' alimony at $1,000 per month." In *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982), the Supreme Court noted that, in consent judgments in which the court adopts the parties' agreement as its order, a provision which purports to prohibit modification of alimony obligations is void because it conflicts with the public policy of our State as set out in G.S. 50-16.9(a):

> An *order* of a court of this State for alimony . . . whether contested or entered by consent, may be modified . . . at any time. . . .

(Emphasis added.) In the instant case, however, the separation agreement provisions governing modification of alimony obligations never became part of a court order, and in no way do they offend public policy.

The result is: those portions of the judgment holding that the separation agreement is subject to modification by the court and striking as void as against public policy two provisions of that agreement are vacated; that part of the judgment awarding attorney fees, ordering plaintiff to pay defendant as alimony the amount of $1,000 per month, and that part of the judgment dismissing defendant's claim for reimbursement of tuition is affirmed; that part of the judgment ordering plaintiff to pay arrearages is affirmed; however, the cause is remanded to the district court for entry of an order requiring plaintiff to pay arrearages in the amount of $8,769.00, rather than $6,718.00.

Affirmed in part, vacated in part, and remanded.

Judges ARNOLD and COZORT concur.

IN RE: TYSON A MINOR CHILD (BRENDA CAROLYN TYSON)

No. 8410DC910

(Filed 3 September 1985)

1. **Parent and Child § 1.6— termination of parental rights—sufficiency of findings**

There were sufficient grounds to terminate a father's parental rights where the trial court made numerous findings supported by substantial evidence that the father had never established paternity, legitimated the child, or provided substantial support or care for the child or her mother; however, the court's findings were inadequate to support its conclusion that grounds existed authorizing termination of the mother's rights under G.S. 7A-289.32(2), (3), or (4) (1981 and Supp. 1983) where the prior adjudication of neglect was entered in 1970 at a hearing of which the mother did not have notice and in which she neither appeared nor was represented by counsel; there was no evidence that the child did not receive proper care, supervision or discipline from the mother during visits while the child was in DSS custody; the child was relinquished by her grandmother at a time when the grandmother was the primary care giver for the child and the mother was unable to care for the child or give her support; and the court found that the mother responded positively to DSS efforts to improve the parent-child relationship, had made improvements, and there was no reasonable portion of the cost of care for the child which the mother could be expected to pay. G.S. 7A-39.32(6) (1981).

2. **Parent and Child § 1— termination of parental rights—court's discretion to refuse to terminate**

The trial court did not abuse its discretion by declining to terminate parental rights where the factual findings were insufficient to support a conclusion that grounds existed for terminating the mother's parental rights and the court declined to terminate the father's parental rights, even though grounds existed to terminate his rights. G.S. 7A-289.31(b) (1981).

APPEAL by petitioner and guardian *ad litem* from *Bason, Judge*. Orders entered 5 March 1984 in District Court, WAKE County. Heard in the Court of Appeals 16 April 1985.

Parker, Sink, Powers, Sink & Powers, by Charles F. Powers, III, for petitioner appellant Wake County Department of Social Services.

Overby & McKee, by Donald W. Overby, for guardian ad litem appellant Nell Allen.

A. Larkin Kirkman, for respondent appellee Brenda Tyson Covington.

Thomas W. Jordan, Jr., for respondent appellee Genatis Lane.

BECTON, Judge.

I

Petitioner, Wake County Department of Social Services (DSS) filed a petition on 14 July 1982 to terminate the parental rights of respondents, Brenda Tyson Covington (sometimes "respondent mother" or "Ms. Covington") and Genatis Lane (sometimes "respondent father" or "Mr. Lane"), in their minor daughter Brenda Carolyn Tyson (sometimes "Carolyn" or "[minor] child"). The case was heard in May 1983, and a separate order was entered as to each parent on 5 March 1984. In these orders, although the trial court concluded that conditions existed authorizing the termination of parental rights as to both parents, it further concluded that it was not in the best interests of the minor child for the parental rights of Ms. Covington and Mr. Lane to be terminated. The petition was dismissed as to Ms. Covington. Although Mr. Lane's parental rights were likewise not terminated, the petition as to him was not dismissed. The DSS and the guardian *ad litem* (sometimes "appellants") appeal, and respondent parents cross-assign error.

The appellants contend that the trial court abused its discretion in concluding that it was not in the best interest of the minor child that respondents' parental rights be terminated once it had determined that grounds authorizing termination existed. Through their cross-assignment of error, the respondent parents contend that the evidence and findings do not support the court's conclusion that conditions authorizing the termination of parental rights have been shown to exist. In the event this Court finds that such conditions exist, the respondents maintain it was a

proper exercise of the trial court's discretion to decline to terminate parental rights.

We conclude that: the order as to Ms. Covington does not support the conclusion that grounds exist authorizing the termination of her parental rights; thus, the discretionary determination by the court that her parental rights not be terminated constitutes harmless error. As to Mr. Lane, the order correctly concludes that grounds exist to authorize termination of his parental rights; however, it was not an abuse of discretion to decline to terminate his parental rights. Therefore, other than modifying the order as to Mr. Lane to correct a technical defect, the orders appealed from are affirmed.

II

Factual Background

Brenda Carolyn Tyson was born on 16 February 1968. Her parents, Brenda Tyson Covington and Genatis Lane, have never married each other. Carolyn was originally placed in DSS custody by order dated 9 January 1970, in which it was found that the child was "in effect, abandoned by her mother" and that she was a neglected child. At the time Carolyn came into DSS custody, she was living with her maternal grandmother, Lola Tyson. Since January 1970, Carolyn has remained in DSS custody, and since July 1970 she has lived in the foster home of Elvis and Zolleen Morgan. At the time of the hearing on the instant petition, Carolyn was 15 years old.

The Morgans and three social workers assigned to Carolyn's case testified for petitioner DSS. Both Elvis and Zolleen Morgan testified that they love Carolyn and want to adopt her. Mrs. Morgan also testified she would have no objection to Carolyn visiting her natural mother after adoption.

Jo Parker was assigned to Carolyn's case from January 1974 to May 1979. She testified that during that period, Carolyn was happy and well-adjusted in the Morgan home, and that she visited sporadically with her natural parents and maternal grandmother. She testified that although the Morgans expressed an interest in adopting Carolyn, her natural parents, particularly Ms. Covington, refused to put her up for adoption. During this period, Ms.

Covington's three children born of her marriage to Lawrence Covington, were also placed in DSS custody.

Susan Shields testified that she was the caseworker from September 1979 to November 1980, that no visitations between Carolyn and her natural parents occurred during that period, and that during Shields' frequent contacts with Ms. Covington, Ms. Covington did not mention Carolyn, but only expressed concern about two of her other children.

Paige Robinson was the social worker next assigned the case in November 1980, and was still working on the case at the time of the hearing. Ms. Robinson testified that during this time sporadic visitation has continued; that Ms. Covington has been offered assistance in numerous ways by the DSS, but has not progressed to the point where she is capable of taking care of Carolyn.

She testified that Ms. Covington is extremely concerned about seeking employment; that sometimes Ms. Covington requested visits with Carolyn that were refused; that although Ms. Covington can be very difficult to work with, she responds to specific suggestions involving her children; that although Ms. Covington is willing to have Carolyn remain with the Morgans, she continues to resist any suggestion that the Morgans be allowed to adopt Carolyn.

According to Ms. Robinson, Mr. Lane has paid no child support while she has worked on the case, and has never established paternity. She testified that the decision to alter the *status quo* of long-term foster care and to seek termination of parental rights was reached for two reasons: (1) a permanent placement was desirable, and (2) Carolyn wanted to be "an adopted child who belongs to a family." She testified that even if parental rights were not terminated, the foster care plan would not be disturbed.

The guardian *ad litem* presented the testimony of herself and of Carolyn Tyson. The guardian *ad litem* testified that she thought it was in Carolyn's best interest that parental rights be terminated. Carolyn testified that she loves the Morgans as though they were her real parents and wants to be adopted by them. She also testified that, if adopted, she would still like to visit with her mother.

The respondent parents presented the testimony of Mr. Lane, Ms. Covington, and Ms. Covington's mother, Lola Tyson. Mr. Lane testified that he is Carolyn Tyson's father, that he has never "signed papers" to legitimate Carolyn, that although he paid about $10.00 a week in child support when the DSS first got custody, he has not paid any support in the past ten years. He testified that for the past three years he has worked at Cross Poultry, earning about $55-$60 per week. Lola Tyson testified that she loves Carolyn, that Ms. Covington loves Carolyn, and that she has never seen Ms. Covington act to harm Carolyn. Brenda Covington testified that she loves her daughter and wants Carolyn to live with her, but that she cannot currently provide a home for her. She testified that nobody ever told her she needed to pay child support for Carolyn. She testified that she currently works part-time cleaning apartments, earning up to $150 per month, and that she is trying to get a job.

III

We first address the question as to whether grounds existed to authorize the termination of parental rights.

[1] The DSS sought to terminate the parental rights of the mother under N.C. Gen. Stat. Sec. 7A-289.32(2), (3), and (4) (1981 and Supp. 1983); and of the father, under those same subsections and also under N.C. Gen. Stat. Sec. 7A-289.32(6) (1981). In neither order did the trial court specify the subsection or subsections upon which a termination of parental rights would be authorized. However, it is well-settled that an adjudication of the existence of only one of the statutorily enumerated grounds will enable the court to terminate parental rights. *In re Johnson*, 70 N.C. App. 383, 320 S.E. 2d 301 (1984).

Before the trial court may exercise its discretion whether to terminate parental rights, it is required to "take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights. . . ." N.C. Gen. Stat. Sec. 7A-289.30(d) (1981). The factual findings must be based on "clear, cogent, and convincing evidence." N.C. Gen. Stat. Sec. 7A-289.30(e) (1981). Such properly supported findings are binding on appeal even though there may be evidence to the contrary. *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984). Furthermore, find-

ings of fact not excepted to are deemed supported by competent evidence and are conclusive on appeal. *In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982).

Applying these rules to the case *sub judice*, we conclude that the order as to Mr. Lane contained ample factual findings supporting the trial court's conclusion that grounds existed authorizing the termination of his parental rights. By way of example, the trial court made numerous unexcepted-to findings, all supported by substantial evidence, that Mr. Lane has never established paternity, legitimated the child, or provided substantial support or care for Ms. Covington and Carolyn, thus authorizing termination of his parental rights under G.S. Sec. 7A-289.32(6) (1981).

As to Ms. Covington, however, although we have carefully reviewed the 65 findings of fact made by the trial court, we find them inadequate to support the court's conclusion that grounds authorizing termination of parental rights existed under G.S. Sec. 7A-289.32(2), (3), or (4) (1981 and Supp. 1983), the grounds upon which the DSS sought termination. (The other statutory grounds have either been repealed or are clearly inapplicable here.)

G.S. 7A-289.32(2) (1981 and Supp. 1983) permits a termination of parental rights upon, *inter alia*, a finding of neglect. The trial court found, without exception, that Carolyn had been adjudicated neglected in 1970, that the prior order had been entered at a hearing of which the mother did not have notice and in which she neither appeared nor was represented by counsel, and that the prior adjudication was based on acts "remote in time" from the instant hearing. The trial court further found, also without exception, that during visits between Ms. Covington and Carolyn while Carolyn was in DSS custody, there was no convincing evidence that Carolyn did not receive proper care, supervision, or discipline from her mother.

Our Supreme Court held in *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984), that

> a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights. . . . [However,] [t]he trial court must also consider any evidence of changed conditions in

light of the evidence of prior neglect and the probability of a repetition of neglect.

Id. at 714, 715, 319 S.E. 2d at 231, 232. The Court also observed that prior adjudication alone is unlikely to sufficiently support termination of parental rights, when parents have been deprived of custody for a significant period of time. Based on the discussion in *Ballard*, the order *sub judice*, containing findings that an *ex parte* adjudication of neglect had been entered thirteen years earlier, and that the petitioner has failed to present "clear, cogent, and convincing evidence" of neglect since that time, does not support termination pursuant to G.S. Sec. 7A-289.32 (2) (1981 and Supp. 1983).

Nor does the order support termination under G.S. Sec. 7A-289.32(3) (Supp. 1983), which authorizes termination when:

> [t]he parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child or without showing positive response within two years to the diligent efforts of a county Department of Social Services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

The trial court found that although no clear, cogent, and convincing evidence showed the conditions leading to the child's removal, there was an indication that the child was relinquished by her maternal grandmother at a time when the grandmother was the primary care giver for the child and the mother was unable to care for Carolyn or contribute to her support. The court further found that:

> 19. Both the establishment of stable housing in an environment free from discord with her former spouse and the establishment of regular and frequent contacts with the Petitioner, in a posture that allows the regular monitored visits with her other children indicates to the court substantial progress over that set of circumstances which has existed at previous periods during the Petitioner's custody of the child.

. . .

31. The mother's response to Mrs. Robinson's efforts to encourage strengthening of the parent-child relationship was positive.

Although the evidence would, in our opinion, support contrary findings, we cannot say that the trial court's findings are not supported by competent evidence.

Finally, a finding that a parent has ability to pay support is essential to termination for nonsupport under G.S. Sec. 7A-289.32 (4) (1981). *In re Ballard.* The trial court found without exception that "[b]ased upon the mother's income there is no reasonable portion of the cost of care for the child which she could be expected to pay." Thus, termination could not be accomplished under G.S. Sec. 7A-289.32(4) (1981).

IV

[2] We next consider whether the trial court committed reversible error in concluding that it was in the best interest of the child that parental rights not be terminated after concluding that grounds existed authorizing such termination.

As stated by our Supreme Court in *In re Montgomery,*

> N.C. Gen. Stat. Sec. 7A-289.31(a) and (b), which governs the disposition stage of a termination proceeding, provide that the trial court may elect not to terminate parental rights if the best interests of the child require such a result:
>
> (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.
>
> (b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after set-

> ting forth the facts and conclusions upon which such dismissal is based.

311 N.C. at 107-8, 316 S.E. 2d at 251 (emphasis omitted). This Court has consistently held that upon a finding that grounds exist to authorize termination, the trial court is never required to terminate parental rights under any circumstances, but is merely given the discretion to do so. *E.g., In re Pierce*, 67 N.C. App. 257, 312 S.E. 2d 900 (1984); *In re Godwin*, 31 N.C. App. 137, 228 S.E. 2d 521 (1976).

As to respondent mother, Ms. Covington, we have already shown how the factual findings were insufficient to support the trial court's conclusion that grounds existed authorizing termination of parental rights. Thus, although the trial judge did not need to reach the issue of whether respondent mother's parental rights should be terminated, because he declined to terminate them, any error inhering from his exercise of discretion was obviously harmless.

As to respondent father, Mr. Lane, after correctly concluding that grounds existed to terminate his parental rights, the trial court further concluded that

> [d]ue to the fact that the parental rights of the mother are not to be terminated, there is no logical reason to terminate the parental rights of the father Genatis Lane; and the court concludes that it is not in the best interests of the minor child that the parental rights of Genatis Lane be terminated.

The trial court then ordered that respondent father's parental rights not be terminated. In our opinion, it was not an abuse of discretion by the trial judge to decline to terminate Mr. Lane's parental rights. We do note, however, that the court neglected to dismiss the petition as to Mr. Lane once it determined his parental rights should not be terminated, pursuant to N.C. Gen. Stat. Sec. 7A-289.31(b) (1981). The order is therefore modified to reflect such dismissal. The trial court might amend its order in order that it indicate the petition as to respondent father is dismissed.

V

In conclusion: the order as to respondent Brenda Tyson Covington is

Affirmed.

The order as to Genatis Lane is

Modified and affirmed.

Judges WEBB and PARKER concur.

LIZZIE R. SUGGS, INDIVIDUALLY, THOMAS K. SUGGS AND CLARA S. WATTS, ATTORNEYS IN FACT FOR LIZZIE R. SUGGS v. ALMA CARROLL, LUCILLE S. INMAN, AND PHYLLIS LONG

No. 8513SC79

(Filed 3 September 1985)

1. **Trial § 3.2— absence of one defendant—denial of continuance**

The trial court did not err in denying defendants' motion for a continuance because of the unavailability of one defendant at the beginning of trial where the attorney for the absent defendant was aware of a conflict four weeks prior to trial, no affidavit in support of the motion to continue was submitted to the court, and such defendant did appear and testify in the afternoon of the second day of the trial.

2. **Evidence § 27— contents of tape recording—qualification of witness**

A witness was qualified to testify as to the contents of a tape recording, although part of the tape was made in his absence, where he had earlier heard the tape during a competency hearing.

3. **Trespass §§ 7, 8— sufficient evidence of wrongful trespass—insufficient evidence of actual damages**

The evidence was sufficient to support a verdict that defendants wrongfully trespassed on plaintiff's property where it tended to show that, although defendants' initial entry into plaintiff's home was peaceful and authorized, they thereafter refused to leave after plaintiff specifically requested them to do so. While plaintiff was entitled to at least nominal damages for the trespass, testimony of several laymen who described plaintiff's physical symptoms following the trespass was insufficient to support the jury's finding that plaintiff suffered an actual injury and its award of $1,200 in compensatory damages to plaintiff.

4. **Damages § 11.1; Trespass § 8— punitive damages for trespass—sufficient evidence**

The evidence was sufficient to support an award of punitive damages for trespass where it tended to show that defendants lacked good faith in in-

stituting a lunacy proceeding against plaintiff, their mother; during a visit to plaintiff's home defendants repeatedly refused to leave when requested to do so and failed to leave when it became clear that their presence was greatly upsetting plaintiff; and defendants spoke to plaintiff "kind of loud and a little bit angry" and attempted without permission to record her conversation.

APPEAL by defendants from *Clark (Giles R.), Judge.* Judgment entered 19 October 1984 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 14 August 1985.

This is a civil action wherein plaintiff Lizzie R. Suggs seeks to recover compensatory and punitive damages for an alleged trespass by defendants and an alleged abuse of process by reason of defendants' institution of lunacy proceedings against her.

At trial, plaintiff introduced evidence tending to show the following: Apparently dissatisfied with plaintiff's division of her real property among her relatives, five of her children and grandchildren instituted a proceeding to have plaintiff declared incompetent, thus voiding her executed deeds. Plaintiff had heard of the proceeding before receiving legal notice of it, and according to her complaint, was "very irritated and mad with the parties who attempted to have her declared incompetent." On 31 January 1982, defendants visited plaintiff in her home. At some point during the visit, plaintiff Clara Watts, a daughter of Lizzie Suggs who was living with and caring for her, discovered that defendant Lucille Inman was attempting to record the conversation. Plaintiff Watts immediately ordered defendants out of the house but they refused to leave. She left the house to find her brother, plaintiff Thomas Suggs. During her absence Lizzie Suggs twice requested defendants to leave, and they refused again. Plaintiff Watts returned with her brother, who forcibly ejected defendants by striking them with a mop handle. Plaintiff Lizzie Suggs testified that after learning that defendants were attempting to record her conversation she became nervous and upset. Plaintiffs Thomas Suggs and Clara Watts both noticed that Lizzie Suggs was gasping for breath, unable to speak, perspiring heavily, and blue around the mouth. She was taken to the hospital where she remained three days.

Defendants introduced evidence tending to show the following: Having heard that plaintiff was concerned about the nature of the pending lunacy proceeding, defendants visited her to ex-

plain that the purpose of the proceeding was not to have plaintiff committed but to appoint an independent guardian for her affairs. Defendant Lucille Inman had at one time held a general power of attorney for Lizzie Suggs which had been partially revoked prior to her visit. Subsequent to the visit, Lizzie Suggs revoked the remainder of Lucille's power of attorney and granted a full general power to Thomas Suggs and Clara Watts jointly. Lucille testified that she took the tape recorder to Lizzie's house "[t]o protect myself from being accused of saying things to her that, you know, that I didn't say. I wanted to prove, you know, have record of what I said so I could—for my own protection." Each defendant testified that Lizzie had not asked them to leave and had spoken quietly to them until Thomas arrived. Defendant Alma Carroll also testified that approximately three days after the incident she saw Lizzie at Warner's Grill and "she seemed to be in pretty good shape."

Phyllis Long was dismissed as a defendant at the beginning of trial. At the close of plaintiff's evidence, the two remaining defendants' motion for a directed verdict in the abuse of process action was granted. A similar motion in the trespass action was denied. That cause of action was submitted to the jury on the following issues and answered as indicated:

(1) Did the defendant, Lucille S. Inman, commit a wrongful trespass on the property of the plaintiff, Lizzie R. Suggs?

ANSWER: Yes.

(2) Did the defendant, Alma S. Carroll, commit a wrongful trespass upon the property of the plaintiff, Lizzie R. Suggs?

ANSWER: Yes.

(3) If so, what amount of actual damages, if any, is the plaintiff, Lizzie R. Suggs, entitled to recover as a result of said trespass?

ANSWER: $1,200.00.

(4) In your discretion, what amount of punitive damages, if any, should be awarded the plaintiff, Lizzie R. Suggs, from the defendant, Lucille S. Inman?

ANSWER: $5,000.00.

(5) In your discretion, what amount of punitive damages, if any, should be awarded the plaintiff, Lizzie R. Suggs, from the defendant, Alma S. Carroll?

ANSWER: $5,000.00.

From a judgment entered on the verdict, defendants appealed.

Marvin J. Tedder and Lee, Lee & Meekins, by Fred C. Meekins, Jr., for plaintiffs, appellees.

McGougan, Wright & Worley, by O. Richard Wright, Jr., for defendants, appellants.

HEDRICK, Chief Judge.

[1] Defendants first assign error to the denial of their oral motion to continue the case because of the unavailability of one of the defendants at the beginning of the trial. It is a well-established rule in North Carolina that granting a motion for a continuance is within the discretion of the trial court. Continuances are not favored, and the party seeking a continuance bears the burden of showing sufficient grounds. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). The record in the present case discloses that when the case was called for trial defendants made a motion to continue because defendant Alma Carroll would not be available at the beginning of the trial. The record also discloses that Mrs. Carroll's attorney was aware of the conflict some four weeks prior to trial, no affidavit in support of the motion to continue was submitted to the court, and Mrs. Carroll did appear and testify late in the afternoon of the second day of trial. We hold that defendants have failed to show any substantial prejudice to their rights. This assignment of error is without merit.

Defendants next assign error to the trial court's admission of testimony by several witnesses in the form of an opinion as to the competence of Lizzie Suggs. The testimony regarding competence, admissible or not, is irrelevant to the dispositive issue of whether a trespass occurred. Additionally, the abuse of process claim was dismissed at the close of plaintiff's evidence. Because this claim was decided in defendants' favor, the disputed testimony is clearly non-prejudicial.

[2] Defendants next assign error to the trial court's admission of plaintiff Thomas Suggs' testimony regarding the content of the tape recording. Defendants argue that Thomas Suggs did not have direct personal knowledge of the contents of the tape since part of it was made in his absence. The record discloses that Thomas Suggs had earlier heard the tape during the competency hearing. Thus he had the requisite first-hand knowledge to testify as to its contents. This assignment of error is without merit.

[3] Defendants next assign error to the denial of their motions for a directed verdict and for judgment notwithstanding the verdict. Their first argument is that the evidence is not sufficient to support the verdict that defendants wrongfully trespassed on the property of plaintiff. "Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, irrespective of degree of force used or whether actual damage is done." *Keziah v. R.R.*, 272 N.C. 299, 311, 158 S.E. 2d 539, 548 (1968). In the present case there is evidence that plaintiff was in actual possession of the house when defendants came to visit her. Defendants contend that they cannot be trespassers because their entry was authorized. They note that their entry was "in the usual routine manner" and that no trouble began until sometime after they entered the house. Our Supreme Court has held that

> [e]ven if the entry is peaceable, or by the express or implied invitation of the occupant, still if after coming upon the premises the defendant uses violent and abusive language and does acts which are calculated to produce a breach of the peace . . ., he is guilty of forceable trespass, because although not a trespasser in the beginning, he becomes a trespasser as soon as he puts himself in open opposition to the occupant of the premises.

Anthony v. Protective Union, 206 N.C. 7, 11, 173 S.E. 6, 8 (1934). When the evidence is considered in the light most favorable to plaintiff, it is clearly sufficient to permit the jury to find, as it did, that defendants wrongfully trespassed on the property of plaintiff. Although defendants' initial entry was peaceful, they became trespassers when they refused to leave after plaintiff specifically requested they do so. This argument is without merit.

Defendants next argue that the evidence is not sufficient to permit the jury to find, as it did, that plaintiff suffered any injury

entitling her to compensatory damages. In *Hatchell v. Kimbrough*, 49 N.C. 163, 165 (1856), our Supreme Court held that a plaintiff could properly recover for "any consequence which naturally flows from an unlawful act. . . ." Justice Pearson in writing for the majority stated that "As the loss of the plaintiff's eye is found by the jury to have been the direct and immediate consequence of [defendants' trespass], it was clearly proper that it should be considered in aggravation of damages." *Id.* (Citation omitted.) It is also the rule that in a successful claim for wrongful trespass the plaintiff is entitled to nominal damages at least. *Lee v. Lee*, 180 N.C. 86, 104 S.E. 76 (1920). In the present case since we have held that the evidence is sufficient to support the jury's verdict on wrongful trespass, it follows that plaintiff is entitled to at least nominal damages. However, we must examine the evidence to see if it is sufficient to support the $1,200 award for compensatory damages. Resolution of this question depends on whether there is sufficient evidence to enable the jury to find that plaintiff suffered any injury whatsoever. Our Supreme Court noted in *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E. 2d 753, 760 (1965), that "[w]here a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony." (Citations omitted.) The record in the present case reveals that plaintiff's only evidence regarding her condition was the testimony of several laymen who described her physical symptoms following the January 31 argument. While this information may have been helpful to a medical expert attempting to diagnose plaintiff's condition, it is clearly insufficient to support the jury's finding that plaintiff suffered an actual injury. Because there is no evidence in the record to show what injury, if any, the plaintiff suffered, the jury's finding must have been based on "mere speculation." There is no evidence to support the $1,200 award for compensatory damages and that part of the judgment entered on the verdict must be vacated.

[4] Finally, defendants contend that the evidence is not sufficient to support the award for punitive damages. Our Supreme Court has noted that

> The rationale permitting recovery of punitive damages is that such damages may be awarded in addition to compensa-

> tory damages to punish a defendant for his wrongful acts and to deter others from committing similar acts. A civil action may not be maintained solely for the purpose of collecting punitive damages but may only be awarded when a cause of action otherwise exists in which at least nominal damages are recovered by the plaintiff.

Shugar v. Guill, 304 N.C. 332, 335, 283 S.E. 2d 507, 509 (1981). "While punitive damages are not recoverable as a matter of right, sometimes they are justified as additional punishment for intentional acts which are wanton, wilful, and in reckless disregard of a plaintiff's rights." *Woody v. Broadcasting Co.*, 272 N.C. 459, 463, 158 S.E. 2d 578, 581-82 (1968). Punitive damages may be awarded for a trespass which "is committed through malice, or accompanied by threats, oppression or rudeness to the owner or occupant." *Waters v. Lumber Co.*, 115 N.C. 648, 655, 20 S.E. 718, 720 (1894).

In the present case, the record discloses that the lunacy proceeding was brought not because defendants believed Lizzie Suggs insane, but because they hoped that familial relations would improve upon the appointment of an independent guardian. Lizzie Suggs heard about the proceedings, and as defendants could have anticipated, became upset. Defendants, thus knowing that Lizzie Suggs was upset, nevertheless planned and subsequently attempted to surreptitiously record her conversation. When Clara Watts, an occupant of the house, discovered the recorder and requested that they leave, defendants refused. Not being able to remove defendants from the house alone, Clara Watts then left seeking help. While she was gone, Lizzie Suggs twice asked defendants to leave and they again refused. Although in poor physical condition and unable to move about easily, plaintiff was on the verge of leaving when Clara returned with Thomas Suggs. Upon entering he immediately noticed that his mother "was sitting there just shaking, and she was blue around the face around her mouth. . . ." Despite her obvious physical distress, defendants yet again refused to leave, whereupon Thomas Suggs forcibly ejected them. Lizzie Suggs was then taken to the emergency room, where a number of her children gathered, and where a further disturbance occurred.

In the present case plaintiff's evidence is clearly sufficient to support the jury's award of punitive damages. Defendants, by

their own testimony, indicated they lacked good faith in instituting the lunacy proceeding. During the visit they repeatedly refused to leave when requested to do so, and also failed to leave when it became clear that their presence was greatly upsetting their mother. They spoke to their mother "kind of loud and a little bit angry" and without permission attempted to record her conversation. These facts taken as a whole demonstrate behavior that is sufficiently malicious, oppressive, and rude to support the jury's award of punitive damages. This assignment of error is without merit.

Because of our disposition of the issue relating to damages for plaintiff's personal injury, we find it unnecessary to discuss defendants' remaining assignments of error. The result is: that portion of the judgment awarding plaintiff $1,200 compensatory damages is vacated. That portion of the judgment awarding plaintiff $5,000 in punitive damages from each defendant is affirmed.

Vacated in part; affirmed in part.

Judges WEBB and WELLS concur.

RONDA JOY WILLIAMS KING v. SANDRA HUDSON ALLRED, LLOYD G. HARZE AND NU-CAR CARRIERS, INC.

No. 8418SC978

(Filed 3 September 1985)

1. **Automobiles and Other Vehicles § 94.7— instructions on contributory negligence of passenger—knowledge that driver intoxicated**

In an action in which a passenger injured in a collision sought damages from the intoxicated driver, the trial court correctly instructed the jury on contributory negligence and properly refused to apply a totally subjective standard to determine contributory negligence. The disputed evidence of contributory negligence was properly submitted to the jury and the "reasonable person" objective standard comes into play once contributory negligence becomes a question for the jury.

2. **Automobiles and Other Vehicles § 91.3— intoxicated driver—willful or wanton conduct**

In an action by an injured passenger against an intoxicated driver, the evidence of the driver's willful or wanton conduct was sufficient to go to the

jury where the driver admitted awareness of her own substantial intoxication, indifference to her duty to avoid operating a motor vehicle while impaired, and obliviousness to the duty to stop at five stoplights between a lounge and the accident. G.S. 20-138.1, G.S. 20-158 (1983).

3. **Evidence § 13— statements made to attorney—protected by attorney-client privilege**

In an action by an injured passenger against an intoxicated driver, the trial court erred by allowing the passenger's attorney to question the driver concerning substantive statements the driver made to her former attorney.

APPEAL by plaintiff from *William Z. Wood, Judge.* Judgment entered 12 December 1983, *nunc pro tunc* 9 December 1983, in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 April 1985.

Bretzmann, Brinson & Bruner, by Raymond A. Bretzmann, for plaintiff appellant.

Henson, Henson & Bayliss, by Perry C. Henson, Jr. and Stephen G. Teague, for defendant appellee, Sandra Hudson Allred.

Nichols, Caffrey, Hill, Evans & Murrelle, by G. Marlin Evans, for defendant appellees, Lloyd G. Harze and Nu-Car Carriers, Inc.

BECTON, Judge.

Plaintiff, Ronda Joy Williams King, was seriously injured in the early morning hours of 21 October 1977, when the car in which she was a passenger collided with a tractor-trailer truck parked in her lane of travel on the I-85 service road just south of Greensboro. King filed this negligence action against the defendant car driver and owner, Sandra Hudson Allred, the defendant tractor-trailer driver, Lloyd G. Harze, and the defendant tractor-trailer owner, Nu-Car Carriers, Inc. (Nu-Car). All three defendants moved for summary judgment. The trial court granted the motions made by Harze and Nu-Car based on the intervening, insulating negligence of Allred. This Court affirmed the lower court's ruling, in an opinion published at 60 N.C. App. 380, 299 S.E. 2d 248 (1983). However, the Supreme Court, in an opinion published at 309 N.C. 113, 305 S.E. 2d 554 (1983), reversed this Court's ruling and remanded the case for trial. The jury found that King's contributory negligence barred her from recovery. From the judgment dismissing her action with prejudice, King appeals.

King assigns error to the jury instructions on contributory negligence and the trial court's refusal to submit the issue of Allred's wilful and wanton negligence to the jury.

I

The accident on 21 October 1977 occurred as King and Allred were returning to High Point from a cocktail lounge in Greensboro. They had gone to the lounge on the night of 20 October 1977, as they had done once before, to drink beer. The evidence is conflicting as to the quantity of beer each party consumed that night and as to whether King was aware of Allred's intoxicated condition when they began the drive back on 21 October.

Allred testified that King sat beside her in the lounge during their four-hour visit there. Allred estimated her own beer consumption at one beer every thirty minutes over the four-hour period. On cross-examination, Allred admitted that she knew she was drunk before she got into her car. King, on the other hand, testified at trial that she only remembered buying and drinking one beer. She did not recall sitting in the lounge for four hours, observing Allred becoming intoxicated, or leaving the lounge. Her next memories postdate the accident. However, King was impeached with a deposition in which she had testified that she and Allred were intoxicated when they left the lounge.

[1] The trial court instructed the jury on contributory negligence, in pertinent part, as follows:

> [A] guest passenger in a motor vehicle is deemed not to have exercised that care for her own safety, which a reasonably prudent person would exercise under all the circumstances then existing, and her conduct would be negligence within—within itself, where the driver was under the influence of intoxicants; and second, the passenger knew or should have known that the driver was under the influence of an intoxicant; and third, the passenger voluntarily rode with the driver even though the passenger knew, or had reason to know that the driver was under the influence of an intoxicant.

Relying on *Litaker v. Bost*, 247 N.C. 298, 101 S.E. 2d 31 (1957) and *Lienthall v. Glass*, 2 N.C. App. 65, 162 S.E. 2d 596 (1968), King

contends that the trial court erred in refusing to apply a totally subjective standard to determine King's contributory negligence. In King's own words, "[t]he trial court erred in refusing to instruct the jury that plaintiff's contributory negligence in riding with an intoxicated driver would depend on whether plaintiff knew what was going on and, if so, consciously committed herself to the assumption of the risk of the trip." We believe the trial court instructed the jury properly.

Although *Litaker* and *Lienthall* involve similar factual situations, they are procedurally distinguishable from the case at hand. In *Litaker* and *Lienthall*, our appellate courts were reviewing rulings on the respective defendants' motions for nonsuit. Thus, the inquiry required an application of the subjective standard King espouses to determine whether the intoxicated passengers were contributorily negligent *as a matter of law.* As the *Lienthall* Court stated: "Nonsuit on the ground of contributory negligence should not be granted unless the evidence, taken in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference can be drawn therefrom." 2 N.C. App. at 71, 162 S.E. 2d at 600.

Here, the disputed evidence on contributory negligence was properly submitted to the jury. Significantly, once contributory negligence becomes a question for the jury, the "reasonable person" objective standard comes into play. *Lee v. Kellenberger*, 28 N.C. App. 56, 220 S.E. 2d 140 (1975) governs the case before us. The *Lee* Court, on similar facts, upheld the trial court's refusal to give a Rule 51(b) requested special jury instruction phrased in terms of actual knowledge—the subjective standard.

> If plaintiff knew that defendant's faculties were in fact appreciably impaired from intoxication or lack of sleep, it would have been contributory negligence for plaintiff to continue to ride in the car with defendant driving, quite apart from whether plaintiff did or did not stay awake. More importantly, it was a question for the jury whether plaintiff knew *or in the exercise of due care should have known* that defendant's faculties were appreciably impaired.

Id. at 59, 220 S.E. 2d at 143 (emphasis in original); *accord Harrington v. Collins*, 298 N.C. 535, 259 S.E. 2d 275 (1979); *see Wood v. Brown*, 20 N.C. App. 307, 201 S.E. 2d 225 (1973).

II

On cross-examination, Allred testified:

> By the time the club closed at 2:00 a.m., I had consumed a sufficient amount of beer that I could tell it was having an effect on me. It affected the manner in which I walked. . . .
>
> . . . I could feel the effects of the beer on me as I started driving my automobile out onto the road and down the service road. As I proceeded down the roadway, I was intoxicated to the extent I was unable to operate my car in a careful and proper manner.
>
> . . .
>
> I knew I was drunk before I got into the car. I didn't think about whether I could operate the car safely or not when I got in. I knew I was drunk. Knowing I was drunk, I got behind the wheel of the car. I do not remember stopping at five different stoplights between the lounge and I-85. I was under the influence of alcohol. I do not know whether I stopped at all the stoplights I encountered or not.

[2] In her Complaint, King alleged that Allred had "operated her vehicle on a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others." It is well-established that the contributory negligence of the plaintiff is not a bar to recovery, when the wilful or wanton conduct of the defendant is the proximate cause of the injury. *Harrington v. Collins; Jarvis v. Sanders*, 34 N.C. App. 283, 237 S.E. 2d 865 (1977). In this case, the trial court refused to submit the issue of Allred's wilful or wanton conduct to the jury. Consequently, King's contributory negligence barred her recovery. We believe there was sufficient evidence to go to the jury on Allred's wilful or wanton conduct.

> An act is done wilfully when it is done purposely and deliberately in violation of law . . ., or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. . . . 'The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by

contract, or which is imposed on the person by operation of law.'

Foster v. Hyman, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929) (citations omitted). Pursuant to N.C. Gen. Stat. Sec. 20-138.1 (1983), a person under the influence of an impairing substance commits the offense of impaired driving if he drives a car on any public road. Thus, the statutory law imposes a duty on all persons to avoid driving while under the influence of an impairing substance. According to her testimony, Allred recognized her own intoxicated condition and deliberately violated her duty. The evidence of Allred's wilful conduct was sufficient to go to the jury.

"An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. . . . A breach of duty may be wanton and wilful while the act is yet negligent. . . ." *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E. 2d 345, 350 (1971) (quoting *Foster v. Hyman*, 197 N.C. at 191, 148 S.E. at 37-8); *Siders v. Gibbs*, 39 N.C. App. 183, 249 S.E. 2d 858 (1978).

There is no evidence of the alcohol content in Allred's blood. Nor is there any evidence that Allred was exceeding the speed limit at the time of the accident. In *Siders v. Gibbs*, this Court reviewed several recent cases in which our appellate courts found sufficient evidence to go to the jury on wilful and wanton conduct. In each case the Court focused on the violations of the safety laws: speed limits and directional traffic. However, the *Siders* Court also emphasized defendant Gibbs' level of intoxication and his awareness of his intoxicated condition: "There was testimony that defendant shortly before the collision, was so drunk that he kept falling against his car. The same witness also testified that because of alcoholic consumption the defendant's speech was noticeably affected and that while talking he had difficulty keeping his eyes open. He was told he was too drunk to drive." *Id.* at 189, 249 S.E. 2d at 862. The above evidence in combination with the violations of the safety laws was considered sufficient for the jury to infer a reckless indifference to the rights of others.

Similarly, we conclude that the evidence of Allred's wanton conduct was sufficient to go to the jury. Here Allred admitted: awareness of her own substantial intoxication, indifference to her duty to avoid operating a motor vehicle while impaired, *see* N.C.

Gen. Stat. Sec. 20-138.1, and obliviousness to the duty to stop at the five stoplights between the lounge and the accident, *see* N.C. Gen. Stat. Sec. 20-158 (1983). It is for the jury to determine whether Allred's negligence evinced a wilful or reckless indifference to the rights of others, and then, whether her wilful or wanton conduct was the proximate cause of the accident.

IV

[3] We summarily dispose of Allred's cross-assignments of error. We hold that the trial court erred in allowing King's attorney to question Allred concerning substantive statements Allred made to her former attorney. This information was protected by the attorney-client privilege. *See State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1978); 1 H. Brandis, *North Carolina Evidence* Sec. 62 (2d rev. ed. 1982). Allred's remaining cross-assignment of error involving a jury instruction on wilful and wanton contributory negligence was never raised at trial, and is not properly before us.

V

In conclusion, the trial court's instructions on contributory negligence were proper. Consequently, the jury verdict finding King contributorily negligent bars her recovery against defendants Harze and Nu-Car Carriers, Inc., and ends her case against them. The trial court erred, however, in refusing to submit the issue of Allred's wilful or wanton conduct to the jury. Furthermore, the trial court erred in allowing questions in violation of the attorney-client privilege. As to defendant Allred, then, we reverse and remand for a new trial.

New trial.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. JEVAN ANDERSON

No. 848SC1159

(Filed 3 September 1985)

1. **Narcotics § 5— trafficking by sale or delivery—ambiguous verdict**

A verdict finding defendant guilty of trafficking "by selling *or* delivering in excess of 4 grams of a mixture containing heroin" was inherently ambiguous and fatally defective since sale and delivery are separate offenses.

2. **Narcotics § 4— trafficking in heroin—analysis of portion of packets—sufficiency of evidence**

The State's evidence was sufficient to permit the jury to find that all fourteen packets obtained from defendant contained heroin and that defendant was thus guilty of trafficking by selling and delivering in excess of 4 grams of a mixture containing heroin where it tended to show that the contents of three of the packets were analyzed by an SBI forensic chemist and found to contain heroin, the chemist visually analyzed all of the packets and testified that in his opinion the packets all contained similar material, and the total weight of the sixteen packets exceeded 6 grams.

3. **Narcotics § 4.3— constructive possession of heroin—conspiracy to possess heroin—sufficiency of evidence**

The evidence was sufficient to support jury findings that defendant possessed and conspired to possess heroin where it tended to show that an undercover agent contacted defendant to arrange the purchase of heroin and defendant informed her as to the price and quantity available; when the agent later met with defendant, defendant asked a codefendant if he had "gone to get it" and "what he was waiting for"; the agent later obtained the agreed-upon amount of heroin from the codefendant; and the agent asked the codefendant how much defendant wanted for the heroin and was told a specific price.

APPEAL by defendant from *Watts, Judge.* Judgment entered 19 January 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 22 August 1985.

Defendant was arrested following an undercover narcotics investigation by the State Bureau of Investigation. He was charged with two counts of conspiracy to traffick in heroin (one by possession with intent to sell and deliver and one by sale and delivery) and with two counts of trafficking in heroin (one by possession with intent to sell and deliver and one by sale and delivery).

SBI Agent Deidre Bowman testified as follows:

On 19 July 1983 she approached defendant and inquired as to the availability of heroin. Defendant said that "sixties" were available. Defendant then told his brother to "get J.T." Shortly thereafter codefendant Jerry Thompson arrived. Defendant told Thompson to "take care of" Bowman. Thompson and Bowman subsequently engaged in a sixty dollar heroin transaction. Immediately prior to the transaction defendant asked Bowman how much Thompson was charging and indicated that the next time he (defendant) would sell it cheaper.

On 8 August 1983 Bowman asked defendant how much "dope" she could get for $605. Defendant calculated and said she could get twelve "quarters." After negotiation he raised the number to fourteen.

Bowman met defendant later that evening and asked for her "package." Thompson came into the room and defendant asked him if he had "gone to get it yet." Thompson said no and defendant "asked him what he was waiting for." Thompson indicated that Bowman was to accompany him.

Bowman then drove Thompson to a corner where Thompson left the car and returned shortly with a small bottle containing fourteen clear plastic packets of white powder. An expert witness in forensic chemistry subsequently testified that samples of the powder contained heroin. Bowman asked Thompson how much defendant wanted for the powder. Thompson replied "six," whereupon she gave him $600.

Defendant later mentioned to Bowman that he had "lost $170 on the deal." Bowman heard no specific conversation between Thompson and defendant relating to the transaction nor did she observe an exchange of drugs or money between the two.

Defendant presented no evidence. The jury convicted him on all counts. The conspiracy charges were consolidated for sentencing, as were the trafficking charges. The court sentenced defendant to thirty-four years imprisonment and fined him $200,000. Defendant appeals.

Attorney General Thornburg, by Assistant Attorney General George W. Lennon, for the State.

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

WHICHARD, Judge.

[1] The verdict form on the charge of "trafficking in heroin by selling *and* delivering" reads as follows: "Guilty of trafficking . . . by selling *or* delivering in excess of 4 grams of a mixture containing heroin." (Emphasis supplied in both instances.) Defendant contends that his conviction on this charge cannot stand because use of the disjunctive "or" in the verdict form renders the verdict inherently ambiguous and deprives him of the right to a unanimous verdict. We agree.

"Two offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count." *State v. Albarty*, 238 N.C. 130, 132, 76 S.E. 2d 381, 383 (1953). Such a disjunctive charge "leav[es] the exact accusation . . . shrouded in uncertainty." *Id.*

Sale and delivery of narcotics are separate offenses. *State v. Dietz*, 289 N.C. 488, 498-99, 223 S.E. 2d 357, 364 (1976). Further, each of the denounced acts in the trafficking statute constitutes a separate offense. *State v. Anderson*, 57 N.C. App. 602, 606, 292 S.E. 2d 163, 166, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982).

In *State v. McLamb*, 313 N.C. 572, 330 S.E. 2d 476 (1985), our Supreme Court held that a verdict "finding that defendant 'feloniously did sell or deliver' cocaine is fatally defective and ambiguous." *Id.* at 577, 330 S.E. 2d at 480. We find *McLamb* controlling and accordingly award a new trial on this charge.

We note that *McLamb* and the case here are distinguishable from *State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985) and *Jones v. All American Life*, 312 N.C. 725, 325 S.E. 2d 237 (1985), which also dealt with disjunctive verdicts. In *Creason* the defendant was found guilty of possession of LSD with intent to sell or deliver. The Court held that such a verdict was not fatally defective because

> the possession of narcotics with the intent to "sell or deliver" is one offense. On this charge the state is required to prove two elements: (1) defendant's possession of the drug, and (2) defendant's intention to "sell or deliver" the drug. . . . It is the *intent* of the defendant that is the gravamen of the offense.

Creason, 313 N.C. at 129, 326 S.E. 2d at 28. In *Jones* plaintiff asserted that submission of the disjunctive issue whether she killed or procured the killing of the insured resulted in an ambiguous verdict. The Court held that the issue and instructions did not deny plaintiff's right to a unanimous verdict since a finding of plaintiff's participation in the death of the insured by either alternative would bar recovery. *Jones*, 312 N.C. at 738, 325 S.E. 2d at 244.

Creason and *Jones* thus deal with situations where a single wrong is established by a finding of any one of multiple alternative elements. That is not the case here. There is no single offense of trafficking which may be proved by evidence of the commission of any one of multiple acts. *Anderson, supra.* Since the verdict form contained two separate offenses which were stated in the disjunctive, the verdict is inherently ambiguous and fails to support the judgment. *McLamb* at 577, 330 S.E. 2d at 480; *Albarty* at 133, 76 S.E. 2d at 383.

[2] Defendant contends the evidence did not suffice to convict him of trafficking by either possession or sale because only three of the fourteen packets of powder were chemically analyzed. The weight of the powder so analyzed was under one gram. Defendant admits that the total weight of all fourteen packets was in excess of six grams. He also acknowledges that the percentage of heroin in the mixture is not important so long as there is some heroin in a mixture that exceeds the statutory weight. *State v. Tyndall*, 55 N.C. App. 57, 60-61, 284 S.E. 2d 575, 577 (1981). He contends, however, that each of the packets, or at least enough of them to achieve a weight of four grams, should have been tested.

State v. Hayes, 291 N.C. 293, 230 S.E. 2d 146 (1976), is dispositive of this issue. There the chemist visually examined nineteen envelopes of vegetable matter seized from the defendant and determined that the contents were the same. He then examined chemically and microscopically the contents of five of the envelopes selected at random and identified the contents as marijuana. The Court found that "there was sufficient evidence to go to the jury on the question of whether all the envelopes contained marijuana." *Id.* at 302, 230 S.E. 2d at 151-52.

Here, similarly, an SBI forensic chemist with over fourteen years experience visually analyzed all packets in question and

chemically tested a random sample. He testified that in his opinion the plastic packets "all contain[ed] similar material which would contain heroin." He based his opinion

> not . . . just on the analysis but also on [his] experience in having seen and analyzed quite a number of different types of containers which contained controlled substances as well as noncontrolled substances and the general appearance of the powder, the weight or amount of material in the individual packets, more or less a visual examination along with the chemical analysis.

This evidence allowed the jury to determine that all the packets contained heroin. *Id., see also State v. Riera*, 276 N.C. 361, 366-67, 172 S.E. 2d 535, 538-39 (1970); *State v. Wooten*, 20 N.C. App. 499, 504, 201 S.E. 2d 696, 700 (1974).

[3] Defendant contends the evidence was insufficient to establish that he possessed or conspired to possess any controlled substance. We disagree.

Possession of a controlled substance may be either actual or constructive. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). It may be in a single individual or in combination with another. *State v. Baxter*, 285 N.C. 735, 737-38, 208 S.E. 2d 696, 698 (1974). To possess a controlled substance the accused must have both the power and intent to control its disposition or use. *Harvey*, 281 N.C. at 12, 187 S.E. 2d at 714; *State v. Allen*, 279 N.C. 406, 412, 183 S.E. 2d 680, 684-85 (1971) (power and intent to control disposition and use while acting in combination with others).

Defendant informed Bowman of the availability and price of heroin. Defendant's remarks to Thompson were indicative of his knowledge of heroin and intent to transfer it to Bowman. Further, Bowman specifically asked Thompson how much defendant wanted for the heroin. Thompson's answer indicates that defendant exercised control over the heroin by setting the price. The evidence thus clearly sufficed to support a finding of defendant's possession.

It similarly sufficed to support a finding of conspiracy. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or

by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E. 2d 521, 526 (1975). The conspiracy itself is the crime and not the act agreed upon. *Id.* at 616, 220 S.E. 2d at 526.

It was not necessary that Bowman observe an actual exchange of money or drugs, or overhear a conversation concerning such, between defendant and Thompson.

> Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but [which], taken collectively, . . . point unerringly to the existence of a conspiracy.

State v. Whiteside, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). Bowman contacted defendant to arrange the purchase of heroin and defendant informed her as to the price and quantity available. Bowman later obtained the agreed-upon amount of heroin from Thompson after meeting defendant. We find this evidence sufficient to establish a prima facie case of a conspiracy between defendant and Thompson. Once a prima facie case of conspiracy was established, the jury could also consider Thompson's statement that defendant wanted a certain price for the heroin. *State v. Conrad*, 275 N.C. 342, 348, 168 S.E. 2d 39, 43 (1969).

We conclude that there was no error in defendant's trial on the charges of conspiracy to traffick in heroin by possession, conspiracy to traffick in heroin by selling and delivering, and trafficking in heroin by possession. Because the verdict form used the disjunctive, resulting in an ambiguous verdict, there must be a new trial on the charge of trafficking in heroin by sale and delivery. Because the trafficking by possession charge was consolidated for sentencing with the trafficking by sale and delivery charge, the sentence as to the trafficking by possession charge must be vacated and the cause remanded for resentencing.

The result is:

(1) As to conspiracy to traffick in heroin by possession, no error.

(2) As to conspiracy to traffick in heroin by sale and delivery, no error.

(3) As to trafficking in heroin by possession, no error in the trial; sentence vacated and cause remanded for resentencing.

(4) As to trafficking in heroin by sale and delivery, new trial.

Judges WELLS and PHILLIPS concur.

BOYD H. ANDERSON, JR., TRUSTEE v. THE JACKSON COUNTY BOARD OF EDUCATION, A BODY CORPORATE

No. 8430SC1237

(Filed 3 September 1985)

1. **Deeds § 12.2— reverter clause—subsequent conveyance of reversionary interest**

The trial court erred by concluding that Log Cabin Associates never conveyed to plaintiff's predecessor in title a possibility of reverter where Log Cabin had conveyed a tract to defendant in 1949 with a reverter if the premises ceased to be used for public school purposes; in 1962 Log Cabin conveyed to plaintiff's predecessor in title several tracts, including the lot held by defendant, with the deed being subject to the 1949 deed to defendant; and Log Cabin filed articles of dissolution in 1963 and conveyed all its assets to a foundation, which conveyed to defendant the contingent reversionary interest. The 1962 deed from Log Cabin to plaintiff's predecessor in title did not contain a reference to a 1949 deed in the description of parcel 7, which included the tract in question, while the description of another parcel included an exception; the parcels conveyed in 1962 were expressly "subject to" five enumerated deeds, including three right of way deeds in the 1949 deed, so that it was clear that the grantor's intent was to convey all of its interests subject to interests previously conveyed and not within its power to convey; and the interest in question is a possibility of reverter and not a covenant, restriction, or easement, to all of which the 1962 conveyance was subject.

2. **Deeds § 12.2— possibility of reverter—no conflict with granting or habendum clause**

The rule that a clause inserted other than in the granting or habendum clause which is repugnant to the unqualified fee granted in those clauses is mere surplusage does not apply where the language creating a fee simple determinable and possibility of reverter is contained within the habendum clause.

APPEAL by plaintiff and defendant from *Downs, Judge*. Judgment entered 23 August 1984 in Superior Court, JACKSON County. Heard in the Court of Appeals 19 August 1985.

This is an action to quiet title to a parcel of land in which plaintiff claims a fee simple absolute interest. In his complaint, plaintiff alleged that in 1949 Log Cabin Association, Inc., conveyed to defendant a fee simple determinable, reserving a possibility of reverter in the event that the land in question ceased to be used for public school purposes. Plaintiff further alleged that he has, by mesne conveyances, become vested with this possibility of reverter, and that the title to the property automatically reverted to him on or about 16 July 1981, when defendant ceased using the land for school purposes. Defendant answered, denying the material allegations of the complaint and asserting several affirmative defenses and a "counterclaim" for fee simple title to the land. The matter came on for determination on written stipulations filed by the parties and on 23 August 1984 Judge Downs entered an order "dismissing" plaintiff's action. Plaintiff appealed, and defendant cross-appealed.

Redmond, Stevens, Loftin & Currie, P.A., by Thomas R. West, William Clarke and Gwynn G. Radecker, for plaintiff, appellant and appellee.

Holt, Haire & Bridgers, P.A., by W. Paul Holt, Jr., Margaret C. Robison, and Ben Oschel Bridgers, for defendant, appellant and appellee.

HEDRICK, Chief Judge.

Plaintiff's central contention on appeal is that the court erred in its conclusion of law that:

> The possibility of the reverter . . . was never conveyed by the said Log Cabin Association, Inc. to any of its successors in title in any of the deeds referred to in Findings of Fact No. 4, 5, and/or 6, and specifically was not conveyed to the plaintiff herein; therefore, the plaintiff has no proprietary interest in the said possibility of reverter.

The following facts are uncontroverted:

On 23 February 1949 Log Cabin Association, Inc. (hereinafter Log Cabin), executed a quitclaim deed in favor of defendant, in which Log Cabin purported to "justly and absolutely dedicate, remise, release and forever quit claim unto the party of the sec-

ond part and to its successors and assigns forever, all such right, title and interest as the party of the first part has or ought to have" in a 4.43 acre tract of land described therein. Following the description of the land, the deed contains a provision "[r]eserving and excepting" a right of way for a road, not pertinent to the instant case. The habendum clause, which follows the reservation of the right of way, contains the following language:

> TO HAVE AND TO HOLD the above-released premises, subject to the right of way reserved therein, unto the party of the second part and its successors and assigns to it and their only proper use and behoof forever; so that neither the party of the first part nor any other person in its name and behalf shall or will hereafter claim or demand any right or title to said premises or any part thereof by virtue of any claim or right now existing in the party of the first part shall, by these presents, be excluded and forever barred, upon the condition that in the event a new public school building is not erected upon the above described land within a period of two (2) years from the date of this deed or in the event that at any time thereafter the premises hereby dedicated should cease to be used for public school purposes, then and in either of those events, the premises hereby dedicated shall revert to the party of the first part, its successors and assigns.

A public school was built on the property in 1949, and the property was used "for public school purposes" until 1 June 1980, at which time defendant ceased such use and resolved to sell the property.

On 15 June 1962 Log Cabin executed a warranty deed in favor of Kelley W. Byars, as trustee, in which it purported to convey twelve described parcels of land "subject to the exceptions and reservations hereinafter set forth." The record contains the following stipulation:

> 10. It is stipulated that the real property described by metes and bounds in Deed Book 180 at Page 229, Jackson County Registry, said deed being from Log Cabin Association, Inc., to the Jackson County Board of Education is physically located within the lines and boundaries of Parcel 7 as said Parcel is described in Deed Book 259 at Page 162,

> Jackson County Registry, said deed being from Log Cabin Association, Inc., to Kelley W. Byars, Trustee and being dated June 15, 1962.

Parcel 7 contains approximately forty-one acres, including the 4.43 acre lot then held by defendant "for public school purposes." The deed from Log Cabin to Byars provided that the twelve parcels

> are sold and to be conveyed subject to the following:
>
> . . .
>
> (3) Deed dated February 23, 1949, recorded at Book 180, page 229, to Jackson County Board of Education;
>
> . . .
>
> (6) Any other covenants, restrictions and easements, contained in prior instruments of record.

The record shows that Mr. Byars, as trustee, conveyed the property to C. Shelby Dale, as trustee, by a deed dated 17 January 1964 containing language identical to that quoted above, and that Mr. Dale conveyed the property to plaintiff on 3 August 1964, incorporating by reference the "description . . . reservations, exceptions and encumbrances" set out in the 17 January 1964 deed. On 4 February 1963 Log Cabin filed articles of dissolution, providing that the corporate assets be distributed to Samuel H. Kress Foundation. On 10 March 1978 Samuel H. Kress Foundation executed in favor of defendant a deed purporting to convey the "contingent reversionary interest" reserved by Log Cabin in the 1949 deed.

[1] Resolution of the issue presented on appeal depends on the meaning of the provision contained in the 15 June 1962 deed from Log Cabin to Byars, stating that the premises conveyed are "subject to" the 1949 deed. Plaintiff contends that this clause "means that Log Cabin was conveying all its interest in the 'premises' to Kelly W. Byars but Byars' interest would be subordinate to all other interests such as easements and determinable fees which Log Cabin had previously deeded away." Defendant, on the other hand, contends that the language "excepts the deed to the Board of Education. It does not except the interest conveyed to the

Board of Education, or the property conveyed to the Board of Education. It excepts the entire contents of the deed, including the possibility of reverter."

It is well settled that "in construing a deed the discovery of the intention of the grantor must be gathered from the language he has chosen to employ, and all parts of the deed should be given force and effect, if this can be done by any reasonable interpretation. . . ." *Cannon v. Baker*, 252 N.C. 111, 113, 113 S.E. 2d 44, 46 (1960) (*quoting Griffin v. Springer*, 244 N.C. 95, 98, 92 S.E. 2d 682, 684 (1956)). "A deed is to be construed by the court, and the meaning of its terms is a question of law. . . ." *Mason v. Andersen*, 33 N.C. App. 568, 571, 235 S.E. 2d 880, 882 (1977).

In the instant case, our examination of the 1962 deed in its entirety causes us to conclude that the court erred in its conclusion of law that the possibility of reverter was never conveyed by Log Cabin to plaintiff's predecessor in title. We first note that the deed in question purports to convey, "subject to the exceptions and reservations hereinafter set forth, all those certain pieces, parcels or tracts of land," described thereafter. Parcel 7, which contains within its boundaries the 4.43 acre tract that is the subject of this action, contains no reference to the 1949 deed from Log Cabin to defendant. Immediately after the description of Parcel 11, on the other hand, the following provision appears:

> *EXCEPTIONS:* The party of the first part excepts from the operation of this deed, the portion of the above-described land heretofore conveyed and described in the following deed:

There follows an identification of the deed and description of the land excepted. Had Log Cabin similarly excepted from operation of the 1962 deed the land conveyed and described in the 1949 deed, there would be little doubt as to the grantor's intention to retain its interest in that land. We find Log Cabin's omission in this regard significant in our inquiry as to its intent.

We also note that the twelve parcels conveyed are, under the terms of the deed, expressly made "subject to" five enumerated deeds previously recorded. One of these, of course, is the 1949 deed from Log Cabin to defendant. Three of the others are denominated "right of way deed[s]." We think it clear that the

grantor's intent, in making the 1962 conveyance "subject to" previously recorded right of way deeds, was to convey to Byars all of its interest in those parcels, subservient to previously granted rights of way. The grantor's placement of the reference to the 1949 deed in this section of the instrument gives credence to plaintiff's contention that the interests contained therein should be accorded similar treatment. The parties intended that all of the interest retained by the grantor should be conveyed to Byars, subject to those interests previously conveyed to others by the grantor, and thus not within the grantor's power to convey.

Defendant relies heavily on the clause in the 1962 deed providing that the conveyance was to be subject to "[a]ny other covenants, restrictions and easements, contained in prior instruments of record." We find defendant's reliance misplaced, however, because the interest in question is a possibility of reverter. This interest, retained by the grantor in the 1949 deed, is neither a covenant, nor a restriction, nor an easement, and is thus not affected by the clause relied on by defendant.

In conclusion, we point out that a grantor who executes a warranty deed conveying property that includes within its bounds a parcel in which the grantor holds a possibility of reverter would be well advised to clearly express his intention to retain that interest. In the present case, there is simply no indication or suggestion in the deed that Log Cabin intended to retain the possibility of reverter which it held, and there are several aspects of the deed, discussed above, that point to a contrary conclusion. Accordingly, we hold that the trial court erred in finding and concluding that the possibility of reverter never passed from Log Cabin to plaintiff by mesne conveyances.

[2] Defendant has appealed from that portion of the court's order concluding that the 1949 deed executed by Log Cabin in favor of defendant created a reversionary interest in Log Cabin. Defendant argues that "[t]he reversionary clause in the deed . . . was not valid," and that defendant consequently took a fee simple absolute interest in the property in 1949. Defendant's contention in this regard rests on its argument that "the language purporting to contain a reversionary interest [is] repugnant to the estate and interest conveyed in the granting and habendum clause." We do not agree.

It is well settled that ordinarily the granting clause in a deed identifies the grantee and the thing granted, while the habendum clause sets out the quantum of the estate granted. *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948). Defendant correctly states the law as follows:

> When the granting clause in a deed . . . conveys an unqualified fee *and the habendum contains no limitation on the fee thus conveyed* and a fee simple title is warranted in the covenants of title, any additional clause or provision repugnant thereto . . . inserted in the instrument as a part of, or following the description of the property conveyed, or elsewhere *other than in the granting or habendum clause*, which tends to delimit the estate thus conveyed, will be deemed mere surplusage without force or effect.

Oxendine v. Lewis, 252 N.C. 669, 672, 114 S.E. 2d 706, 709 (1960) (emphasis added) (citations omitted). Defendant is incorrect, however, in contending that this rule has application in the instant case, in which the language creating a fee simple determinable and possibility of reverter is contained within the habendum clause. See *Lackey v. Board of Education*, 258 N.C. 460, 128 S.E. 2d 806 (1963), in which our Supreme Court reached the same result on similar facts. Defendant's assignment of error is thus without merit.

The result is: The decision of the trial court is reversed, and the cause is remanded to that court for entry of a judgment declaring that defendant's interest in the property in question reverted to plaintiff as successor in title to Log Cabin when defendant ceased to use the property for public school purposes.

Reversed and remanded with directions.

Judges ARNOLD and COZORT concur.

In re Appeal of Parker

IN THE MATTER OF: THE APPEAL OF EDWIN PARKER, CHARLES HARDEN, J. B. DAVENPORT, III, J. A. DILDAY, R. E. DILDAY, VERNON COBB, ROBERT L. HOGGARD, HERBERT JENKINS, JR., G. D. PERRY, DAVID ASKEW, BRYANT SAVAGE, HURRON FREEMAN, RHODES BOND, JR., AND C. B. GRIFFIN, JR.

No. 8410PTC1146

(Filed 3 September 1985)

Taxation § 25.7— ad valorem taxation—same true value and use value schedules

The Property Tax Commission erred in allowing the true value schedule and the use value schedule used in appraising real property in Bertie County for ad valorem taxation to be the same with certain exceptions because G.S. 105-277.6(b) and (c) require that the true value schedule and the use value schedule be determined separately.

APPEAL by petitioners from a final decision of the North Carolina Property Tax Commission entered 23 May 1984. Heard in the Court of Appeals 4 June 1985.

This is a proceeding under the Machinery Act, G.S. 105-271 through G.S. 105-395. On 1 August 1983 the Board of Commissioners of Bertie County adopted both the market value and the present use value schedule of values, standards and rules to be used in appraising real property in Bertie County for the octennial revaluation to be effective 1 January 1984. The 1 August 1983 meeting was the culmination of numerous meetings with the county tax supervisor concerning the schedule of values for Bertie County. Prior to this meeting, the tax supervisor had submitted to the Commissioners voluminous documentation and a proposed true value schedule and a proposed use value schedule. At the 1 August 1983 meeting, the Commissioners voted (i) to reduce the market or true value schedule by twenty-five percent (25%) across the board and (ii) to adopt the same values for both the market value schedule and the use value schedule. Notice of this action by the Commissioners was published beginning 11 August 1983 in the Bertie *Ledger-Advance*, a newspaper having general circulation in Bertie County. Thereafter on 1 September 1983, pursuant to G.S. 105-277.6 and 105-317(c), petitioners gave notice of appeal to the North Carolina Property Tax Commission (hereinafter Commission) sitting as the State Board of Equalization and Review. The appeal was heard before the Commission beginning 13 December 1983 and ending 20 December 1983. On 6

January 1984 the Commission issued its Memorandum of Decision and the Final Decision was entered 23 May 1984.

The schedule of true values adopted by the Bertie County Board of Commissioners contained a Note with eight subparts lettered A through H. Note F was designed to appraise properties having factors that made them more valuable or less valuable than other property and stated:

> The above schedule will apply where no other factor[s] exist that enhance the value. In areas of commercial or industrial sites, tracts located and suitable (where soil type permits development) for residential development, excessive road frontage, useable river frontage, and well located small tracts, or any other factor that affects the land value will be priced to reflect the proper value. Also factors that affect tracts located in areas that make them unfeasible to manage and practically unaccessible will be used to reduce the price to reflect proper value. Effective front foot prices will be priced to a maximum of $300 per front foot.

Note G stated:

> Marshall Valuation Service manual will be used as a guide to price all commercial and industrial improvements less 25% to reflect economic conditions locally (Bertie County).

The use value schedule also contained a Note with six subparagraphs lettered A through F, none of which are pertinent to this appeal.

On appeal the Commission found that the action of the Bertie County Board of Commissioners reducing all values twenty-five percent was arbitrary and that Notes F and G should be modified as follows:

> F. This schedule shall be the basis of appraisal of all rural land in Bertie County. The acreage prices shown reflect the value of rural land in the county which does not have a greater value for purposes other than agricultural, horticultural or forestry uses. In areas of the county where the value of the land is enhanced by non-agricultural influences, appraisals shall be increased to reflect such influences. These

influences shall include, but not be limited to, water frontage, excessive road frontage, size, or demand for more intensive uses such as residential, recreational, commercial or industrial development.

Road frontage rates and building site values will be derived from the figures entered by the Bertie County Tax Office on the Bertie County map prepared by the North Carolina Department of Transportation, identified as Bertie County Road and River Frontage Guide, and hereby incorporated into this schedule. The road frontage rates will apply to a depth of 200 feet unless the property is not that deep. If the depth is less than 200 feet, the appraiser shall take that fact into consideration in applying the road frontage factor.

At the completion of the reappraisal, the Bertie County Tax Office shall place the waterfront values applied to waterfront property on the map referred to above.

Similarly, in areas of the county where negative influences exist that cause the land to be less valuable for agricultural, horticultural, or forestry uses, such as inadequate access, poor topography or drainage problems, the basic prices shall be reduced to reflect these factors.

G. Marshall Valuation Service manual will be used as a guide to price all commercial and industrial improvements. The pricing schedules for all other improvements shall be as recommended by the Bertie County Tax Supervisor.

The Commission found as fact that (i) the 460,000 acres of land in Bertie County consists primarily of agricultural land and timberland, (ii) there is very little industrial activity in Bertie County and (iii) if a parcel of property is not subject to outside influences which are related to a different use, the use value of that property and its market value are the same. Based on these and other findings, the Commission further ordered that the present use value schedule adopted by the Bertie County Commissioners be modified to reflect the same values as those included in the market value schedule as modified by the Commission's final decision without any change in the notes as originally adopted.

Petitioners appealed to this Court pursuant to G.S. 105-345.

Josey, Josey and Hanudel by C. Kitchin Josey for taxpayer-appellants.

John R. Jenkins, Jr., for respondent-appellee.

Robert B. Broughton, General Counsel for North Carolina Farm Bureau Federation, filing an Amicus Curiae Brief.

PARKER, Judge.

We note at the outset that petitioners have flagrantly violated Appellate Rule 28 by failing to bring forward in their brief assignments of error with exceptions grouped thereunder. Nevertheless, in the exercise of our discretion, pursuant to Appellate Rule 2, we will consider the appeal; however, all exceptions not herein discussed are deemed abandoned.

The question presented for review before this Court is whether the decision of the North Carolina Property Tax Commission as it affected the ad valorem tax present use value schedule and the ad valorem tax true or market value schedule adopted by the Bertie County Board of Commissioners was (i) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or (ii) arbitrary and capricious or (iii) affected by other errors of law. G.S. 105-345.2. For the reasons herein discussed as to that part of the Property Tax Commission's decision finding the adoption of the true value schedule to be arbitrary on account of the twenty-five (25%) percent reduction in the proposed true value schedule, we affirm; however, as to that part of the decision permitting the true value schedule and the use value schedule to be the same except for Notes F and G as modified on the true value schedule, we reverse.

The statutory scheme for taxation of property qualifying for present use value treatment as defined in G.S. 105-277.2 and 277.3 is a tax deferment. General Statute 105-277.4(c) provides:

> Property meeting the conditions herein set forth shall be taxed on the basis of the value of the property for its present use. The difference between the taxes due on the present-use basis and the taxes which would have been payable in the absence of this classification, together with any interest, penalties or costs that may accrue thereon, shall be a lien on

> the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes shall be carried forward in the records of the taxing unit or units as deferred taxes, but shall not be payable, unless and until [certain disqualifying conditions occur].

The statutory provision which, in our view, mandates that the true value schedule and the use value schedule be determined separately is G.S. 105-277.6 which provides:

> (b) In revaluation years, as provided in G.S. 105-286, *all property entitled to classification under G.S. 105-277.3 shall be reappraised at its true value in money and at its present use value* as of the effective date of the revaluation. The two valuations shall continue in effect and shall provide the basis for deferred taxes until a change in one or both of the appraisals is required by law. (Emphasis added.)
>
> (c) To insure uniform appraisal of the classes of property herein defined in each county, the tax supervisor, at the time of the general reappraisal of all real property as required by G.S. 105-286, *shall also prepare a schedule of land values, standards and rules which, when properly applied, will result in the appraisal of the property at its present-use value.* Such schedule, standards and rules shall be used by the tax supervisor to appraise property receiving the benefit of this classification until the next general revaluation of real property in the county as required by G.S. 105-286. . . . The schedule of values, standards and rules shall be subject to all of the conditions set forth in G.S. 105-317(c), (c)(1) and (c)(2) relating to the adoption of schedules, standards and rules in revaluation years. (Emphasis added.)

Under the plain language of the statute, the Board of County Commissioners was required to adopt a separate market value schedule and use value schedule. The utilization of a note such as Note F to appraise properties having enhancing factors is not consistent with the stated purpose of the statute to "insure uniform appraisal." Without an objective standard by which to determine the tax to be deferred, taxpayers who would qualify for present use value tax treatment are conceivably deprived of the benefit of the classification. This lack of a uniform standard affects a substantial right and is clearly prejudicial. G.S. 105-345.2(c). We

reiterate that petitioners are challenging the schedule and not the assessed value of a particular parcel.

The Bertie County Tax Supervisor testified that he correlated the income approach and the market approach based on thirty-one comparable sales. The Commission, relying on *In re McElwee*, 304 N.C. 68, 283 S.E. 2d 115 (1981), ruled that the income approach was not the sole appropriate method for determining present use value. While *In re McElwee, supra*, does not prohibit a correlation of the market and income approaches to determine present use value, the situation in Bertie County, where the highest and best use of much land is in fact for agricultural purposes or timber land, may well illustrate the necessity for using the capitalization approach for determining present use value. As stated in *McElwee, supra:*

> [I]n determining the *present use value* of agricultural, horticultural and forest land as contemplated by G.S. 105-277.2(5) . . . the criterion is that both buyer and seller shall "have reasonable knowledge of the capability of the property to produce income *in its present use*. . . ." (Emphasis added.) In this instance, the clear legislative intent is that property be valued on the basis of its ability to produce income in the manner of its present use. All other uses for which the property might be employed and the many factors enunciated in G.S. 105-317(a) are irrelevant and immaterial. The focus of the appraisal is a narrow one: If the use of the property subject to present use valuation continues as at present what income will the property produce? *Id.* at 89, 283 S.E. 2d at 128.

For the foregoing reasons, we hold that there was error of law in the Commission's final decision and we remand the case to the Property Tax Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges ARNOLD and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM EUGENE BENFIELD

No. 8421SC1101

(Filed 3 September 1985)

1. **Criminal Law § 138— aggravating factor—prior convictions**

In a prosecution in which defendant was convicted of felonious breaking and entering, discharging a firearm into an occupied building, and multiple counts of assault, defendant failed to carry his burden of proof regarding prior convictions as to indigency, representation by counsel, or whether records of prior convictions were his; however, the court erred by considering as prior convictions cases in which prayer for judgment had been continued. G.S. 15A-1340.4(e).

2. **Criminal Law § 138— mitigating factor—extenuating relationship with victim—not present**

In a prosecution in which defendant was convicted of breaking and entering, discharging a firearm into an occupied dwelling, and multiple counts of assault after he saw his wife with another man, the trial court did not err by failing to find as a mitigating factor for the assault upon a bystander in the dwelling into which defendant discharged a firearm that defendant was under provocation or that the relationship between defendant and the victim was extenuating. While there may have been an extenuating relationship between defendant and his wife, that could not justify or mitigate defendant's act of shooting randomly into a house and hitting an innocent bystander.

3. **Criminal Law § 138— mitigating factor—mental or physical condition that reduced culpability—not present**

In a prosecution in which defendant was convicted of breaking and entering, discharging a firearm into an occupied dwelling, and multiple counts of assault, the trial court did not err by failing to find as a mitigating factor that defendant suffered from a mental or physical condition which reduced his culpability in that he had been shot after he initiated the shootout. G.S. 15A-1340.4(a)(2)(d).

4. **Criminal Law § 138— consecutive sentences—no abuse of discretion**

The trial court did not err in a prosecution in which defendant was convicted of breaking and entering, discharging a firearm into an occupied dwelling, and multiple counts of assault by imposing sentences to be served consecutively rather than concurrently. G.S. 15A-1354(a) gives the sentencing judge discretion to impose concurrent or consecutive sentences.

5. **Criminal Law § 138; Constitutional Law § 81— consecutive sentences—not disproportionate**

Consecutive sentences for breaking and entering, discharging a firearm into an occupied dwelling, and multiple counts of assault were not so grossly disproportionate to the crimes committed that they violated the Eighth Amendment.

6. Criminal Law § 152— appeal in forma pauperis—limited to one of several cases

Where defendant was convicted of breaking and entering, discharging a firearm into an occupied dwelling, and multiple counts of assault, the trial court did not abuse its discretion by failing to afford defendant an opportunity to be represented on appeal *in forma pauperis* with regard to all appealable issues in all of the cases rather than in only the one case in which the sentence exceeded the presumptive. Defendant was entitled to appeal as of right only in that case. G.S. 15A-1444(a1).

APPEAL by defendant from *Albright, Judge.* Judgment entered 16 July 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 20 August 1985.

Defendant was found guilty of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of felonious breaking and entering, one count of assault with a deadly weapon and one count of discharging a firearm into an occupied dwelling. All charges stemmed from a shooting incident after defendant observed his estranged wife in bed with another man.

In a previous appeal, *State v. Benfield*, 67 N.C. App. 490, 313 S.E. 2d 198, *cert. denied*, 311 N.C. 404, 319 S.E. 2d 274 (1984), this Court remanded for resentencing due to factors in aggravation held erroneously found. At the resentencing hearing the court entered the presumptive sentence for three of the four felonies and a sentence of two years for the misdemeanor assault. As to the fourth felony (No. 82CRS47156), the assault with a deadly weapon inflicting serious injury upon Beverly Lineberry (a bystander in the dwelling into which defendant discharged a firearm), the court found as an aggravating factor that defendant had a prior criminal conviction punishable by more than sixty days confinement. It found as a mitigating factor that defendant had expressed remorse. It declined to find two mitigating factors urged by defendant: (1) that "the defendant was suffering from a mental or physical condition that . . . significantly reduced his culpability," G.S. 15A-1340.4(a)(2)(d); (2) that defendant had acted under strong provocation, G.S. 15A-1340.4(a)(2)(i), as a result of seeing his wife with another man.

The court found that the aggravating factor outweighed the mitigating factor for this offense (No. 82CRS47156) and sentenced defendant to fifteen years imprisonment, a sentence in excess of

the presumptive. It also decreed that the various sentences were to run consecutively rather than concurrently.

Defendant appeals *in forma pauperis* from the sentence in excess of the presumptive in No. 82CRS47156.

Attorney General Edmisten, by Assistant Attorney General Richard L. Kucharski, for the State.

Davis & Harwell, P.A., by Fred R. Harwell, Jr., for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred and abused its discretion in its findings of aggravating and mitigating factors, in determining the weight given to those factors, and in imposing a sentence greater than the presumptive in No. 82CRS47156. He first argues that his prior convictions may not be used as a factor in aggravation because the court made no findings as to his indigency or representation by counsel at the time thereof. Defendant has the burden of proof on this issue, however, *State v. Thompson*, 309 N.C. 421, 427, 307 S.E. 2d 156, 161 (1983), and he has failed to carry that burden.

Defendant further argues that the prior convictions were not adequately proven. Defendant stipulated, however, that records which he furnished to the court were official court records, and he admitted that they bore the name "William Benfield." These records also reflected that the defendant in those cases lived on the same road as does the defendant here. G.S. 15A-1340.4(e) provides, in pertinent part:

> The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

Defendant thus had the burden of proving that the records were not in fact his, and he failed to carry that burden.

Defendant further argues that the court, in finding prior convictions as an aggravating factor, improperly considered his con-

victions in cases in which prayer for judgment was continued. We are constrained to agree. The record indicates that prayer for judgment was continued in cases in which defendant was convicted of communicating threats and of exceeding a safe speed. It is evident that the court considered at least the conviction for communicating threats in finding the aggravating factor of prior convictions. The State does not argue to the contrary but contends that proof of the conviction for communicating threats was by a preponderance of the evidence and that the aggravating factor of prior convictions thus was properly found.

At the time of the resentencing hearing the parties and the trial court did not have the benefit of this Court's decision in *State v. Southern*, 71 N.C. App. 563, 322 S.E. 2d 617 (1984), *aff'd per curiam*, 314 N.C. 110, 331 S.E. 2d 688 (1985). The Court there held, based on the statutory definition of "prior conviction," that a conviction with prayer for judgment continued cannot support a finding of prior convictions as an aggravating factor. It stated:

> The definition of "prior conviction" appears in G.S. 15A-1340.2(4):
>
> > A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, *and judgment has been entered thereon and the time for appeal has expired*, or the conviction has been finally upheld on direct appeal. (Emphasis added.)
>
> Thus, an offense is a "prior conviction" under the Fair Sentencing Act only if the judgment has been entered and the time for appeal has expired, or the conviction has been upheld on appeal. When an accused is convicted with prayer for judgment continued, no judgment is entered, *see State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966), and no appeal is possible (until judgment is entered). Such a conviction therefore may not support a finding of an aggravating circumstance under G.S. 15A-1340.4(a)(1)(o).

Id. at 565-66, 322 S.E. 2d at 619. We thus hold that the court erred in basing a finding of prior convictions as an aggravating factor at least in part on a conviction or convictions on which prayer for judgment was continued. The case accordingly must be

remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

Defendant further argues that the court erred in failing to find as mitigating factors (1) that he acted under strong provocation or that the relationship between him and the victim was otherwise extenuating, and (2) that he was suffering from a mental or physical condition that reduced his culpability. We note that the trial court has great discretion in determining the existence of aggravating and mitigating factors. *State v. Graham*, 309 N.C. 587, 592, 308 S.E. 2d 311, 315 (1983); *see also State v. Thompson*, 310 N.C. 209, 220, 311 S.E. 2d 866, 872 (1984), *quoting State v. Ahearn*, 307 N.C. 584, 596, 300 S.E. 2d 689, 697 (1983). Further, the defendant bears the burden of proof in regard to mitigating factors. *State v. Jones*, 309 N.C. 214, 219, 306 S.E. 2d 451, 455 (1983).

[2] Defendant's contention that he was under provocation, or that the relationship between him and the victim was otherwise extenuating, is based on the fact that the shooting occurred after he saw his wife with another man. This Court has previously noted that provocation within the meaning of G.S. 15A-1340.4 (a)(2)(i) "requires a showing of a threat or challenge by the victim to the defendant." *State v. Puckett*, 66 N.C. App. 600, 606, 312 S.E. 2d 207, 211 (1984). There was no such showing here. While there may have been an extenuating relationship between defendant and his wife, that could not justify or mitigate defendant's act of shooting randomly into a house and hitting an innocent bystander. We thus find this contention without merit.

[3] Defendant's contention that as a result of having been shot he suffered from a mental or physical condition that reduced his culpability is also without merit. Mental and physical conditions recognized as possible mitigating factors have been those which existed prior to a defendant's criminal act. *State v. Taylor*, 309 N.C. 570, 572, 308 S.E. 2d 302, 305 (1983) (chronic brain syndrome); *State v. Puckett*, 66 N.C. App. 600, 601-02, 312 S.E. 2d 207, 208-09 (1984) ("post-traumatic stress disorder" in Vietnam veteran); *State v. Salters*, 65 N.C. App. 31, 36, 308 S.E. 2d 512, 516, *disc. rev. denied*, 310 N.C. 479, 312 S.E. 2d 889 (1984) (alcoholism); *State v. Jones*, 59 N.C. App. 472, 473-74, 297 S.E. 2d 132, 133-34, *disc. rev. denied*, 307 N.C. 579 (1983) (epileptic seizures and brain surgery).

We believe this reflects legislative intent in the enactment of G.S. 15A-1340.4(a)(2)(d). Here defendant was wounded after he initiated a shootout. Since his own culpable conduct led to his being shot, he cannot properly claim diminished responsibility on that account.

[4] Defendant contends the court erred and abused its discretion in imposing sentences to be served consecutively rather than concurrently. G.S. 15A-1354(a) gives the sentencing court discretion to run multiple sentences either concurrently or consecutively. Our Supreme Court has stated that the General Assembly, by leaving this statute substantially intact when it enacted the Fair Sentencing Act, must have intended that the sentencing judge retain this discretion. *State v. Ysaguire*, 309 N.C. 780, 785, 309 S.E. 2d 436, 440 (1983). Consecutive sentencing thus does not violate our statutes. *Id.*

[5] We also find defendant's "proportionality" argument, *i.e.*, that the imposition of consecutive sentences results in punishment so grossly disproportionate to the crimes committed that it violates the Eighth Amendment, without merit. "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Ysaguire* at 786, 309 S.E. 2d at 441. Like the Court in *Ysaguire*, "we find nothing so grossly disproportionate in this sentencing judgment for these criminal offenses to justify our upsetting via the Eighth Amendment the traditional sentencing prerogatives of the legislature and the trial court." *Id.* at 787, 309 S.E. 2d at 441.

[6] Defendant contends the court erred and abused its discretion in failing to afford him an opportunity to be represented on appeal *in forma pauperis* "with regard to all appealable issues . . . in all of the cases before the court," instead of only in the one case (No. 82CRS47156) in which the sentence exceeded the presumptive. Defendant was entitled to appeal as of right only in that case, since only in that case did the sentence exceed the presumptive. G.S. 15A-1444(a1). Since defendant could appeal as of right only in case No. 82CRS47156, the court neither erred nor

abused its discretion in refusing to allow him to appeal *in forma pauperis* in the other cases.[1]

Defendant contends the court erred and abused its discretion in denying his motion for appropriate relief made at the conclusion of the sentencing hearing. Since the motion presented an argument we have herein found without merit, we find no error or abuse of discretion in its denial.

Remanded for resentencing.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. PEARL ALFREDA WEST

No. 844SC1184

(Filed 3 September 1985)

1. **Criminal Law § 40— unavailable witness—testimony at preliminary hearing—recollection by investigating officer**

A detective was not incompetent to give his recollection of the preliminary hearing testimony of a witness who was unavailable for the trial because the detective served as an investigating officer in the case. Furthermore, defendant's opportunity to cross-examine the witness at the preliminary hearing satisfied defendant's rights of confrontation and cross-examination.

2. **Homicide § 21.7— second degree murder—insufficient evidence**

The evidence was insufficient to support a finding that defendant suffocated a child so as to support her conviction of second degree murder where the State's evidence was entirely circumstantial and showed that defendant and the child's mother both had the opportunity and motive to suffocate the child but failed to show that defendant in fact did so.

APPEAL by defendant from *Pope, Judge*. Judgment entered 14 April 1984 in Superior Court, DUPLIN County. Heard in the Court of Appeals 26 August 1985.

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1. Defendant was entitled to petition the appellate division for a review of the other cases. G.S. 15A-1444(a1). We take judicial notice of the records of this Court, *In re Trucking Co.*, 285 N.C. 552, 557, 206 S.E. 2d 172, 176 (1974), and note that defendant filed with this Court a petition for writ of certiorari in the other cases. On 18 September 1984 another panel of this Court denied the petition. We may not overrule that decision. *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983).

State v. West

Defendant Pearl West was charged with the first degree murder of Jason Lamar Fillyow, a two-year-old child, on 9 February 1984. The trial was conducted as a capital trial. The trial judge instructed the jury on first degree murder and the lesser-included offense of second degree murder. The jury convicted defendant of second degree murder. After finding one aggravating factor and five mitigating factors, the trial judge sentenced the defendant to twenty-five years in prison.

The State's evidence tended to show that defendant's husband, Carlton West, began having an affair with Ingenue Fillyow, an unmarried teenager and mother of Jason Fillyow, sometime before Christmas, 1983. When defendant became aware of the affair, she confronted her husband and Ingenue. Shortly thereafter, she took her five children with her and moved from Wallace, North Carolina, where defendant and her husband lived, to Washington, D.C. Once defendant left, Ingenue and her son moved into defendant's house.

A few days later, on 7 February 1984, Carlton West drove to Washington, apparently seeking reconciliation with his wife. He stayed one night with defendant in a hotel, but the two argued the next morning and defendant took Carlton's car, leaving him stranded. He went back to North Carolina.

On 9 February 1984 defendant borrowed a friend's car and drove to North Carolina. She stopped in Warsaw and called her husband. She did not tell him she was in North Carolina. He told her he was not with Ingenue, and started to pray with her on the phone. Defendant became upset and hung up. Twenty minutes later, she arrived at her house, where Carlton and Ingenue were staying.

At trial, there were three sources of evidence as to what happened when defendant arrived at the house: Ingenue's trial testimony, the testimony of a police officer as to how defendant's husband testified at the preliminary hearing, and defendant's trial testimony. Defendant's husband refused to testify at trial, invoking the spousal privilege.

Ingenue Fillyow testified that on the evening of 9 February 1984 she was at Carlton West's house when he received a phone call from his wife, the defendant. About fifteen minutes later, she

heard the door open and Carlton said, "It's Pearl" and "Get in the closet." She went to the closet in the TV room and got in it. Jason was in the TV room, watching television.

From the bedroom closet, Ingenue heard Pearl say a number of times, "Where is she?" She heard Carlton say, "She's outside" and "Go outside and get her." Then she heard noises, as though, in her testimony, someone was fighting, coming from the TV room. She heard Pearl say, "Let me go," and she could hear Jason screaming.

She looked out of the closet and saw Jason lying on the bed, on his stomach, with his hands under his chin, but didn't notice him moving at all. Later, Pearl entered the bedroom and went to the closet door. Ingenue came out of the closet and the two had a struggle. Finally, Ingenue pushed Pearl against a dresser and ran out of the room. When she ran out, Jason was still on the bed. When asked if he was alive or dead or asleep, she said, "I wouldn't say he was dead."

The State presented Deputy Sheriff Jimmy Smith, who testified as to his recollection of Carlton West's testimony at the preliminary hearing. Smith said that Carlton testified that when his wife arrived on the evening of 9 February 1984, she came into the house and began looking for Ingenue. Defendant opened the door of the TV room and said "Where is she?" Carlton answered, "Outside" and "Come on. I'll get her," and walked to the kitchen door, hoping Pearl would follow him outside. He heard Jason screaming and returned to the TV room, where he saw Jason in a chair and Pearl "on top of him with a black object over his head." He took the object, which he said could have been a coat.

Pearl then grabbed the child by the neck, and he (Carlton) grabbed her. Pearl took hold of the boy by his body. Carlton then freed the child and told it to run outside. He held Pearl on the floor in order for Ingenue and Jason to get outside. He said that she was in an hysterical, emotional state.

When he thought Ingenue and the boy had gotten outside, Carlton left the TV room and went out the kitchen door. He heard Ingenue screaming and started back inside, but Ingenue ran past him outside. Carlton followed her. Although Ingenue told him the boy was inside, he did not think defendant would hurt the boy.

Out of fear of defendant, the two went deep into the woods and did not return for 2½ hours. When they returned, they found Jason dead, lying on his back on the bed.

Defendant testified that she went into the house, met her husband, and, on realizing Ingenue was there, struggled with him. She stated that she saw Jason in the TV room and, when her husband wrestled her to the ground, she grabbed Jason by the pants and then put her arm around him, holding him to her. When her husband started choking her, and she bit him, she let go of Jason. Defendant testified that her husband then shoved her to the floor and held her there while she screamed "Let me go." After eight to ten minutes, he jumped up and ran out the kitchen door.

She then went into the bedroom, saw Jason lying on the bed, and saw Ingenue's black coat, indicating to her that Ingenue was in the room. Defendant went to the closet door, and Ingenue emerged screaming and flailing her hands, knocking the closet door off its runners and down on the bed. Defendant then fought with Ingenue for five or six minutes, during which time she did not notice Jason moving or making a sound. Defendant testified that she then followed Ingenue and her husband out of the house, but then returned when she realized she didn't have her keys. After finding her car key on the floor of the bedroom, she saw the closet door lying slantwise against the bed, and underneath it, was the child Jason. When he did not respond to her call, she shook him, but got no response. Frightened, and thinking that Ingenue and Carlton would return as soon as she was gone, she left, so they could come back and see about the child.

The medical evidence showed that the child died by suffocation. He had a small abrasion on his neck under his jaw, but had no other abrasions or bruises.

The trial judge refused to instruct on voluntary manslaughter or involuntary manslaughter.

From a judgment of guilty of second degree murder and a sentence of twenty-five years in prison, the defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lucien Capone III, for the State.

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

ARNOLD, Judge.

[1] We first consider whether the trial judge should have excluded the testimony of Detective Jimmy Smith as to what Carlton West testified at the preliminary hearing of this case. Mr. West, defendant's husband, testified against his wife at the preliminary hearing, but avoided testifying against her at trial by claiming the privilege of not testifying against his spouse. The trial judge found defendant's husband to be an unavailable witness, and allowed his prior testimony to be admitted under the former testimony exception to the hearsay rule. The defendant does not challenge the finding that defendant's husband was an unavailable witness, but contends that the court committed prejudicial error by allowing Detective Smith, who was an investigating officer, assisting the prosecution, to give his recollection of Carlton West's testimony at the preliminary hearing.

We agree that Detective Smith, who served as an investigating officer in the case, may not have been the best source of Carlton West's former testimony. Yet, we find no authority for ruling that because Detective Smith was otherwise providing evidence for the State his testimony was incompetent as a matter of law. In general, any first-hand observer of the giving of former testimony is qualified to testify to its purport from his unaided memory. *See* McCormick on Evidence § 260 (3rd ed. 1984). Any potential bias or tendency to confuse the testimony with other accounts of the crime can be exposed by cross-examination, and goes to credibility, which is the jury's province to determine.

The giving of former testimony does not infringe the defendant's constitutional rights to confrontation and cross-examination if the defendant is present and represented by counsel, and if he has an adequate opportunity to cross-examine the witness. *See Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597, 100 S.Ct. 2531 (1980). Our review of North Carolina's preliminary hearing statute and case law convinces us that it assures an opportunity for cross-examination adequate to fulfill the requirements of our state and federal confrontation clauses. The record indicates the defendant and her attorney were present at the preliminary hearing.

We conclude that the trial court did not err by admitting Carlton West's former testimony as recalled by Detective Smith.

[2] The next, and most crucial, question in this case is whether, given the admissibility of Carlton West's former testimony, there was sufficient evidence to convict defendant of second degree murder. In deciding this question, we must consider the evidence in the light most favorable to the State, and determine whether it substantially supports a finding that the offense charged has been committed and that defendant has committed it. "[I]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator," then the motion to dismiss for insufficiency of the evidence should have been granted. *State v. Bates*, 309 N.C. 528, 533, 308 S.E. 2d 258, 262 (1983).

Here, as to whether the defendant committed the crime charged, the State's evidence is entirely circumstantial. Two persons had the opportunity and motive to have covered the child's mouth and suffocated it: defendant, who out of rage with Ingenue, the child's mother, may have killed the child after Ingenue ran from the house, and Ingenue, who was hiding in the bedroom and was alone with the child in the bedroom after it came screaming in to her, and out of fright may have covered its mouth to quiet it, and accidentally suffocated it. Carlton West's former testimony, that he saw the defendant in the TV room with a black object over the child's head and later that defendant grabbed the child's neck, supports a finding that defendant had malice towards the child and intent to harm and possibly to kill the child, but it does not tell us whether or not defendant in fact did kill the child. We can only speculate as to that crucial fact. Given this gap in the record, we cannot in conscience say that there is substantial evidence to support the finding that the defendant suffocated the child. The motion to dismiss for insufficiency of the evidence should have been granted.

We see no need to reach defendant's other contentions.

Reversed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. JETCHEL C. PARKER

No. 8412SC1173

(Filed 3 September 1985)

1. **Rape and Allied Offenses § 5— second degree sexual offense—evidence sufficient**

The evidence was sufficient to support a conviction of second degree sexual offense under G.S. 14-27.5 where the prosecutrix testified that defendant manipulated her "vagina," and "that he tried to put his penis into my vagina but could not . . . get it completely in."

2. **Rape and Allied Offenses § 4.3— prior sexual encounter with another man—properly excluded**

In a prosecution in which defendant was accused of committing a second degree sexual offense against a paralegal in a law office after she had gone to a nearby club for drinks with the attorney and defendant and then returned to the office with defendant, the trial court properly excluded evidence that the prosecutrix had on a prior occasion gone to the club with the attorney for drinks, then returned to the office where she had sex with the attorney on the sofa in the reception room. The testimony did not show a *pattern* of sexual behavior tending to show that the prosecutrix consented to sexual relations with defendant; defendant did not argue at trial that the evidence was admissible to show that the acts charged were not committed by defendant; and, while the evidence would impeach the prosecutrix and add to the defense theory that the prosecutrix fabricated the offense to get back at the attorney, it had a high potential for producing prejudicial inferences. Moreover, the trial judge stated that the defendant could introduce evidence that the attorney and the prosecutrix had a dating relationship. G.S. 8-58.6(b)(3).

APPEAL by defendant from *Battle, Judge*. Judgment entered 25 June 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 August 1985.

The defendant was charged with second-degree rape, second-degree sexual offense, and kidnapping. At trial, at the close of the State's evidence, the judge dismissed the kidnapping charge. The jury acquitted the defendant of rape, but found him guilty of the second-degree sexual offense. The defendant was sentenced to ten years in prison.

The State's evidence showed that on 20 February 1984, the defendant spent the afternoon discussing with Fayetteville lawyer Jack Carter the details of a civil suit Carter was handling for defendant. At around 5:30 p.m., the two finished work and began drinking at the conference table in Carter's office. The prosecu-

trix, one of Carter's paralegal assistants, had left the office at 4:00 p.m. to go shopping and have a glass of wine with a friend, but returned around 7:30. The two men, who had consumed all but one-half inch of a fifth of bourbon whiskey, invited the prosecutrix to join them in finishing the bottle. She had a drink with them of whiskey mixed with cola.

Carter then suggested that they go to Sh-booms, a private club nearby, for another drink. The three stayed at the club approximately one hour. The prosecutrix testified that there she had one drink, while the two men had two to three drinks each. Carter left first and drove himself home, although defendant suggested that they both had had too much to drink and that he would call his son.

After Carter left, the defendant and the prosecutrix continued talking. The prosecutrix testified that the defendant had another drink while she had nothing more to drink. The prosecutrix paid for the drinks and then the two went out to the parking lot. As the prosecutrix was getting her car key out, the defendant told her he wanted to talk more with her and suggested they go back into Carter's law office. The prosecutrix said all right, but said also: "it has to be short. I need to get home."

She unlocked the door, and entered the reception area, turning on the light. Defendant came in behind her, and turned off the light. She turned the light back on and then he grabbed her, and tried to kiss her. She tried to get free but he continued to hold her and tried to get her skirt up and underclothing down. He forced her hand over his penis, and then masturbated. He had only a partial erection, and told her that he would not hurt her and that there was nothing he could do. At one point he succeeded in partially removing her underwear, and spreading her legs. The prosecutrix testified that he then attempted penetration but was unable to achieve erection. Eventually he let her go, and she left and went to a friend's house.

The defendant's evidence tended to show that the prosecutrix made advances towards him, by sitting on his lap, at Carter's office, before the three left for Sh-booms, and later at Sh-booms. Defendant testified that the prosecutrix became drunk at Sh-booms, and that when they left defendant suggested they go back in the office to have coffee and sober up. Defendant testified that

he and the prosecutrix sat in the reception area of the law office, smoking and talking. Defendant testified that the prosecutrix complained that no one, especially Jack Carter, respected her as a woman; that she said she had a pretty body; and that she took off part of her clothes in front of him. He testified that they hugged and kissed, and talked, and that the prosecutrix unzipped his pants and pulled his penis out. He testified further that he laid on top of her, but was unable to have an erection, and made no attempt to insert anything into her vagina. The defendant's testimony indicated that the prosecutrix either initiated or consented to whatever sexual contact the two had.

The defendant appeals his conviction of second degree sexual offense.

Attorney General Lacy Thornburg, by Assistant Attorney General Evelyn M. Coman, for the State.

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

ARNOLD, Judge.

[1] The defendant challenges the sufficiency of the evidence to support his conviction of a second-degree sexual offense under G.S. 14-27.5. In examining the sufficiency of the evidence, we must assume that the testimony favorable to the State is true and consider whether it establishes beyond a reasonable doubt each element of the crime charged. *See State v. Robinson*, 310 N.C. 530, 313 S.E. 2d 571 (1984); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). After careful consideration of the State's evidence in the present case, we conclude that it is sufficient to support the defendant's conviction under G.S. 14-27.5.

Under G.S. 14-27.5(a), "[a] person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person: (1) [b]y force and against the will of the other person. . . ." A "sexual act" is defined under G.S. 14-27.1(4) as: "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. . . ."

In the present case, the State's evidence shows that any sexual act between the defendant and the prosecutrix was clearly against the will of the prosecutrix. The defendant admits that "any object" may include parts of the human body, such as fingers. The defendant argues, however, that the prosecutrix's testimony that "[h]e had put his hand inside my vaginal area," is not sufficient to show penetration of the genital opening. We disagree.

The one statement quoted by defendant might raise some question with respect to penetration of the genital opening. However, there was additional testimony by the prosecutrix that defendant manipulated her "vagina," and "that he tried to put his penis into my vagina but he could not . . . get it completely in." Without further elaboration of the testimony, and in light of the ordinary meanings of common word usage, we find that the jury had before it sufficient evidence from which to find beyond a reasonable doubt each element of second-degree sexual offense under G.S. 14-27.5.

[2] The defendant contends also that the trial court erred by excluding evidence of a prior sexual encounter between the prosecutrix and attorney Jack Carter under the Rape Shield Act. The defendant sought to introduce evidence that on at least one occasion the prosecutrix and Carter had gone drinking at Sh-booms, then returned to the sofa in the reception room of Carter's law office, and had sex. Defendant argues that this evidence should have been admitted under G.S. 8-58.6(b)(3), which provides an exception to the Rape Shield Act for evidence tending to show "a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented. . . ."

We do not agree that the testimony defendant sought to have admitted reflected a *pattern* of sexual behavior tending to show that the prosecutrix consented to sexual relations with defendant. Attorney Carter testified in *voir dire* that he and the prosecutrix had had a romantic relationship and that on one occasion they had returned to the law office and reception room, after

drinking at Sh-booms, and had had sexual intercourse. This occurred, Carter testified, approximately one year before the prosecutrix's encounter with defendant. Defendant produced no other evidence of similar sexual behavior by the prosecutrix; nothing in the record indicates that the prosecutrix was in the habit of drinking with men at Sh-booms and then returning with them to the law office for sex. This single incident involving the prosecutrix and her boyfriend, a year prior to the alleged crime, does not qualify as a pattern of behavior under G.S. 8-58.6(b)(3), having probative value on the issue of consent which far outweighs any prejudicial effect. *See State v. Rhinehart*, 68 N.C. App. 615, 316 S.E. 2d 118 (1984); *cf. State v. Shoffner*, 62 N.C. App. 245, 302 S.E. 2d 830 (1983).

Defendant argues on appeal that the evidence was also admissible under G.S. 8-58.6(b)(2), which provides an exception for evidence "of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant. . . ." Defendant failed to make this argument at trial and therefore cannot now assert it. Even had defendant properly invoked the exception, we note that it does not apply to the facts of this case. Exception (b)(2) was intended to cover evidence that someone other than the defendant produced the injuries or sperm found on or in the prosecutrix. *See State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980). The defendant certainly does not submit the evidence of the prosecutrix's sexual activity with her boyfriend, of a year before, to put in question the identity of the person who had a forcible sexual encounter with her on 20 February 1984.

The defendant argues further that the evidence of the prosecutrix's prior sexual conduct was necessary to impeach her and to establish the defense theory of fabrication. We note first that the defense counsel disclaimed any attempt at trial to introduce the evidence for impeachment purposes, but rather relied on the exception to the Rape Shield Act found at G.S. 8-58.6(b)(3). Counsel stated that while he did not seek to introduce the evidence to impeach the prosecutrix's testimony, the ultimate effect of its admission under G.S. 8-58.6(b)(3) would be to impeach her. We agree that the evidence of the prosecutrix's prior sexual conduct with Carter might strengthen defendant's theory that she sought to have sex with defendant in order to hurt Carter, and so

might tend to impeach her testimony at trial. Yet, this type of evidence, of prior sex with a boyfriend, has a high potential for producing erroneous prejudicial inferences, *e.g.*, that the prosecutrix is an immoral or "loose" woman and therefore is more likely to have sex with any man, including defendant. Further, the probative value of the evidence of prior sex with Carter, *i.e.*, what it might add to the defense theory that the prosecutrix fabricated the criminal offense to get back at Carter, is really very small as compared to the prejudicial effect it might have produced at trial. At the in-camera hearing, the trial judge stated that the defendant could introduce evidence that Carter and the prosecutrix had a dating relationship. This was sufficient to present the defense theory to the jury. Evidence of particular sexual encounters between the prosecutrix and Carter, however, would clearly carry a high risk of producing prejudicial inferences, but would do very little towards making the crucial link in the defense theory between the prosecutrix's relationship with Carter and her encounter with defendant the evening of 20 February 1984. The trial judge's exclusion of evidence of the prosecutrix's prior sexual activity was consistent with the letter and the spirit of the Rape Shield Act.

The defendant's contention as to the trial judge's failure to exclude portions of the prosecutrix's out-of-court statement to police was not presented according to our Rules, *see* Rule 28(b)(5), and we therefore will not consider it.

No error.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. WILLIAM J. GRAHAM

No. 8416SC1298

(Filed 3 September 1985)

Constitutional Law § 49— waiver of assigned counsel to retain counsel—appearance without counsel—required inquiries

The trial court erred in requiring defendant to proceed to trial *pro se* in the absence of (1) further inquiry into the reasons for defendant's lack of

counsel and (2) the inquiries required by G.S. 15A-1242 (1983) where defendant initially requested and received court-appointed counsel; defendant then discharged appointed counsel with the expectation of retaining private counsel and signed a written waiver of assigned counsel; defendant appeared for trial without counsel; when asked if he was "willing to go without an attorney," defendant stated that he "would like to have one"; and defendant stated that he "ran into a little problem" in obtaining his own attorney.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 9 February 1984 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 29 August 1985.

Defendant appeals from a judgment of imprisonment entered upon his conviction of felonious breaking or entering and larceny.

Attorney General Thornburg, by Assistant Attorney General John R. Corne, for the State.

W. Phillip McRae for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in denying him court-appointed counsel or additional time in which to secure retained counsel. We find *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984), controlling. Pursuant thereto, we hold that in the absence of (1) further inquiry into the reason(s) for defendant's lack of counsel and (2) the inquiries required by N.C. Gen. Stat. Sec. 15A-1242 (1983), it was error to require defendant to proceed to trial *pro se*.

The pertinent facts are as follows:

Defendant initially requested and received court-appointed counsel. On 1 June 1983, by written motion, he indicated a desire to retain his own counsel and petitioned the court to relieve appointed counsel of further responsibility. He further requested a continuance to allow him to retain private counsel.

Judge Walker (H.H.) granted the motion, relieved appointed counsel of further responsibility, and continued the case until the August 1983 Session "for the defendant to have an opportunity to retain private counsel." Defendant, apparently simultaneously, executed a sworn waiver of right to assigned counsel.

Defendant was not tried until 9 February 1984. Upon the call of the case the court asked the prosecuting attorney and the defendant if they were ready for trial. Both responded in the affirmative. The following dialogue then occurred:

THE COURT: I see you do not have an attorney. You willing to go without an attorney?

DEFENDANT GRAHAM: Well, I would like to have one.

THE COURT: As I understand it you were going to get your own lawyer; is that correct?

DEFENDANT GRAHAM: Yes, sir.

THE COURT: What happened to that?

DEFENDANT GRAHAM: Ran into a little problem.

. . . .

THE COURT: Mr. Graham, I understand it, you were appointed an attorney at one time; is that correct?

DEFENDANT GRAHAM: Yes, sir.

. . . .

THE COURT: As I understand it, as well, you were dissatisfied with his representation of you?

DEFENDANT GRAHAM: Yes, sir.

THE COURT: You asked that he not represent you; is that correct?

DEFENDANT GRAHAM: Yes, sir.

THE COURT: And then you were told—I assume you were told that you could do that, but then you would have to get your own lawyer?

DEFENDANT GRAHAM: That's what I was told.

THE COURT: All right. Mr. Graham, you understand that you are not entitled to an appointed attorney; . . . that you are not entitled to pick your own attorney, you go with the attorney we select for you, or you don't go at all; understand that?

DEFENDANT GRAHAM: Yes, sir.

THE COURT: I assume you were told that before; weren't you, that you can go out and hire whoever you want to, but you don't get an appointed one?

As a result of that, you signed a waiver to a Court-appointed lawyer; you told the Court that you were going to get your own?

DEFENDANT GRAH[A]M: Yeah, I signed a waiver.

THE COURT: Now, you don't have an attorney?

DEFENDANT GRAHAM: No, sir.

THE COURT: Well, the Court's position on this is that the Court will not appoint you another attorney, so your choice was to go it alone or hire your own. So, you're going it alone?

I think the case was continued at the last session, was that not correct, Mr. Carter [prosecuting attorney], so he could get his own lawyer?

MR. CARTER: Yes, sir, Your Honor.

Your Honor, I would like the Court to notice that this is an '82 case, also, so he's had plenty of time to hire a lawyer.

THE COURT: Let the record show the Court would find that his waiver still stands, under the circumstances.

So, I guess you will be trying this yourself.

Okay. Bring the Jury back. Be ready for trial?

MR. CARTER: Yes, sir, Your Honor.

THE COURT: You ready for trial, Mr. Graham?

DEFENDANT GRAHAM: (Nods head.)

THE COURT: All right.

The right to counsel is one of the most closely guarded of all trial rights. *State v. Colbert*, 311 N.C. 283, 285, 316 S.E. 2d 79, 80 (1984). The right nevertheless implicitly gives a defendant the right to refuse counsel and conduct his or her own defense. *State v. Thacker*, 301 N.C. 348, 353-54, 271 S.E. 2d 252, 256 (1980), citing

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). Such waiver, however, like that of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, understood the consequences of waiver, and was voluntarily exercising free will. *Id.*

Prior to arraignment defendant here signed a form designated "Waiver of Right to Assigned Counsel." The fact that an accused waives his right to assigned counsel does not mean that he waives all right to counsel, however. *State v. McCrowre*, 312 N.C. 478, 481, 322 S.E. 2d 775, 777 (1984). In *McCrowre*, as here, the defendant discharged assigned counsel with the expectation of retaining private counsel. He then appeared for trial without counsel and requested that the court "get someone to assist me in [my] case." *McCrowre* at 480, 322 S.E. 2d at 776. The court denied the request, stating that defendant had waived his right to counsel. In holding this error the Supreme Court reasoned that there was "no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *McCrowre* at 480, 322 S.E. 2d at 776-77. It added that "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Id.*, 322 S.E. 2d at 777 [quoting *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E. 2d 788, 800 (1981)]. It added further, citing N.C. Gen. Stat. Sec. 15A-1242 (1983), that

> [h]ad defendant clearly indicated that he wished to proceed *pro se*, the trial court was required to make inquiry to determine whether defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

McCrowre at 481, 322 S.E. 2d at 777, *see also State v. Michael*, 74 N.C. App. 118, 327 S.E. 2d 263 (1985).

The record here reveals no such inquiry. There is no evidence that defendant was informed of the nature of the charges

and the range of permissible punishments or that he understood and appreciated the consequences of proceeding without counsel. Absent such evidence, the court should not have permitted him to proceed *pro se*. N.C. Gen. Stat. Sec. 15A-1242; *McCrowre, supra.*

Further, here, as in *McCrowre*, "there is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *McCrowre* at 480, 322 S.E. 2d at 776-77. His statement that he "would like to have one" when asked if he was "willing to go without an attorney" indicates the contrary. The trial court here, like that in *McCrowre*, apparently "mistakenly believed that defendant had waived his right to *all* counsel," *McCrowre* at 481, 322 S.E. 2d at 777, by waiving his right to appointed counsel.

"Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E. 2d 788, 800 (1981). Defendant here expressly indicated the contrary by stating that he "would like to have" an attorney. The court failed to inquire further when defendant said he "[r]an into a little problem" in retaining private counsel, and the record contains no evidence as to the nature of the problem. We thus have no basis for concluding that defendant's failure to retain counsel was due to his own negligence or lack of diligence.

We believe *McCrowre* requires a new trial. Since defendant's other assignment of error relates to a matter unlikely to recur upon retrial, we do not discuss it.

New trial.

Judges WELLS and PHILLIPS concur.

CAROLE CHASE BEARD v. ALBERTA MUNDAY NEWSOME

No. 8421SC1029

(Filed 3 September 1985)

Chattel Mortgages § 1— transaction either a chattel mortgage or an absolute sale with option to repurchase—directed verdict improper

The trial court erred by granting a directed verdict for defendant in an action to recover damages for wrongful conversion of personal property where plaintiff had transferred personal property to defendant for $2,557.89; both parties had signed a document labeled "bill of sale and option to repurchase"; the property was stored in a local warehouse at defendant's expense; plaintiff claimed that the agreement was a chattel mortgage and that she was to have access to the property; defendant claimed that the transaction was an absolute sale with an option to repurchase; and defendant eventually sold the property. Evidence that the consideration for the bill of sale was markedly less than the value of the silver, china, crystal, and oil paintings and that plaintiff and defendant would each have access to the stored property created a question for the jury as to whether the transaction was intended as a chattel mortgage. G.S. 25-9-203 (Supp. 1983).

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 29 March 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 May 1985.

White and Crumpler, by Robin J. Stinson and David R. Crawford, for plaintiff appellant.

Cofer and Mitchell, by William L. Cofer and Dean B. Rutledge, for defendant appellee.

BECTON, Judge.

This appeal presents the issue whether a certain transaction was, as defendant contends, an absolute sale with an option to repurchase, or, as plaintiff contends, a chattel mortgage. The trial court directed a verdict in favor of the defendant. We conclude that whether the arrangement constituted a sale or a mortgage was a question for the jury, and we therefore reverse and remand for a new trial. We find it unnecessary to discuss the second issue involving certain character and impeachment evidence.

I

Plaintiff, Carole Beard, brought this action to recover damages allegedly sustained as a result of defendant Alberta New-

some's wrongful conversion of her personal property. (The Complaint was later amended to list the specific items of property.) Beard further alleged that Newsome's actions constituted unfair and deceptive trade practices and prayed that damages be trebled. Defendant Newsome answered and counterclaimed. By agreement of the parties, the counterclaims have not yet been tried.

At the close of the evidence at trial, the judge directed a verdict for Newsome on Beard's claims for fraud and unfair trade practices and on the issue of whether the absolute sale with an option to repurchase was intended to be a loan secured by a chattel mortgage. On the sole issue submitted to the jury, the jury found that Newsome had not extended the option date for Beard to repurchase the property. From the judgment entered, Beard appeals.

II

In late 1980, Carole Beard had recently separated from her husband and was in need of money. A friend recommended she contact Alberta Newsome, suggesting that Newsome might be able to help. Although the parties disagree as to whether Beard contacted Newsome or the reverse, they agree that they met at Beard's residence and discussed her financial situation. On 4 November 1980, the parties signed a document entitled "Bill of Sale and Option to Repurchase," in which Beard agreed to sell, and Newsome to purchase, certain items of Beard's personal property, mainly household furnishings, for approximately $2,500. According to this instrument, Beard was granted an option to repurchase the property on or before 1 May 1981 at the price originally paid by Newsome. Beard maintains, and Newsome denies, that the transaction was intended to be a loan secured by the property. The property was stored in a local warehouse at Newsome's expense. Beard stated that she was to have access to the property for the purpose of selling some pieces to raise the money to repay Newsome. Newsome denies any such agreement.

Beard and Newsome further disagree as to what happened after the execution of the document. Beard's testimony was that as the due date approached, she expressed her concern to Newsome that she might not be able to repay the loan on time; that she discussed selling some of the furniture in storage; but that

Newsome reassured her and told her not to worry, everything would be "OK." Beard testified that a few days after the due date, she tendered the amount of the loan to Newsome, but Newsome refused to accept it. Newsome testified to the contrary, stating that she never told Beard not to worry, and Beard never tendered the repurchase price of the furniture. The evidence is uncontradicted that shortly after 1 May 1981, Newsome had the property removed from storage and sold at a public auction.

III

Beard's principal assignment of error is that the trial court erred in granting Newsome's motion for a directed verdict on whether the transaction in question was a loan or an absolute sale with an option to repurchase, because evidence sufficient to raise a factual issue for the jury was adduced. We agree.

A chattel mortgage is a conditional sale of personal property as security for the payment of a debt or the performance of some other obligation. *Odom v. Clark*, 146 N.C. 544, 60 S.E. 513 (1908); *see* 68 Am. Jur. 2d *Secured Transactions* Sec. 86 (1973). North Carolina accepts the majority common law rule that under certain circumstances a bill of sale, although absolute on its face, may be regarded as a chattel mortgage. *Dukes v. Jones*, 51 N.C. 14 (1858). *See generally* Annot., 33 A.L.R. 2d 364 (1954). In particular, an absolute bill of sale with an accompanying parol agreement that the purchaser will reconvey the property upon the repayment of the money within a certain time is a mortgage, and it will be treated as such. Anonymous, 3 N.C. 26 (1797); *see* 68 Am. Jur. 2d *Secured Transactions* Sec. 97 (1973) & cases at n. 50.[1] These common law rules have apparently survived the adoption of the Uniform Commercial Code. *See* N.C. Gen. Stat. Sec. 25-9-203 official comment 4 (Supp. 1983) ("Under this Article as under prior law a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security. . . .").

Thus, North Carolina recognizes that a bill of sale with an option to repurchase, absolute on its face, may be treated as a chat-

1. When an absolute bill of sale is accompanied by a *written* option to repurchase, it has also been consistently held or recognized that the bill of sale was intended as a chattel mortgage. *See* Annot., 33 A.L.R. 2d 364, Sec. 11 (1954).

tel mortgage. The standard of proof appears to be one of clear, cogent and convincing evidence:

> To convert . . . [an absolute conveyance] into a security for money lent, it must be shown by facts and circumstances dehors the deed, that such was the fact, and those facts and circumstances must be such as, to the apprehension of men versed in business, and judicial minds, are incompatible with the idea of an absolute purchase, and leave no fair doubt that a security only was intended. But parol evidence by itself that, at the time of its execution, it was agreed it should be a mortgage, will not answer.

Colvard v. Waugh, 56 N.C. 335, 337 (1857) (emphasis and citation omitted). *But see Whitfield v. Cates*, 59 N.C. 136 (1860) (no conversion of deed absolute into mortgage absent allegation of fraud, imposition, oppression or mistake).

The gist of Newsome's argument is that Beard relied exclusively on her bare assertion that she "thought" the transaction was a loan, and, therefore, it was proper for the trial court to direct a verdict against her. Beard, however, takes the position that evidence of the inadequacy of consideration for the transaction and of joint constructive possession of the property was sufficient to require a jury to consider whether the agreement was intended to be a chattel mortgage. Beard's position has merit.

When the price of property sold is not fairly proportionate to its value, there is a strong indication that the transaction is intended to be a mortgage rather than a sale. *See State v. Snyder*, 71 Idaho 454, 233 P. 2d 802 (1951); *accord* 68 Am. Jur. 2d *Secured Transactions* Sec. 96 (1973) & cases at n. 40. In the case at bar, the purchase price contained in the bill of sale was $2,557.89. Beard testified that the property in question contained enough furniture for a house of four thousand square feet. Before being cut off by objection of defense counsel, Beard said, "[t]here was the equivalent to furnish two living rooms, two formal dining rooms, kitchen and dinette furniture. . . ." Another witness described the property as "the most elegant, beautiful, expensive furniture that money could buy. . . . And a lot of silver, china, crystal, beautiful little oil paintings. Just more than you can dream of." Newsome herself testified that it took "from eight Monday morning until six Monday evening" for the movers to

pack Beard's belongings. This, in our opinion, constitutes ample evidence that the consideration for the bill of sale was markedly less than the value of the property.[2]

> Another factor often considered in determining whether a bill of sale absolute on its face was a chattel mortgage was whether the property remained in the possession of the seller or was delivered to the buyer upon the execution of the instrument.

68 Am. Jur. 2d *Secured Transactions* Sec. 96 (1973) (footnote omitted). The transferor's retention of the property, while not controlling, is some evidence that the parties intended to create a chattel mortgage. *State v. Snyder.* In the instant case, there was evidence that Newsome and Beard agreed that each would have access to the stored property and that Beard could remove and sell some of the items in order to repay Newsome. Although there was contradictory evidence, in ruling upon a motion for a directed verdict, discrepancies in the evidence are to be resolved in favor of the non-movant. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). Competent evidence of constructive joint possession by buyer and seller is, then, a further indication that the transaction was intended as a chattel mortgage.

IV

"A motion for a directed verdict raises the question as to whether there is sufficient evidence to go to the jury. . . . The plaintiff's evidence must be taken as true and be considered in the light most favorable to [her], and a directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff." Shuford, *N.C. Civ. Prac. and Proc.*, Sec. 50-5 (2d ed. 1981) (footnote omitted). Applying this standard to the instant case, we are convinced that a directed verdict was granted erroneously. Evidence of facts and circumstances beyond the deed—particularly of inadequacy of con-

2. Beard also contends in a related argument that it was prejudicial error for the trial court not to allow her to testify as to the value of her personal property. Her contention is without merit. Beard was never specifically asked the value of the property. An objection was sustained to a narrative by Beard describing the property, but no offer of proof was ever made as to what she would have answered. In any event, we find that no prejudice adhered to Beard because there was ample evidence concerning the amount and value of the property.

sideration and constructive joint possession—create a question for the jury as to whether the transaction was intended as a chattel mortgage. Accordingly, the directed verdict is reversed, and the cause is remanded for a

New trial.

Judges WELLS and EAGLES concur.

MARY McCLAIN CHAVIS v. SOUTHERN LIFE INSURANCE COMPANY

No. 8410DC1037

(Filed 3 September 1985)

Insurance § 18— life insurance—misrepresentations in application for reinstatement

Under the terms of a life insurance policy, the incontestability clause was applicable only to the initial application and policy, and once the contestable period had expired while the policy was in effect, a subsequent application for reinstatement of the policy did not trigger a second two-year contestable period. Furthermore, a requirement of "evidence of insurability" was a condition precedent to reinstatement rather than a defense to payment, and the alleged falsity of the insured's statements in his application for reinstatement was not a valid defense to an action to recover under the policy.

APPEAL by plaintiff from *Creech, Judge.* Orders entered 27 January and 11 May 1984 in District Court, WAKE County. Heard in the Court of Appeals 8 May 1985.

Nicholas J. Dombalis, II, for plaintiff appellant.

Poyner, Geraghty, Hartsfield & Townsend, by David W. Long and Susanna K. Gilchrist, for defendant appellee.

BECTON, Judge.

Plaintiff, Mary McClain Chavis, instituted this action on 14 October 1982 as the beneficiary of a $17,000 life insurance policy issued to her deceased husband, Leotha Jim Chavis, to recover the proceeds after the defendant insurer, Southern Life Insurance Company (Southern Life), denied her claim.

Mr. Chavis died on 25 July 1981 from burns received in a house fire. In its Answer, filed 21 December 1982, Southern Life raised the defense that Mr. Chavis' "false and misleading . . . material" misrepresentations in a 1980 application for reinstatement of his lapsed life insurance policy voided the reinstatement. Thus, according to Southern Life, Mr. Chavis had no Southern Life insurance coverage at the time of his death. Both parties moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Mrs. Chavis appeals from the denial of her motion and the grant of Southern Life's motion several months later.

On appeal, Mrs. Chavis contends that the trial court erred in denying her motion for summary judgment and in granting Southern Life's motion. We agree with Mrs. Chavis on both issues. We therefore reverse the trial court's rulings for the following reasons.

I

Summary judgment is appropriate only when the moving party establishes the absence of a genuine issue as to any material fact. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). On a motion for summary judgment, the reviewing court must look at the evidence in the light most favorable to the nonmovant. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978).

The uncontradicted evidence is as follows. Mr. Chavis was illiterate. On 27 March 1975 he met with a general agent for Southern Life, who read to Mr. Chavis the questions on an application for a Southern Life insurance policy and recorded his answers on the form. Mr. Chavis was issued a Southern Life life insurance policy, number 2642, on 19 April 1975. He paid the $19.67 monthly premiums until March 1980 when he had financial problems. The policy then lapsed due to default in payment. Under the terms of the policy, Mr. Chavis was entitled to have the lapsed policy reinstated within five years of the default in payment of any premium "upon evidence of insurability satisfactory to the Company and the payment of the defaulted premiums with interest. . . ." Mrs. Chavis completed an application for reinstatement of life insurance policy number 2642 in June 1980.

Mr. Chavis signed it. The application listed several questions on Mr. Chavis' health:

> Have you or any person to be insured by this policy had any sickness or injury or been attended by any physician within the past 5 years, or since the issuance of this policy, if later?
>
> To the best of your knowledge and belief, are all persons to be insured in sound health?

Mr. Chavis answered the first question "no" and the second question "yes." Mr. Chavis paid Southern Life the defaulted monthly premiums and the policy was reinstated. Mr. Chavis continued to pay the monthly premiums until his death on 25 July 1981.

The following facts are in dispute. Mrs. Chavis stated in her affidavit:

> I answered the questions on the reinstatement application and stated that he had not seen a physician within the past five years because I had simply forgotten that he had seen any doctors during that period of time. . . . When I filled in the blanks on the paper I honestly believed what I wrote down and did not do so with the intention to misrepresent the insurance company or to make a fraudulent statement.

According to Southern Life, the attempted reinstatement was invalid because Mr. Chavis' statements on the application for reinstatement were "false and misleading and constituted a fraud, material misrepresentation, concealment and/or breach." Under N.C. Gen. Stat. Sec. 58-30 (1982), material or fraudulent misrepresentations in an application for an insurance policy are grounds for avoiding payment on the policy. Southern Life cites Mr. Chavis' failure to mention in his application for reinstatement: an August 1976 emergency room visit, a seven-day hospitalization in September 1976, and eight office visits to a private physician between 1976 and 1980. We are not persuaded. We hold that Mrs. Chavis is entitled to the proceeds of her husband's life insurance policy as a matter of law, based on the unambiguous language of the policy.

II

An insurance policy is a contract to be construed under the rules of law applicable to other written contracts. *Bailey v. Life Ins. Co. of Virginia*, 222 N.C. 716, 24 S.E. 2d 614 (1943). The parties' intentions are the controlling guide in the interpretation of the policy. *Duke v. Mutual Life Ins. Co. of New York*, 286 N.C. 244, 210 S.E. 2d 187 (1974). When the language of a contract is plain and unambiguous, its construction is a matter of law for the Court. *Martin v. Martin*, 26 N.C. App. 506, 216 S.E. 2d 456 (1975). An insurance policy is to be construed as a whole, giving effect to each clause, if possible. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970).

We turn to the pertinent clauses of Mr. Chavis' insurance policy.

> THE CONTRACT—This policy and the application therefor, a copy of which is attached hereto and made a part hereof, constitute the entire contract. All statements made by the Insured or in his behalf in the application in the absence of fraud shall be deemed representations and not warranties and no statements shall avoid any payment under this policy or be used in defense of any claim hereunder unless it is contained in one of these instruments.
>
> * * *
>
> INCONTESTABILITY—After this policy shall have been in force during the lifetime of the Insured for two full years from the date hereof, it shall be incontestable except for non-payment of premium, and except as to the provisions, if any, granting total and permanent disability insurance, and the provisions, if any, granting additional insurance specifically against death by accidental means.
>
> * * *
>
> REINSTATEMENT—If this policy shall lapse in consequence of default in payment of any premium it may be reinstated at any time within five years upon evidence of insurability satisfactory to the Company and the payment of the defaulted premiums with interest. . . .

A copy of the March 1975 application for life insurance was attached to Mr. Chavis' April 1975 policy. As of 1980, when Mr. Chavis policy lapsed due to default in payment, the two-year contestable period prescribed in the uncontestability clause of the policy had expired. Southern Life contends that the application for reinstatement reactivated the contestable period for an additional two years. Southern Life relies on the strong public policy reasons behind the majority rule discussed in 1A J. & J. Appleman, *Insurance Law and Practice* Sec. 320 (rev. ed. 1981). The majority rule permits the insurer a second contestable period identical in length to the original contestable period to investigate representations in applications for reinstatement. *Id.* Significantly, the majority rule derives from the perceived intentions of the parties: "This conclusion cannot rest upon any precise language in the policy; but it is the reasonable inference as to what the parties intended by reinstating a policy containing [an incontestability] clause. . . ." *New York Life Ins. Co. v. Seymour*, 45 F. 2d 47, 49 (6th Cir. 1930); *see* cases cited in Appleman, *supra*, at Sec. 320 n. 1. *See generally* Annot. 23 A.L.R. 3d 743 (1969).

Here, we need not *infer* the parties' intentions; the language of the policy expressly precludes Southern Life's use of material or fraudulent misrepresentations in the reinstatement application as a defense to payment. The parties agreed in the clause entitled "CONTRACT" that the application for life insurance attached to the policy and the policy itself constituted the entire contract. No reference is made in that clause to an application for reinstatement of the policy. Equally important, the parties specified that only statements made in the *initial application* or *the policy* could be used to avoid payment under the policy. Further, the policy provided that Mr. Chavis had a right to reinstatement of the lapsed policy. Southern Life had the right to investigate the representations in the application for reinstatement and deny reinstatement if the "evidence of insurability [was not] satisfactory to the Company." However, it is clear from the policy that "evidence of insurability" was a condition precedent to reinstatement, rather than a defense to payment. As stated before, only statements made in the initial application or the policy could be used to avoid payment under the policy. Thus, the incontestability clause was applicable only to the initial application and the policy. Once the contestable period had expired in 1977, the 1980 applica-

tion for reinstatement did not trigger a second two-year contestable period. Consequently, under the terms of the policy, the truth or falsity of Mr. Chavis' statements in the application for reinstatement was only contestable before reinstatement of the policy. Accordingly, the alleged falsity of Mr. Chavis' statements in the application for reinstatement is not a valid defense to this action to recover the proceeds. Instead, the terms of the April 1975 policy entitle Mrs. Chavis to recover the proceeds of her husband's life insurance policy as a matter of law.

III

Summary judgment in favor of Southern Life is vacated. We hereby remand this case for summary judgment to be granted in favor of Mrs. Chavis.

Vacated and remanded.

Judges PHILLIPS and EAGLES concur.

THOMAS M. McINNIS & ASSOCIATES, INC. v. JANET H. HALL

No. 8420DC709

(Filed 3 September 1985)

1. Rules of Civil Procedure § 60; Judgments § 25— failure to file answer—reliance on assurances of husband—excusable neglect

The trial court did not abuse its discretion by finding that defendant's failure to respond to a complaint was excusable neglect where defendant and her husband had entered into an auction contract with the plaintiff to sell their farm, earnest money from the sale was paid into an escrow account, the sale was never completed, defendant's husband instituted an action against the auctioneer to recover the earnest money and the auctioneer filed a counterclaim for commissions plus interest from the date of the sale, defendant was not a party to the action, judgment was entered in favor of the auctioneer with interest from the date of judgment, the auctioneer filed an action against defendant for commissions plus interest from the date of sale, defendant's husband assured her that the matter had been resolved and that there was no need to respond to the complaint, and default was entered against defendant for the difference between interest calculated from the date of sale and interest awarded from the date of judgment in the earlier action. Defendant had cosigned the contract with the auctioneer, she had followed the action against her husband, she was aware that he had satisfied the judgment against him,

and she therefore reasonably relied on his assurances that the matter had been taken care of. G.S. 1A-1, Rule 60(b)(1).

2. **Rules of Civil Procedure § 60.2; Judgments § 29— failure to file answer—satisfaction of judgment against joint obligor—not a meritorious defense**

The trial court did not abuse its discretion in denying defendant's Rule 60(b)(1) motion where defendant could not rely on a judgment against her husband to establish collateral estoppel as a meritorious defense because she was a joint obligor with her husband but was neither a party to the earlier action nor in privity with him. G.S. 1-72 (1983).

Judge WELLS concurring in part and dissenting in part.

APPEAL by defendant from *Beale, Judge.* Order entered in open court 9 February 1984 and signed 28 February 1984 in District Court, RICHMOND County. Heard in the Court of Appeals 15 February 1985.

Sharpe & Buckner, by Richard G. Buckner, for plaintiff appellee.

Manning, Fulton & Skinner, by Charles B. Morris, Jr. and Barry D. Mann, for defendant appellant.

BECTON, Judge.

Defendant, Janet H. Hall, appeals from the denial of her Rule 60(b)(1) motion to set aside a default judgment in the amount of $1,678.56.

On 21 July 1980, Janet Hall and her husband, Bobby R. Hall, entered into an auction contract with the plaintiff auctioneer, Thomas M. McInnis & Associates, Inc. (McInnis), which provided that McInnis would sell the Halls' 70-acre poultry farm in exchange for commissions based on a set percentage of the sale price. After the high bidder at the 22 July 1980 auction had paid the earnest money into an escrow account, a dispute arose between the high bidder and the Halls. As a result, the sale was never completed.

In December 1980, Mr. Hall instituted an action against McInnis to recover the earnest money McInnis held in escrow. Mrs. Hall was not joined as a party to the action. McInnis filed a counterclaim for breach of the auction contract against Mr. Hall, asking the trial court to award $7,800 in commissions plus in-

terest from the date of sale, the date of the alleged breach. A judgment was entered in favor of McInnis, awarding it $7,800 plus interest from the date of the judgment, not the date of the sale.

Three days after Mr. Hall had satisfied the judgment against him, Mrs. Hall, the joint obligor on the auction contract, was served with a summons and complaint for a second action, based on the same breach of contract. McInnis again asked the trial court to award it $7,800 in commissions plus interest *from the date of sale*. Mr. Hall assured his wife that the matter had been resolved, and there was no need to respond to the Complaint. Mrs. Hall followed his advice. Default was entered on 18 July 1983 in the amount of $1,678.56, the difference between the interest calculated from the date of sale and the interest awarded from the date of judgment in the earlier action against Mr. Hall. Default judgment was entered on 25 July 1983 in the same amount. The trial court denied Mrs. Hall's Rule 60(b)(1) motion to set aside the default judgment. The court found that Mrs. Hall's failure to respond to the Complaint constituted excusable neglect but that collateral estoppel was not a meritorious defense.

On appeal Mrs. Hall asserts that collateral estoppel is a meritorious defense to the additional award of interest. McInnis cross-assigns error to the trial court's finding of excusable neglect. We are not persuaded by either party. For the purpose of clarity, we address McInnis' cross-assignment of error first.

I

[1] To set aside a judgment on the ground of excusable neglect under Rule 60(b)(1) of the North Carolina Rules of Civil Procedure, a movant must show both excusable neglect and a meritorious defense. *Howard v. Williams*, 40 N.C. App. 575, 253 S.E. 2d 571 (1979); *U.S.I.F. Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975). Appellate review of a ruling on a Rule 60(b) motion is limited to determining whether the trial court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E. 2d 532, 541 (1975).

Mrs. Hall cites *Hickory White Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237 S.E. 2d 862 (1977) and *Gregg v. Steele*, 24 N.C. App. 310, 210 S.E. 2d 434 (1974) to support the trial court's finding of excusable neglect. To establish excusable neglect, both the *Hicko-*

ry and the *Gregg* Courts relied exclusively on evidence of the wives' reliance on their husbands' assurances that their husbands would handle the matters in the future. Each case quotes *Abernathy v. Nichols*, 249 N.C. 70, 72, 105 S.E. 2d 211, 213 (1958) (citations omitted):

> [A] wife's failure or neglect to file answer in a suit against her and her husband, upon assurances by her husband that he will be responsible for and assume the defense of the action, is excusable neglect.

Here the trial court found that Mrs. Hall "turned the papers over to [her husband], upon the assurance from [him] that this matter had been resolved and that there was no necessity to respond to [McInnis'] complaint." McInnis does not dispute Mrs. Hall's reliance, but instead it argues that her reliance on Mr. Hall's assurances of past actions cannot form the basis for excusable neglect. We are unwilling to draw such a fine line between *Abernathy, Hickory,* and *Gregg*, on one hand, and the facts before us, on the other. The emphasis in the case law appears to be on the wife's reliance on her husband's assurances, rather than on the time sequence of his actions. We conclude that the trial court did not abuse its discretion in finding that Mrs. Hall's failure to respond to the Complaint was excusable neglect under these circumstances. Mrs. Hall had co-signed the contract; she had followed the action against her husband; she was aware that he had satisfied the judgment against him; and she, therefore, reasonably relied on his assurances that the matter had been taken care of. *See Dishman v. Dishman*, 37 N.C. App. 543, 547, 246 S.E. 2d 819, 822 (1978) (standard for excusable neglect: reasonably expected conduct of a party paying proper attention to her case under all surrounding circumstances).

II

[2] The crucial issue becomes whether Mrs. Hall established a *prima facie* meritorious defense. *See U.S.I.F. Wynnewood Corp.* (need not establish meritorious defense as a matter of law). We conclude that the doctrine of collateral estoppel is not a meritorious defense to this breach of contract action involving joint obligors.

Under N.C. Gen. Stat. Sec. 1-72 (1983), joint obligors on a contract are jointly and severally liable. The statute permits an in-

jured party to seek recovery against one or more joint obligors without impairing his right to proceed against the other joint obligors later. *Rufty v. Claywell, Powell & Co.*, 93 N.C. 306, 308 (1885). Conversely, a joint obligor who is not a party to the original action is not bound by any judgment rendered in that action.

Thus, in application, the doctrine of joint and several liability is inconsistent with the doctrine of collateral estoppel. Collateral estoppel prevents parties, and those in privity with them, from relitigating issues that were necessarily decided in a prior action. *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973).

> Two tortfeasors or two obligors are not as such in privity with each other. One not sued is a stranger to a judgment rendered in an action between the injured person or the obligee and the other tortfeasor or obligor. Even when sued jointly, they are not in privity with each other. . . . It is only where the parties have litigated or had an opportunity to litigate the issues between themselves or where there is a relation between them which affects their rights inter se [that collateral estoppel applies].

Restatement of Judgments Sec. 94 comment a (1942); *see also id.* Sec. 93; *cf.* 46 Am. Jur. 2d *Judgments* Sec. 547 (1969) (discussing effect on co-parties of judgment in first action on later action between them). Since Mrs. Hall was neither a party to the earlier action against her husband nor in privity with him, she has failed to establish collateral estoppel as a *prima facie* meritorious defense.

Absent a showing of a meritorious defense, the trial court did not abuse its discretion in denying Mrs. Hall's Rule 60(b)(1) motion.

Affirmed.

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 holds that the trial court correctly concluded that defendant's neglect in failing to answer was excusable.

I dissent from that part of the majority opinion which holds that defendant did not have a meritorious defense to plaintiff's claim because defendant was not in privity with her husband with respect to plaintiff's claim. This application of the doctrine of privity is both narrow and mechanistic, and such application is not required by previous decisions of our courts.

In the prior case against defendant's husband, plaintiff's claim for prejudgment interest was fully litigated and finally determined. In my opinion, plaintiff should be collaterally estopped by the judgment in that action from pursuing the same claim against defendant in this action.

SAMUEL COLON AND RUSSELL L. SCHELB, JR., PLAINTIFFS v. F. D. BAILEY AND WIFE, SUE BAILEY, AND ROBERT C. PRESSLEY, DEFENDANTS, GREAT AMERICAN INSURANCE COMPANY, PROPOSED INTERVENOR

No. 8428SC1307

(Filed 3 September 1985)

1. Torts § 7.1— action barred by mutual release

An agreement in which the parties divided insurance proceeds for the contents of a restaurant destroyed by fire and released and discharged each other "from all claims, suits, causes of action and charges" arising out of defendants' lease of plaintiffs' property barred plaintiffs' suit against defendants for breach of the lease and negligent maintenance of equipment as a matter of law, and parol evidence could not be introduced by plaintiffs to show that their execution of the release related only to their insurance coverage on the contents of the restaurant.

2. Rules of Civil Procedure § 24— summary judgment for defendants—denial of motion to intervene

The trial court did not err in denying an insurance company's motion to intervene where summary judgment was properly granted for defendants, since no controversy or pending legal proceeding remained in which the insurance company could intervene. G.S. 1A-1, Rule 24(a)(2).

Judge PHILLIPS dissenting.

Colon v. Bailey

APPEAL by plaintiffs and proposed intervenor from *Lewis (Robert D.), Judge.* Judgment entered 13 September 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 August 1985.

Plaintiffs appeal from summary judgment for defendants F. D. Bailey and wife Sue Bailey (defendants). Proposed intervenor (Insurance Company) appeals from the denial of its motion to intervene. Defendant Pressley, prior lessee and guarantor of defendants, is not a party to this appeal.

Plaintiffs are the owners of a restaurant that was destroyed by fire on 26 January 1981. Defendants were lessees of plaintiffs' property. Insurance Company insured the building against loss by fire and United States Fidelity and Guaranty (U.S.F. & G.) insured the contents. Shortly after the fire Insurance Company paid plaintiffs sums in excess of $125,000, the full amount of plaintiffs' policy. U.S.F. & G. also paid on its policy. In settlement of their differences plaintiffs and defendants on 19 May 1981 signed an "Agreement and Mutual Release" whereby they divided the proceeds of the U.S.F. & G. policy and released and discharged each other "from all claims, suits, causes of action and charges" arising out of defendants' lease of plaintiffs' property.

Plaintiffs instituted this action on 1 December 1983 for breach of the lease agreement and negligent maintenance of equipment. On 30 May 1984, after the statute of limitations on an independent action had run, Insurance Company moved to intervene, claiming subrogation to the rights of plaintiffs to the extent it had paid on plaintiffs' policy. Defendants raised as a defense the release signed by plaintiffs. On 13 September 1984 the court entered summary judgment for defendants based upon the following finding: "The 'agreement and mutual release' executed between the plaintiffs and defendants . . . constitutes a bar to any claims the plaintiffs . . . have against the defendants. . . ." It also denied Insurance Company's motion to intervene without prejudice to its right to proceed against defendants in a separate action.

Plaintiffs and Insurance Company appeal.

Morris, Golding and Phillips, by Thomas R. Bell, Jr., for plaintiffs and proposed intervenor, appellants.

Michael T. Moore for defendants, appellees.

HEDRICK, Chief Judge.

[1] Plaintiffs and Insurance Company contend the court erred in granting summary judgment for defendants. G.S. 1A-1, Rule 56(c) permits summary judgment if no genuine issue exists as to any material fact and a party is entitled to judgment as a matter of law. Plaintiffs and Insurance Company argue that a genuine issue of fact has been raised as to whether the agreement was executed for the purpose of releasing all claims or merely those relating to the U.S.F. & G. proceeds. They contend that this issue is raised in plaintiffs' answer to defendants' interrogatory, which states that they executed the release as "part of the settlement with U.S.F. & G. relative to their coverage on the contents of the restaurant." We hold that plaintiffs have not raised a genuine issue of material fact.

The express language of the agreement signed by plaintiffs reads in pertinent part:

> 1. Lessor does hereby release and discharge Lessee from all claims, suits, causes of action and charges arising out of that lease dated September 1, 1976 above referred to and the possession of the premises by the Lessee up to and including the date hereof.
>
> 2. Lessee does hereby release and discharge Lessor from all claims, suits, causes of action and charges arising out of that lease [dated] September 1, 1976 above referred [to] and the possession of the premises by Lessee up to and including the date hereof.

We find this language plain and unambiguous. Construction of the agreement thus is a matter of law for the court. *Robbins v. Trading Post*, 253 N.C. 474, 478, 117 S.E. 2d 438, 441-42 (1960). Where contract terms are explicit, as here, the court determines the legal effect and enforces the contract as written by the parties. *Kent Corporation v. Winston-Salem*, 272 N.C. 395, 401, 158 S.E. 2d 563, 567 (1968). Contrary to plaintiffs' and Insurance Company's argument, parol evidence as to the facts surrounding execution of the release may not be introduced to contradict or vary the written terms. *Hoots v. Calaway*, 282 N.C. 477, 486, 193 S.E. 2d 709, 715 (1973); *see* 2 Brandis on North Carolina Evidence Sec. 251 (2nd rev. ed. 1982).

Here the court correctly determined that the mutual release bars plaintiffs' suit against defendants for breach of the lease and negligent maintenance of equipment. *See Cowart v. Honeycutt*, 257 N.C. 136, 139, 125 S.E. 2d 382, 384 (1962). Since plaintiffs cannot surmount this affirmative defense, defendants are entitled to judgment as a matter of law. *See Bernick v. Jurden*, 306 N.C. 435, 440-41, 293 S.E. 2d 405, 409 (1982). Thus, summary judgment was properly granted.

[2] Plaintiffs and Insurance Company contend that the court erred in denying Insurance Company's motion to intervene because Insurance Company met the requirements of G.S. 1A-1, Rule 24(a)(2), which permits intervention as of right. Rule 24(a)(2), however, permits one who has met its requirements "to intervene *in an action*. . . ." (Emphasis supplied.) Here, summary judgment having been properly granted for defendants, "there is no controversy in which [Insurance Company] may intervene." *Childers v. Powell*, 243 N.C. 711, 713, 92 S.E. 2d 65, 67 (1956). "Stated in another way, 'intervention' is the admission . . . of a person not an original party to the *pending legal proceeding*. . . ." *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E. 2d 313, 316 (1968) (emphasis supplied). No proceeding is pending here.

We thus hold that summary judgment for defendants and denial of Insurance Company's motion to intervene were proper.

Affirmed.

Judge WELLS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the trial court erred both in denying Great American's motion to intervene and in entering summary judgment against plaintiffs, after being apprised of Great American's interest in the suit and their right to participate in it. When Great American moved to intervene the action was still pending, the order of summary judgment dismissing the action not being entered until nearly four months later, and since Great American's motion shows that it has a substantial interest in the trans-

action which is the subject of the suit, is so situated that the disposition of the action will impair its ability to protect that interest and its interest is not being adequately represented by plaintiffs, it has the absolute right to intervene under the terms of Rule 24(a)(2). Furthermore, the majority seems to be of the view that since the release bars plaintiffs from further pursuing *their* claim against defendants that that necessarily ends the matter. Such is not the law, as I understand it. When a third party tort feasor has knowledge of an insurer's interest in the claim, his settlement with the insured is no defense to a suit by the insurer. *Nationwide Mutual Insurance Co. v. Canada Dry Bottling Co.*, 268 N.C. 503, 151 S.E. 2d 14 (1966). The defendant appellees argue in their brief that when the settlement was made they had no knowledge of Great American's interest in the claim; but whether that is so is a question that remains to be adjudicated.

NANCY L. CAMPBELL v. BOARD OF EDUCATION OF THE CATAWBA COUNTY SCHOOL ADMINISTRATIVE UNIT, AND DOTTIE TRIPLETT

No. 8525SC44

(Filed 3 September 1985)

1. **Schools § 13.1— temporary teacher—failure to hire for permanent position—no violation of statute**

The General Assembly did not intend that the "temporary personnel" authorized by G.S. 115C-295 be included within the term "probationary teacher" contained in G.S. 115C-325(a)(5). Thus, where plaintiff alleged and the forecast of evidence showed that she was hired as a "temporary teacher" for a term which ended on a specified date, she was not a probationary teacher and a board of education's failure to employ her for a permanent position was not a violation of G.S. 115C-325(m)(2).

2. **Contracts § 34— tortious interference with freedom of contract—insufficient forecast of evidence**

Summary judgment was properly entered for defendant on plaintiff's claim that defendant tortiously interfered with plaintiff's freedom of contract by influencing the hiring process for a school music teacher position to plaintiff's detriment where defendant submitted affidavits averring that defendant was not consulted prior to the hiring decision, that defendant played no role in the hiring or interview process for the music teacher vacancy, and that any friction between plaintiff and defendant had no relation to the decision not to hire plaintiff, and where plaintiff's affidavit merely restated the conclusory allegations of the complaint, and plaintiff submitted no forecast of evidence

showing that defendant was involved in the hiring decision or that such involvement constituted tortious interference.

APPEAL by plaintiff from *Sitton, Judge.* Judgment entered 14 November 1984 in Superior Court, CATAWBA County. Heard in the Court of Appeals 27 August 1985.

Plaintiff was employed as an interim music teacher in the Catawba County school system. She was serving as a replacement for Deborah Jordan, who had taken a maternity leave. Plaintiff's contract ran from 22 August 1983 until 20 December 1983. On 5 December 1983 Jordan resigned, creating a vacancy. Plaintiff applied but was not hired for the position.

Plaintiff alleges that defendant Board of Education (Board) violated G.S. 115C-325(m)(2) in that she was not rehired for arbitrary, capricious and personal reasons. She also alleges tortious interference with her freedom of contract by defendant Triplett (Triplett).

Defendants' motion for summary judgment was granted. Plaintiff appeals.

Thomas, Gaither, Gorham & Crone, by James M. Gaither, Jr., for plaintiff appellant.

Williams & Pannell, by Richard A. Williams, Jr., for defendant appellees.

WHICHARD, Judge.

Plaintiff contends the court erred in granting defendants' motion for summary judgment. We disagree.

"The purpose of summary judgment [is] to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971); *see also Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E. 2d 101, 103 (1970). The court is not authorized to decide an issue of fact but to determine if such an issue exists. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 422 (1979). The party moving for summary judgment has the burden of proving that no genuine issue of material fact exists.

Lowe v. Bradford, 305 N.C. 366, 369-70, 289 S.E. 2d 363, 366 (1982). Once the moving party has submitted materials in support of the motion, however, the burden shifts to the opposing party to produce evidence establishing that the motion should not be granted. *Id.* at 370, 289 S.E. 2d at 366.

Here defendants presented the following evidence in support of their motion:

Plaintiff was hired only as an interim teacher for the first semester. Her application for the position in question was considered and appropriate procedures were followed in making the selection.

Affidavits from the principals of the schools where plaintiff taught stated that Triplett was not consulted prior to the hiring decision and that any difficulties between plaintiff and Triplett had no bearing on their decision. Members of the Board submitted affidavits which stated that any strained relation between plaintiff and Triplett did not affect their hiring decision.

Plaintiff, on the other hand, claimed that on 16 November 1983 she was informed by Triplett that plaintiff was to attend a music convention in Winston-Salem on 20 November 1983. Plaintiff states that she informed Triplett that she would be unable to attend and that Triplett responded by telling plaintiff that nonattendance would be unfavorably regarded should plaintiff seek permanent employment.

Plaintiff claimed further that she had received no criticism of her performance during her contract period and that she was encouraged to apply for the vacant position by the principals of the respective schools. Plaintiff's complaint states that her refusal to attend the convention led Triplett to influence the hiring process to plaintiff's detriment.

[1] Plaintiff contends that the decision not to hire her is a violation of G.S. 115C-325(m)(2). That statute governs the failure to renew contracts of probationary teachers and specifies that such nonrenewal may not be for arbitrary, capricious or personal reasons. Defendants contend that plaintiff was not a probationary teacher but an interim teacher hired to fill a temporary vacancy.

G.S. 115C-325 does not define the status of interim or other temporary teachers. It is, however, a matter of common knowl-

edge that such personnel are employed routinely by local school boards. G.S 115C-295 authorizes employment of "temporary personnel" provided they meet certain criteria. Such positions generally are not considered a part of the career teacher ladder that leads to permanent employment and tenure, however. *See generally* Gatti & Gatti, *The Teacher and the Law* at 116 (1972). We thus do not believe the General Assembly intended that the "temporary personnel" authorized by G.S. 115C-295 be included within the definition of "probationary teacher" contained in G.S. 115C-325(a)(5).

Plaintiff alleges and the forecast of evidence shows that she was hired as a "temporary teacher" for a term which ended 20 December 1983. Given our interpretation of legislative intent, she therefore was not a probationary teacher and the Board's failure to employ her for the permanent position was not a violation of G.S. 115C-325(m)(2). The Board's forecast of evidence established the fact of plaintiff's temporary status. Plaintiff offered no forecast of evidence which placed this fact in dispute. Summary judgment for the Board on plaintiff's claim for violation of G.S. 115C-325(m)(2) thus was proper.

[2] In support of their motion for summary judgment on plaintiff's claim that Triplett tortiously interfered with plaintiff's freedom of contract by influencing the hiring process to her detriment, defendant submitted affidavits averring that Triplett was not consulted prior to the hiring decision, that Triplett played no role in the hiring or interview process for this vacancy, and that any friction between plaintiff and Triplett had no relation to the decision not to hire plaintiff. Plaintiff submitted in response: (1) a letter from a former interim teacher who allegedly had experienced problems with Triplett; (2) affidavits from parents supportive of plaintiff's performance; (3) plaintiff's employment form; and (4) a sworn affidavit from plaintiff basically restating the allegations of her complaint. With the exception of plaintiff's affidavit, none of the above bear any relation to whether Triplett influenced the hiring procedure for the vacancy. Plaintiff's affidavit merely restating the allegations of the complaint consists of conclusory allegations, unsupported by facts. It thus does not suffice to defeat a motion for summary judgment. *Lowe* at 370, 289 S.E. 2d at 366.

"[W]hen the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment." *Conner Co. v. Spanish Inns*, 294 N.C. 661, 675, 242 S.E. 2d 785, 793 (1978). Plaintiff has submitted no forecast of evidence showing that Triplett was involved in the hiring decision in any way, much less that such involvement constituted tortious interference. Summary judgment for Triplett on plaintiff's claim for tortious interference with her freedom of contract thus was proper.

Affirmed.

Judges WELLS and PHILLIPS concur.

MUIR LYON, JIM SCHENCK AND FRED STECK, PARTNERS D/B/A LYON, SCHENCK AND STECK ASSOCIATES, PLAINTIFFS v. CONTINENTAL TRADING COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DOUG HORNER AND LACKEY INDUSTRIES, INC., THIRD-PARTY DEFENDANTS

No. 855SC12

(Filed 3 September 1985)

1. **Negligence § 22— storage of chemical in defective container—claim sufficiently stated**

The trial court did not err by denying defendant's Rule 12(b)(6) motion to dismiss where plaintiffs clearly alleged in their complaint a claim for relief based upon defendant's storage of a chemical in defective and leaking containers and that such negligence on the part of the defendant was a proximate cause of the damage to plaintiffs' Swedish rayon fiber.

2. **Negligence § 29.1— negligent storage of chemical—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss under G.S. 1A-1, Rule 41(b) where the court made findings of fact supported by the evidence which clearly disclosed that defendant was negligent in the storage of a chemical and that such negligence was a proximate cause of damage to plaintiffs' Swedish rayon fiber.

3. **Evidence § 45— non-expert testimony as to value—admissible**

In an action to recover damages caused by the negligent storage of chemicals, the trial court did not err by allowing a witness to testify as to the value of plaintiffs' fiber damaged by the chemicals leaking from defendant's containers where the witness testified on direct examination that he was

familiar with two invoices that described the number of bales of Swedish fiber which were stored in the warehouse along with the chemical in the leaking containers, these invoices were introduced into evidence, the testimony of the witness demonstrated his considerable experience and knowledge concerning the particular fiber involved in this case, the witness detailed his information and knowledge as to the manner in which the fiber was damaged and that such damaged fiber was sold for salvage, the record disclosed that the witness was testifying from notes made "at the time," and defendant did not cross-examine the witness at trial as to the value of the material damaged by defendant's negligence.

APPEAL by defendant Continental Trading Company from *Llewellyn, Judge*. Judgment entered 17 May 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 August 1985.

This is a civil action wherein plaintiffs seek to recover $47,081.84 for damage done to their bales of fiber by defendant's chemicals which were allegedly stored negligently in rusty containers.

In their complaint, plaintiffs alleged that they had stored 384 bales of Swedish rayon fiber in a warehouse operated by Lackey Industries, Inc., and that defendant had stored a chemical known as "2-4 Dinitrophenol" in the same warehouse. Plaintiffs further alleged that defendant knew or should have known of the deteriorated and leaking condition of the containers in which the chemical was contained, and that the chemical leaked out of some of the containers, contaminating plaintiffs' yarn. Defendant answered, admitting that it had entered into a storage contract with Lackey Industries, Inc., and then impleaded Lackey as a third party defendant.

After a trial before the judge without a jury, the court made findings of fact which, except where quoted, are summarized as follows: In late 1979 plaintiffs and defendant, unbeknownst to one another, each contracted with Lackey Industries, Inc., for storage space. Defendant's president, Dr. Liu, notified Lackey that it needed to store 1,800 drums of Dinitrophenol and stated that the drums containing the chemicals were either new or reconditioned. The drums received in the first shipment were in good condition. Thereafter, shipments contained some drums which were not in good condition, and Dr. Liu was notified of this fact. The drums of Dinitrophenol were stored near plaintiffs' bales of yarn in the

same warehouse. The results of this storage are noted in Finding of Fact No. 9:

> 9. Soon after the drums of dinitrophenol started arriving some of these started leaking a yellowish liquid. After the liquid evaporated, a yellowish powder type residue was left. Personnel from Lackey Industries swept, mopped, and tried to clean this up. However, every day new liquid deposits were noted on the floor and every work day employees of the warehouse spent some time attempting to clean up this liquid. That the usual activity in the warehouse, such as movement of people, forklifts and movement of air throughout the warehouse caused this yellow dust to settle on goods stored in the warehouse including the plaintiff's bales of Swedish made rayon fiber. After a day's work the employees of Lackey Industries would be covered with yellow dust which would wash out of their clothes but which stained their skin somewhat.

The trial court further found the value of the yarn in its undamaged state to be $66,680.86 and that it was sold as salvage for $19,599.02.

Based on its findings of fact, the trial court drew the following conclusions of law:

> . . .
>
> 2. That as a result of the negligence of the defendant 93,345 pounds of the plaintiff's rayon was stained and damaged at the Lackey Warehouse in Whiteville, North Carolina. The total value of the damaged rayon is $66,680.86.
>
> 3. That the plaintiff sold its damaged rayon for a net salvage price of $19,599.02. Consequently, the plaintiff has been damaged in the amount of $47,081.84.

The court also found and concluded that plaintiffs had settled a claim against Lackey Industries for $10,000, and that defendant Continental Trading Co. was entitled to a credit on the judgment against it in the amount of $10,000.

From a judgment that plaintiffs recover of defendant $37,081.84, defendant appealed.

Johnson & Lambeth, by Robert Johnson, for plaintiffs, appellees.

Dean R. Davis for defendant, appellant.

HEDRICK, Chief Judge.

[1] Based on Assignment of Error No. 3, defendant contends the trial court erred in denying its 12(b)(6) motion to dismiss for the failure of the complaint to state a claim upon which relief could be granted. Defendant argues that the complaint does not allege the elements of a negligence action with sufficient particularity so as to state a cognizable claim.

This Court has on a number of occasions stated the rule applicable to 12(b)(6) motions to dismiss. "A complaint should not be dismissed for failure to state a valid claim 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. Unless the face of the complaint shows an insurmountable bar to recovery, plaintiff's action should not be dismissed on the pleading." *Piatt v. Doughnut Corp.*, 28 N.C. App. 139, 142, 220 S.E. 2d 173, 175 (1975), *disc. rev. denied*, 289 N.C. 299, 222 S.E. 2d 698 (1976).

Plaintiffs have clearly alleged in their complaint a claim for relief based upon defendant's storage of the chemical Dinitrophenol in defective and leaking containers and that such negligence on the part of defendant was a proximate cause of the damage to plaintiffs' Swedish rayon fiber. There is nothing whatsoever alleged or unalleged in plaintiffs' complaint to establish an insurmountable bar to plaintiffs' claim. Defendant's assignment of error to the denial of its 12(b)(6) motion borders on the frivolous.

[2] Based on Assignment of Error No. 2, defendant contends the trial court erred in denying defendant's motion to dismiss made pursuant to Rule 41(b). Here defendant contends that plaintiffs failed to show their right to relief based on their evidence at trial.

Rule 41(b) in pertinent part provides:

> . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move

for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . .

Having made findings of fact which clearly disclose that defendant was negligent in the storage of the chemical Dinitrophenol, and that such negligence was a proximate cause of the damage to plaintiffs' Swedish rayon fiber, and since these findings are supported by the evidence in the record, it is clear the trial court did not err in denying defendant's motion to dismiss pursuant to Rule 41(b).

[3] Assignments of Error Nos. 1, 4, 5, 6, and 7 and the exceptions upon which they are based raise the questions of whether the trial court erred in allowing the witness Earl Stewart to testify as to the value of the Swedish rayon fiber stored in the Lackey Industries warehouse, and whether the court erred in finding and concluding the extent of plaintiffs' damage based on such testimony.

The only evidence in this record with respect to the value of plaintiffs' property damaged by the chemical leaking from defendant's drums came from the witness Earl Stewart, "associated and employed by" plaintiffs. He testified that the rayon described in certain invoices (Exhibit No. 3) had a total value of $66,680.86, and that the same material had a salvage value after being damaged of $19,599.02. Although Stewart was not denominated by the court as an expert witness, he was certainly qualified by experience and observation as shown by his further testimony in the transcript to communicate his knowledge of the fiber's value, and such testimony is admissible. *Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975).

The witness testified on direct examination that he was familiar with two invoices (Exhibit No. 3) that describe the number of bales of Swedish fiber which were stored in the Lackey Industries warehouse along with the chemical in the leaking containers. These invoices were introduced into evidence and disclosed that 672 bales of fiber were stored in the warehouse. The testimony of the witness demonstrates his considerable experience and knowledge concerning the particular fiber involved in this case. The witness detailed his information and knowledge as to the manner in which the fiber was damaged and that such

damaged fiber was sold for salvage. The record discloses that the witness was testifying from notes made "at the time."

We hold that the witness was qualified to testify as to the value of plaintiffs' fiber damaged by the chemicals leaking from defendant's containers, and that the trial court did not err in allowing all of his testimony challenged by the exceptions upon which these assignments of error are based. We note also that defendant did not cross-examine the witness at trial as to the value of the material damaged by defendant's negligence.

We hold the findings made by the trial court support the conclusions of law drawn therefrom, which in turn support the judgment entered.

Affirmed.

Judges WEBB and WELLS concur.

MABEL H. ALLEN v. BENJAMIN H. ALLEN

No. 859SC25

(Filed 3 September 1985)

1. **Parent and Child § 2— parent-child immunity—not abolished as to child defendant**

The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendant on the basis of child immunity where plaintiff was injured while a passenger in a car being driven by defendant, her son. G.S. 1-539.21 abolished only a parent's immunity to suit; the title of the statute, "Abolition of parent-child immunity in motor vehicle cases," does not control the very explicit text.

2. **Constitutional Law § 23; Parent and Child § 2.1— abolition of immunity of parent to suit by child—no violation of substantive due process**

G.S. 1-539.21, which abolished parental immunity in motor vehicle cases, does not violate substantive due process because it does not deny plaintiff parent a right to which she would otherwise be entitled.

3. **Constitutional Law § 20; Parent and Child § 2.1— abolition of parental immunity—no violation of equal protection**

G.S. 1-539.21, which abolished parental immunity in motor vehicle cases, is rationally related to the governmental objective of promoting and protecting

domestic harmony and does not violate the equal protection requirements of the North Carolina or United States Constitutions.

4. Parent and Child § 2.1— abolition of parental immunity—public policy

The complete abolishment of the doctrine of parent-child immunity for public policy reasons is not a proper function of the Court of Appeals.

APPEAL by plaintiffs from *Martin, John C., Judge.* Judgment entered 13 November 1984 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 26 August 1985.

On 23 April 1980 the plaintiff, Mabel H. Allen, was riding in her car which was being driven by the defendant, her sixteen-year-old son. An automobile accident occurred in which plaintiff suffered severe physical injuries which have left her permanently disabled. On 22 April 1983, Ms. Allen filed a complaint against her son. Summary judgment was granted for the defendant on the basis that an unemancipated child is immune from a tort action by his parent. From this judgment, plaintiff appealed.

McCain & Essen, by Grover C. McCain, Jr. and Jeff Erick Essen; and Cooper, Williams & Bryan, by Robert E. Cooper, for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by David H. Batten and Paul R. Cranfill, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial judge erred in granting summary judgment in favor of the defendant on the basis of the common law doctrine of child immunity. More specifically, the plaintiff contends that 1) G.S. 1-539.21 abolished such immunity and 2) if the statute is interpreted as not to have affected such immunity, then the statute violates the equal protection and substantive due process requirements of the North Carolina and United States Constitutions.

[1] Plaintiff first contends that the title of G.S. 1-539.21, "Abolition of parent-child immunity in motor vehicle cases," should be used in construing the meaning of the statute. Plaintiff argues that the title implies total abolition of the parent-child immunity doctrine. It is true that the title of a statute may be considered when there is confusion in the wording of the text itself. *Toomey*

v. Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916). When the legislative intent is expressed clearly in the statutory language itself however, that language is controlling. *In re Forsyth County*, 285 N.C. 64, 203 S.E. 2d 51 (1974). The text of G.S. 1-539.21 specifically states, "The relationship of parent and child shall not bar the right of action *by a minor child against a parent* for personal injury or property damages arising out of the operation of a motor vehicle owned or operated by such parent." G.S. 1-539.21 (emphasis added). The text is very explicit and it, not the title, controls.

Further, this Court dealt with G.S. 1-539.21 in *Ledwell v. Berry*, 39 N.C. App. 224, 249 S.E. 2d 864 (1978), *disc. rev. denied* 296 N.C. 585, 254 S.E. 2d 35 (1979). There the statute was interpreted as abolishing only a parent's immunity to suit. We still adhere to that position.

Plaintiff next contends that if G.S. 1-539.21 is found to abolish only parental immunity then the statute violates the substantive due process and equal protection requirements of the North Carolina and United States Constitutions. These contentions have no merit. We examine each separately.

[2] G.S. 1-539.21 does not violate substantive due process because it does not deny plaintiff a right to which she otherwise would be entitled. Before this statute was enacted, the established rule was that both children and their parents were immune from such suits by each other. *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965); *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676 (1965). G.S. 1-539.21 abolished parental immunity and opened an avenue for children to sue their parents. To hold that an established right was taken away because the statute did not open the same door for parents is incorrect. Even if one views G.S. 1-539.21 as "denying" parents of such a right, such denial is within the rights of the legislature. This Court stated in *Dixon v. Peters*, 63 N.C. App. 592, 597, 306 S.E. 2d 477, 480 (1983), that ". . . our Constitution gives the legislature power . . . to grant or deny immunity."

[3] In dealing with the equal protection challenge, we note that this question has already been answered in *Ledwell*. This Court determined that the class created by G.S. 1-539.21 was based on a "reasonable distinction." *Id.* at 226, 249 S.E. 2d at 864. A test of

strict scrutiny was not appropriate because there was neither a suspect class nor a fundamental right involved.

Plaintiff argues that the scrutiny test stated in *Dixon* should be used in an equal protection challenge to G.S. 1-539.21. We disagree. Applied when the interests involved are very important but not fundamental or the class involved is near but not quite suspect, the *Dixon* test requires that the classification involved be related substantially to the governmental objective. *Dixon* at 602, 306 S.E. 2d at 483. There is no "semi-fundamental right" or "semi-suspect class" in the present case which would require that the *Dixon* test be used. We reject plaintiff's contention that the right to be compensated for an action of negligence is a "semi-fundamental right." *See id.*

The *Ledwell* case is controlling on the equal protection challenge. The classification created by G.S. 1-539.21 is rationally related to the governmental objective of promoting and protecting domestic harmony. G.S. 1-539.21 is not in violation of the equal protection requirements in the North Carolina or United States Constitutions.

[4] Finally, plaintiff contends that this Court should abolish completely the doctrine of parent-child immunity for policy reasons. Such is not a proper function for this Court. Issues of public policy should be addressed to the legislature. *Skinner v. Whitley*, 281 N.C. 476, 189 S.E. 2d 230 (1972).

Summary judgment was properly granted in favor of the defendant. We uphold the trial court's decision.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. CHARLES GLENN PARKER

No. 8410SC790

(Filed 3 September 1985)

1. **Criminal Law § 91— Speedy Trial Act—dismissal of charge without prejudice**

The trial court did not err in dismissing a charge against defendant without prejudice, rather than with prejudice, for the State's failure to prosecute him within the time limit specified in the Speedy Trial Act where the trial judge stated that he had considered each of the factors set forth in G.S. 15A-703, and there was sufficient cause shown to support the trial court's determination that a superseding indictment was obtained in good faith and not in contravention of the Speedy Trial Act.

2. **Receiving Stolen Goods § 5.2— insufficient evidence of dishonest purpose**

The evidence was insufficient to support an inference that defendant acted with a dishonest purpose so as to support his conviction of felonious possession of stolen property where the State's own evidence disclosed that defendant was merely driving a stolen automobile for a friend, and there was no evidence that defendant was being paid by the friend, that he had any financial interest in the vehicle, or that he expected to gain any financial reward for doing his friend a favor.

APPEAL by defendant from *Herring, Judge.* Judgment entered 15 March 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 19 August 1985.

Defendant was initially indicted by a properly convened grand jury on 25 April 1983 on a charge of felonious possession of stolen property. On 2 June 1983, defendant waived arraignment and filed a "Certificate of Readiness." During the next six months, five continuances were granted in the case for a variety of reasons. On 28 December 1983 defendant filed a motion to dismiss based on the prosecution's failure to comply with the provisions of the Speedy Trial Act. A second grand jury reindicted defendant on 3 January 1984. The trial court dismissed the first indictment without prejudice on 11 January 1984 and upheld the superseding indictment.

Defendant and one Arthur L. Medlin were indicted and tried for possession of a Datsun 280-ZX automobile stolen from Carlos Patrice Baker. Medlin was found guilty as charged and appealed to this Court, which found no error in his trial. *State v. Medlin*, 73 N.C. App. 180, 327 S.E. 2d 68 (1985).

The evidence tends to show that on Sunday morning 20 March 1983, Medlin, a used car dealer, went to the home of defendant and requested defendant to accompany him to a motel for the purpose of driving an automobile which he, Medlin, was buying. When Medlin and defendant arrived at the motel, Medlin gave defendant $800.00 to take to someone inside the motel and get the ignition keys to the Datsun 280-ZX. The police, who were watching the motel, testified that defendant went in the motel, returned to the automobile and talked with Medlin, went back into the motel, and then came out, got in the stolen vehicle and drove away. The police followed in a high-speed chase, the automobile was wrecked, and defendant fled on foot.

Defendant was on probation in a halfway house and on furlough for the weekend with his wife. When apprehended, defendant had on his person $5,903.42.

Defendant's evidence tends to show, through the testimony of defendant's wife, that defendant and Medlin had been friends for years and that defendant had never worked for Medlin.

Defendant was found guilty as charged and appealed from a judgment imposing a prison sentence of three years.

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

Gerald L. Bass for defendant, appellant.

HEDRICK, Chief Judge.

[1] By his first assignment of error, defendant raises the issue of whether the trial court erred in dismissing the charge against him without prejudice, rather than with prejudice, for the State's failure to prosecute him within the time limit specified by the Speedy Trial Act, N.C. Gen. Stat. Sec. 15A-701 et seq. Section 15A-703 in pertinent part provides:

> . . . In determining whether to order the charge's dismissal with or without prejudice, the court shall consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; the impact of a re-prosecution on the administration of this Article and on the administration of justice. . . .

Defendant cites the case of *State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981) in support of his contention that the judge did not make the required findings of fact and conclusions of law to support a dismissal without prejudice. In *Moore* we said:

> The statute [G.S. 15A-703] thus leaves in the discretion of the trial court the determination of whether dismissal should be with or without prejudice. It *mandates*, however, that the court consider *each* of the factors set forth in making that determination.

Id. at 29, 275 S.E. 2d at 260 (emphasis original).

In the instant case, the trial judge stated that he had considered each of the factors set forth in the statute and that the original indictment should be dismissed without prejudice. His order further stated:

> The Court is also of the opinion that the superseding indictments returned on January 3, 1984 against the Defendant begin a new 120 days for purposes of the application of the Speedy Trial requirements contained in G.S. 15-70 [sic] et seq. In reaching this decision the Court did find as a fact that the attainment of superseding indictments appear to have been both appropriate and in good faith.

The record discloses that of the five continuances, two were at the request of the State because counsel for defendant's co-defendant (Medlin) was unable to be present, two others were at the request of the State because the Assistant District Attorney was involved in the trial of an individual who, unlike defendant, was in custody, and one was at the request of defense counsel because "The trial of other cases prevented the trial of this case during this session." Manifestly, there was sufficient cause shown for the trial judge to conclude that the superseding indictments were obtained in good faith and not in contravention of the Speedy Trial Act. Accordingly, we overrule this assignment of error.

[2] Defendant next assigns error to the denial of his timely motions to dismiss the charge against him. He contends there is no evidence in the record that he knew or had reasonable grounds to believe that the Datsun 280-ZX was stolen or that he acted with a dishonest purpose. The elements of the crime with which defend-

ant is charged, possessing stolen goods, N.C. Gen. Stat. Sec. 14-71.1, are as follows:

> (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose.

State v. Davis, 302 N.C. 370, 373, 275 S.E. 2d 491, 493 (1981).

Assuming *arguendo* there is sufficient evidence to raise an inference that defendant knew or had reasonable grounds to believe that the 280-ZX was stolen, there is no evidence in this record to raise an inference that defendant "acted with a dishonest purpose." We note that one of defendant's principal arguments at trial in support of his motion to dismiss was that the State had offered no evidence that he had acted with a dishonest purpose. In his brief on appeal defendant argues vehemently that the record contains no evidence that he acted with a dishonest purpose when he drove the 280-ZX. Yet, the State in its brief makes *no response whatsoever* to this argument. The State argues only that the evidence is sufficient to raise an inference that defendant knew or had reasonable grounds to believe that the automobile in question was stolen.

We agree with defendant. The State's own evidence discloses that defendant was merely driving the automobile for Medlin. There is no evidence that defendant was being paid by Medlin or that he had any financial interest in the vehicle or that he expected to gain any financial reward for doing his friend a favor. There is no evidence in the record that defendant and Medlin had ever discussed the transaction before Medlin went to get defendant to drive the car.

In short, the record is devoid of any evidence that defendant possessed the stolen vehicle for a dishonest purpose.

The judgment appealed from must be reversed.

Reversed.

Judges ARNOLD and COZORT concur.

In re Ennix

IN THE MATTER OF SILYONDER ENNIX, A MINOR CHILD, DATE OF BIRTH: 9/18/75; RESPONDENT, MARVEY JONES

No. 855DC11

(Filed 3 September 1985)

Parent and Child § 1.6— termination of parental rights—evidence sufficient

The evidence was more than sufficient to meet the clear, cogent, and convincing standard required for termination of parental rights under G.S. 7A-289.30(e) where the child became a quadriplegic at an early age as a result of improperly administered anesthesia; a malpractice action on her behalf resulted in a substantial trust fund and a settlement of $15,000 to the mother; the settlement to the mother was spent on clothing, an automobile, and travel; the child was found to be neglected in 1977 and placed in foster care; respondent lived in a motel during the first six months that the child was placed with DSS but visited the child only a few times and frequently made drunken telephone calls to DSS; respondent later moved to Florida and made only approximately thirteen trips to see the child after 1977 despite being given approximately $500 from the trust fund for each trip; respondent lived in a house purchased with trust fund monies, made payments in excess of $500 per month from that fund, and refused to release any money from the trust fund to DSS for the care and benefit of the child; respondent failed to complete a program of alcoholic rehabilitation counseling to become self-sufficient, to provide a stable home environment and adequate housing for the child, or to locate sources of training and assistance for the child, despite her agreement to do so; respondent did not visit with the child at appointed times, did not adequately feed the child, was sometimes drunk on her trips to Wilmington, and once attempted to leave North Carolina with the child; and on one occasion the child was found wearing only an undershirt, a Pamper and socks, and at another time respondent asked someone to buy a can of spaghetti and meatballs for the child's breakfast, which the child could not eat because of difficulty in swallowing due to her handicap.

APPEAL by respondent from *Tucker, Judge*. Order entered 13 August 1984 in District Court, NEW HANOVER County. Heard in the Court of Appeals 14 August 1985.

This is a proceeding instituted by Mary Humphrey, petitioner, to terminate the parental rights of Marvey Jones, respondent, with respect to Silyonder Ennix, pursuant to G.S. 7A-289.24.

From an order terminating her parental rights with respect to Silyonder, respondent appealed.

Julia Talbutt, for the New Hanover County Department of Social Services.

Payne, Boyle & Davis, by Karen Paden Boyle, for Mary Humphrey, petitioner, appellee.

J. H. Corpening, II, for Guardian ad Litem.

Michael R. Mitwol, for respondent, appellant.

HEDRICK, Chief Judge.

Respondent on appeal presents four questions for review, all variations of one issue: whether the evidence presented at the termination hearing conformed to the "clear, cogent, and convincing" standard required by N.C. Gen. Stat. Sec. 7A-289.30(e) such that it supported the findings of fact and conclusions of law drawn therefrom.

After the hearing the court made findings of fact which, except where quoted, are summarized as follows:

Silyonder Ennix was born to respondent Marvey Jones and Louis Ennix on 18 September 1975. As a result of improperly administered anesthesia at an early age, she became a quadriplegic, requiring specialized care in feeding, bathing, and sleeping arrangements. A malpractice action was filed on her behalf, resulting in both a substantial trust fund of which Silyonder is the beneficiary, and a settlement of $15,000 to respondent, which was spent on clothing, an automobile, and travel.

On 13 October 1977, after a trial court found her to be a neglected child, Silyonder was placed in the care of the New Hanover County Department of Social Services, and then in the foster care of Mary Humphrey. This determination and placement were made partly on the basis of an incident in which respondent left Silyonder and several of her siblings, the oldest of whom was seven, alone late at night in a hotel room while she [respondent] visited with a man in another part of the hotel.

During the first six months that Silyonder was placed with the Department of Social Services, respondent lived in a motel in New Hanover County, but visited with her child only a few times and frequently made drunken telephone calls to the Department of Social Services. Respondent later moved to Florida, and has

made only approximately thirteen trips to see Silyonder since October 1977, despite being given approximately $500.00 from Silyonder's trust fund for the travel expenses of each trip.

Respondent now lives in a house purchased with monies from her daughter's trust fund, and continues to make mortgage payments in excess of $500.00 per month from that fund. At the same time, respondent has refused to release any money from the trust fund to the New Hanover Department of Social Services for the care and benefit of Silyonder.

The court further found that respondent had agreed to

> complete a program of alcoholic rehabilitation counselling and to provide documentation of satisfactory completion of such counselling; to become self sufficient for a source of income; to arrange visits with Silyonder in Wilmington, North Carolina and to give notice so that Silyonder could be prepared for the visit; to provide a stable home environment and adequate housing for Silyonder; and to locate sources for training and assistance with Silyonder because of her special handicaps.

Instead of carrying out this program, respondent did not visit with Silyonder at the appointed times, did not adequately feed the child, was sometimes drunk on her trips to Wilmington, and at one point attempted to leave North Carolina with Silyonder. On one occasion, Silyonder was found wearing only an undershirt, a Pamper and socks, and at one other time, respondent asked someone to buy a can of spaghetti and meatballs for Silyonder's breakfast, which the child could not eat because of difficulty in swallowing due to her handicap.

Based on its findings of fact, the trial court made the following conclusions of law:

> 1. That Respondent has wilfully left Silyonder in foster care for more than two (2) consecutive years without showing to the satisfaction of the Court that substantial progress has been made in correcting those conditions which led to the original removal of Silyonder for neglect.
>
> 2. That Respondent has wilfully left Silyonder in foster care for more than two (2) consecutive years without showing

a positive response to the diligent efforts of the New Hanover County Department of Social Services to encourage Respondent to strengthen the parental relationship to Silyonder and to follow through with constructive planning for the future of Silyonder.

3. That Respondent has left Silyonder in the custody of the New Hanover County Department of Social Services since 1977 without paying any cost of the care of the minor child.

4. That it is in the best interest of the minor child that the parental rights of Marvey Jones be terminated.

N.C. Gen. Stat. Sec. 7A-289.32 sets forth the grounds upon which a termination of parental rights may be made. These include 1) a court's finding that the child in question is a neglected child (Sec. 7A-289.32(2)), 2) a finding that the parent has wilfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child (Sec. 7A-289.32(3)), and 3) a finding that while in the custody of a county department of social services, the parent has failed to pay a reasonable portion of the cost of care of the child (Sec. 7A-289.32(4)).

We hold the evidence presented was more than sufficient to meet the "clear, cogent, and convincing" standard applicable in this case, and to support the findings made by the trial court. These findings clearly support the conclusions of law drawn therefrom and support the order terminating Marvey Jones' parental rights.

Affirmed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. BOBBY RAY [SIC] McCULLOUGH

No. 8524SC303

(Filed 3 September 1985)

Automobiles and Other Vehicles § 134; Robbery § 5.4— common law robbery—unauthorized vehicle use not lesser offense

Unauthorized use of a motor vehicle is not a lesser included offense of common law robbery, and the trial court in a common law robbery prosecution thus erred in submitting an issue as to defendant's guilt of unauthorized use. G.S. 14-72.2(a).

APPEAL by defendant from *Lamm, Judge.* Judgment entered 25 October 1984 in Superior Court, MADISON County. Heard in the Court of Appeals 26 August 1985.

Defendant was indicted for common law robbery. At trial, the State offered evidence which tended to show that the defendant and three other persons were riding in a truck owned and operated by Randal Rathbone. Two scuffles ensued and during the second fight defendant struck Rathbone with a lug wrench. As Rathbone fled the scene of the scuffle he heard his truck start up, and heard someone driving it away. Rathbone received his truck back the next day.

Defendant presented evidence which tended to show that he, Rathbone and two girls had been swimming, drinking liquor and smoking marijuana. They then went to Canton and picked up the defendant's brother. While traveling to Asheville a couple of scuffles broke out involving defendant, his brother and Rathbone, because Rathbone was driving too fast. While the second fight was in progress one of the two girls started the truck and the defendant left with them. The truck was left in front of a church in Canton. Defendant further testified that he had no intention of stealing the truck from Rathbone.

At the close of the evidence the court submitted as possible verdicts guilty of common law robbery, guilty of unauthorized use of a motor vehicle and not guilty. Defendant was convicted of unauthorized use of a motor vehicle and sentenced to two years imprisonment as a committed youthful offender. From this judgment, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

ARNOLD, Judge.

The sole issue presented for review is whether the trial court erred by submitting as a possible verdict guilty of unauthorized use of a motor conveyance. Defendant argues that unauthorized use of a motor vehicle is not a lesser included offense of common law robbery; and, therefore, that he was convicted of a crime for which he had not been indicted. We agree, and reverse defendant's conviction.

The test for determining whether one crime is a lesser included offense of another was set forth by our Supreme Court in *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). In *Weaver* the Court stated:

> We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. *State v. Banks*, 295 N.C. 399, 415-416, 245 S.E. 2d 743, 754 (1978). In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis. (Emphasis in original.)

306 N.C. at 635, 295 S.E. 2d at 378-379. The definition of 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 by putting him in fear. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974). A person is guilty of the unauthorized use of a motor vehicle if he takes or operates a motor-propelled conveyance of another without the express or implied consent of the owner or the person in lawful possession of the conveyance. *See* G.S. 14-72.2(a).

Under the strict definitional approach established in *Weaver* unauthorized use of a motor vehicle is not a lesser included offense of common law robbery. One of the essential elements of unauthorized use of a motor vehicle is the taking or operating of a motor vehicle without having formed an intent to permanently deprive the owner thereof. Conversely to be guilty of common law robbery one must have an intent to permanently deprive one of whatever goods which they take from said person. All the elements of unauthorized use of a motor vehicle are not present in common law robbery. Therefore, under the *Weaver* test unauthorized use is not a lesser included offense of common law robbery.

For the above stated reasons we hold that defendant's conviction must be, and hereby is,

Reversed.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. TONY NEAL

No. 8426SC1209

(Filed 3 September 1985)

Criminal Law § 92— joinder of offenses—no error

The trial court did not err by joining charges of felonious larceny and felonious possession of stolen property arising from the theft of automobiles from the parking lot of the Charlotte YMCA on 11 February 1984 and 15 February 1984 where in each case the owner of the car left his keys in a locker and noticed their absence upon his return. Viewing the facts as of the time of the order of consolidation, the court properly could find them indicative of a single scheme or plan; moreover, there was no prejudice in that defendant did not show a reasonable possibility that the jury would have reached a different verdict if the possession charge had not been joined. G.S. 15A-1443(a), G.S. 15A-926(a).

APPEAL by defendant from *Griffin, Judge*. Judgment entered 23 July 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 August 1985.

Defendant was charged with one count of felonious larceny in the theft of a 1982 Isuzu from the parking lot of the Charlotte YMCA on 15 February 1984. The owner had left his keys in a locker and upon returning had noticed that they were missing. Two YMCA employees observed defendant enter the Isuzu and drive it away.

Defendant was also charged with one count of felonious possession of stolen property. On 11 February 1984 a 1977 silver Volkswagen Dasher was stolen. This theft, like that of the 1982 Isuzu, was from the Charlotte YMCA parking lot. The owner of the Dasher, like the owner of the Isuzu, had left the keys in a locker and had noticed their absence upon his return. On 6 March 1984 an officer observed defendant driving a silver Dasher. The stolen Dasher was recovered later that day. No further evidence linked defendant to the stolen Dasher.

Pursuant to G.S. 15A-926(a) the court joined the charges for trial. Defendant was convicted of felonious larceny and acquitted of possession of stolen property. He appeals the joinder of the charges.

Attorney General Thornburg, by Associate Attorney Augusta B. Turner, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

WHICHARD, Judge.

The issue is whether the court erred in joining the charges. We find no error.

G.S. 15A-926(a) provides for joinder of two or more offenses when they "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." It is not enough that a defendant is charged with acts of the same class of crime or offense; there must also be a transactional connection. *State v. Greene*, 294 N.C. 418, 421, 241 S.E. 2d 662, 664 (1978). In addition, the court must determine whether the accused can receive a fair hearing on more than one charge at the same trial. *State v. Silva*, 304 N.C. 122, 126, 282 S.E. 2d 449, 452 (1981). If joinder will impair

the ability to present a defense, the motion should be denied. *Greene* at 421, 241 S.E. 2d at 664.

The joinder motion is ordinarily addressed to the sound discretion of the court and, absent abuse of discretion, its ruling will not be disturbed. *State v. Bracey*, 303 N.C. 112, 117, 277 S.E. 2d 390, 394 (1981); *State v. Powell*, 297 N.C. 419, 428, 255 S.E. 2d 154, 160 (1979); *Greene* at 421-22, 241 S.E. 2d 662 at 664. Whether an abuse of discretion occurred must be determined as of the time of the order of consolidation; subsequent events are irrelevant on this issue. *Silva* at 127, 282 S.E. 2d at 452.

In *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981), the defendant and an accomplice were charged with a series of robberies in a two block area over a ten-day period. All victims were proprietors of small businesses, and the robberies had a pattern of unarmed assault followed by flight on foot. The court allowed joinder, noting that there were common issues of fact. *Id.* at 117, 277 S.E. 2d at 394. The Supreme Court upheld the ruling, stating that "[t]he evidence in the three cases show[ed] a similar modus operandi and similar circumstance in victims, location, time and motive." *Id.* at 118, 277 S.E. 2d at 394.

We find such similarity in the charges joined here. They involved two vehicles taken from the same location under similar circumstances four days apart. Viewing these facts as of the time of the order of consolidation, *Silva* at 127, 282 S.E. 2d at 452, the court properly could find them indicative of a single scheme or plan to deprive members of the Charlotte YMCA of their property while they used the "Y" facilities. We thus find no abuse of discretion in the joinder.

Defendant cites *State v. Wilson*, 57 N.C. App. 444, 291 S.E. 2d 830, *disc. rev. denied*, 306 N.C. 563, 294 S.E. 2d 375 (1982), in arguing absence of the requisite transactional link. We find *Wilson* distinguishable. The defendant there faced two charges of obtaining money by false pretenses. The offenses occurred approximately three weeks apart. While the *modus operandi* was the same, there was no connection between the victims, the location, or the time. *Wilson* is thus a case of "offenses [that] were separate and distinct, not part of 'a single scheme or plan.' " *Id.* at 449, 291 S.E. 2d at 833. The facts here, by contrast, permit finding a single scheme or plan.

Assuming, *arguendo*, that the court erred in allowing joinder, defendant has failed to show prejudice. The evidence against him on the larceny charge was clear and substantial. He has not shown a reasonable possibility that the jury would have reached a different verdict if the possession charge had not been joined. G.S. 15A-1443(a).

No error.

Judges WELLS and PHILLIPS concur.

HELEN THREATT v. J. M. HIERS, IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF H. E. HIERS

No. 8426SC1344

(Filed 3 September 1985)

Unfair Competition § 1; Landlord and Tenant § 20— tenant's burning of building— no unfair trade practice—action for waste

Plaintiff's allegations that a tenant intentionally caused the burning of a building leased from plaintiff was insufficient to state a claim against the tenant for unfair and deceptive trade practices under G.S. 75-1.1(a). However, such allegations stated a claim against the tenant for waste. G.S. 75-1.1(b).

APPEAL by plaintiff from *Burroughs, Judge*. Judgment entered 26 November 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 August 1985.

This is a civil action wherein the plaintiff filed suit seeking to recover damages for unfair and deceptive trade practices within the meaning of G.S. 75-1.1. In her complaint plaintiff alleged that H. E. Hiers occupied a building owned by the plaintiff, and that while Hiers occupied the property it incurred forty-five thousand dollars ($45,000.00) in damage due to fire. Plaintiff also alleges upon information and belief that Hiers intentionally caused the fire to be set in order to make a fraudulent insurance claim. Plaintiff contends that Hiers' actions constituted an unfair or deceptive trade practice and sought to recover treble damages pursuant to Chapter 75 of the North Carolina General Statutes.

Defendant moved to dismiss the complaint for failure to state a claim pursuant to Rule 12B of the Rules of Civil Procedure.

From the trial court's order allowing the motion, plaintiff appealed.

Casey, Bishop, Alexander & Murphy, by Jeffrey L. Bishop, for plaintiff appellant.

Brackett and Sitton, by William L. Sitton, Jr., for defendant appellee.

ARNOLD, Judge.

The issue presented for review is whether plaintiff's allegations that the deceased intentionally caused the burning of a building which he leased from plaintiff is sufficient to state a claim for relief. She vigorously contends that the allegations are sufficient to state a claim for relief under G.S. 75-1.1 for unfair and deceptive trade practices. G.S. 75-1.1(a) provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

The rental of residential and commercial property satisfies the "in or affecting commerce" requirement of G.S. 75-1.1. *See Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978); *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E. 2d 176, *modified and affirmed*, 303 N.C. 675, 281 S.E. 2d 43 (1981). However, our research has not revealed any cases which speak directly to the issue of whether a tenant's intentional burning of a leased property falls within the scope of G.S. 75-1.1. Thus, we must determine whether the alleged cause of action falls within the intended scope of the statute.

When G.S. 75-1.1 was adopted in 1969 it contained the following statement of purpose:

> The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between persons engaged in business and the consuming public within this State to the end that good faith and fair dealings *between buyers and sellers* at all level of commerce be had in this State. (Emphasis added.)

G.S. 75-1.1(b). In response to our Supreme Court's holding in *Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 233 S.E. 2d

895 (1977), that this wording was too narrow to encompass credit sales by retail stores, the General Assembly amended G.S. 75-1.1 (b) (1977) to read as follows:

> For the purposes of this section "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

As we held in *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E. 2d 118, *disc. rev. denied*, 305 N.C. 759, 292 S.E. 2d 574 (1982), we do not believe that this language is broad enough to "encompass 'all forms of business activities,' " but was adopted to ensure that the original intent of the statute as set forth in G.S. 75-1.1(b) (1977) was effectuated. The alleged acts of the deceased do not constitute unfair and deceptive trade practices within the intended purpose of the statute. Thus, the complaint fails to state a claim for relief under Chapter 75 of the General Statutes.

Having determined that the facts pleaded in the complaint fail to set forth a cause of action under Chapter 75, we must determine whether the facts set forth establish any other claim for relief. The facts pleaded, rather than the theory set forth, are the determinative factors in determining whether the complaint states a claim upon which relief can be granted. *Benton v. Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975). Believing that the facts alleged state claims for intentional burning and waste, we reverse the trial court's order.

Waste is a species of tort which is generally defined as the misuse or destruction of property by one lawfully in possession thereof, to the prejudice of the estate or interest of another. 78 Am. Jur. 2d Waste § 1. *See also, Casualty Company v. Oil Company*, 265 N.C. 121, 143 S.E. 2d 279 (1965). The plaintiff's complaint alleging an intentional burning of the premises is sufficient to state this claim. Thus, dismissal pursuant to Rule 12(b)(6) was in error.

Reversed and remanded.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. ROY LEE HADDICK

No. 8512SC146

(Filed 3 September 1985)

1. **Robbery § 5.4— attempted armed robbery—no instruction on attempted common law robbery—no error**

In a prosecution for attempted armed robbery and assault with a deadly weapon, the trial court did not err by refusing to instruct the jury on attempted common law robbery where defendant admitted on cross-examination that he intended to rob the store, intended to frighten the cashier with the shotgun, and that he pointed the shotgun in her direction. Defendant's contentions that he neither pointed the gun at the cashier's stomach nor intended to hurt anyone are immaterial.

2. **Criminal Law § 113.1— instruction on the evidence—inadvertent misstatement—no prejudicial error**

In a prosecution for attempted armed robbery, the trial court's description of undisputed evidence that defendant fled the scene of the crime as a contention of the State was merely inadvertent.

APPEAL by defendant from *Johnson, E. Lynn, Judge.* Judgment entered 27 September 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 August 1985.

Defendant was properly indicted for the offense of attempted armed robbery. At trial, the State and defendant presented evidence which may be summarized in pertinent part as follows:

On the evening of 13 April 1984, defendant pushed a filled grocery cart up to the checkout counter in a Fayetteville Winn-Dixie store. While his groceries were being bagged, defendant told the cashier that he was robbing the store and demanded that she give him money. He removed a loaded sawed-off shotgun from a bag in the shopping cart and pointed it in the direction of the cashier. The cashier testified that the defendant then repeated his demand, saying that this was a stick-up and that if she did not give him all her money, he would shoot. The defendant testified that he did point the gun in her direction, but that he did not threaten to shoot the gun. The cashier turned to get a key and defendant fled from the store. He hid in some bushes a short distance away where he was later found by police.

At trial, the court instructed the jury on attempted armed robbery and assault with a deadly weapon but refused defend-

ant's request to instruct on attempted common law robbery. With respect to defendant's flight, the court instructed the jury as follows:

> The State contends that the Defendant ran from the Winn-Dixie and hid in the bushes. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the Defendant's guilt.

The jury returned a verdict of guilty of attempted armed robbery and defendant was sentenced to fourteen years in prison. He appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David S. Crump, for the State.

Beaver, Thompson, Holt and Richardson, by William O. Richardson, for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first contention that the trial court erred when it refused to instruct the jury on attempted common law robbery is without merit. We have carefully examined the record and the transcript and can find no evidence of the lesser included offense. Defendant admitted on cross-examination that he intended to rob the store and that he intended to frighten the cashier with the shotgun. He admitted also that he pointed the shotgun in her direction. The use of a weapon to frighten or intimidate a robbery victim is the main element of armed robbery. *State v. Clemmons*, 35 N.C. App. 192, 241 S.E. 2d 116, *disc. rev. denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978). All of the evidence in this case points to defendant's intention to do exactly that. There is no contrary evidence and defendant's contentions that he neither pointed the gun at the cashier's stomach nor intended to hurt anyone are immaterial. We note further that the evidence was clearly sufficient to support the charge of attempted armed robbery. *See State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980).

[2] Defendant's second contention that the court, in instructing the jury on the evidence of defendant's flight, committed preju-

dicial error when it phrased the instruction as a contention is likewise without merit. It is clear from the record that the court was merely reciting what the evidence from both sides indisputably showed; the court expressly refrained from stating the State's contention as to what this evidence meant. The court's description of the undisputed evidence that defendant fled the scene of the crime as a contention of the State was merely inadvertent, and did not give rise to an obligation to describe the defendant's contentions about the effects of his alcoholism on his consciousness of guilt. We do not believe that the jury was misled or that the defendant was prejudiced. The error was harmless. *See State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968).

No error.

Chief Judge HEDRICK and Judge PARKER concur.

EVELYN H. SINK v. LAWRENCE EGERTON, JR.

No. 8422SC1350

(Filed 3 September 1985)

Mortgages and Deeds of Trust § 32.1— subordinated purchase money deed of trust —foreclosure of senior deed of trust—no right of action on note

A seller who is a holder of a subordinate purchase money deed of trust and whose security has been eroded by a foreclosure of a senior deed of trust cannot bring an *in personam* action for the debt because of the anti-deficiency statute, G.S. 45-21.38.

APPEAL by plaintiff from *Walker (Russell G., Jr.), Judge.* Judgment entered 25 September 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 21 August 1985.

Plaintiff sued to recover principal and interest on a $10,000.00 promissory note secured by a purchase money second deed of trust. From judgment for the defendant, plaintiff appealed.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for plaintiff, appellant.

Egerton, Marshall & Cutcher, by Michael T. Marshall, for defendant, appellee.

HEDRICK, Chief Judge.

The following facts have been stipulated to by the parties: In May 1980 defendant purchased property. He paid the seller with $23,545.00 borrowed from United Virginia Mortgage Corporation and secured by a deed of trust. The $10,000.00 balance of the purchase price was borrowed from the seller and secured by a subordinate deed of trust.

Defendant failed to make the 15 April 1981 interest payment owed to seller. On 19 April 1981 seller died and her interest in the note was assigned to plaintiff by the administratrix. About 27 May 1981 plaintiff's attorney sent notice to defendant that due to defendant's default plaintiff was exercising her rights under the subordinate note and deed of trust to accelerate the indebtedness. Defendant failed to pay the indebtedness and plaintiff initiated a foreclosure proceeding. Defendant then stopped making payments on the senior note and deed of trust to United Virginia Mortgage Corporation. United Virginia foreclosed on its note and plaintiff abandoned her foreclosure proceeding. At the foreclosure sale, United Virginia bought the property for $26,100.00, an amount more than sufficient to satisfy their lien but less than sufficient to satisfy both liens. Plaintiff received no proceeds from the foreclosure sale.

Plaintiff filed suit on the note on 20 October 1983 at which time the balance due was $13,443.83. The trial court concluded that the action was one for a deficiency judgment and that recovery was barred by the North Carolina Anti-Deficiency Judgment Statute, G.S. 45-21.38.

The dispositive issue on appeal is whether a seller, who is the holder of a subordinate purchase money deed of trust and whose security has been eroded by foreclosure of a senior deed of trust, can bring an *in personam* action for the debt. Plaintiff argues that her suit is not for a deficiency judgment as prohibited by N.C. Gen. Stat. Sec. 45-21.38, but is an action on the note

where the security is no longer available. Plaintiff cites *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940) and *Blanton v. Sisk*, 70 N.C. App. 70, 318 S.E. 2d 560 (1984) in support of her proposition that N.C. Gen. Stat. Sec. 45-21.38 does not apply in this case.

N.C. Gen. Stat. Sec. 45-21.38 provides in pertinent part:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: . . .

The legislative intent behind N.C. Gen. Stat. Sec. 45-21.38 is to limit recovery by purchase money mortgagees to the property conveyed. *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979). Underlying this intent is a desire to discourage oppressive overpricing at sale and underpricing at foreclosure. Currie & Lieberman, Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method, 1960 Duke L.J. 1, 30.

Neither *Brown* nor *Blanton* controls the present case. Despite a headnote to the contrary, the facts recited in *Brown* clearly show that the note sued on in that case was not a purchase money note but rather a refinancing note signed a year after the sale. Moreover, a majority of our Supreme Court has recently rejected the reasoning in *Brown*. *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E. 2d 600 (1985).

In *Blanton* a purchase money deed of trust was subordinated to a deed of trust for a construction loan made after the purchase of the property. Foreclosure under the construction loan deed of trust completely exhausted the collateral. The value of the property in *Blanton* was never applied to the purchase price of the property because all the proceeds from foreclosure went to pay

the construction loan which was unrelated to the purchase of the property.

In the present case, the proceeds from the note secured by the first deed of trust went to the seller. The seller cannot bring an *in personam* action on the subordinated note. To hold otherwise would allow mortgagees to evade N.C. Gen. Stat. Sec. 45-21.38 by merely subordinating their mortgages.

The judgment appealed from is affirmed.

Affirmed.

Judges ARNOLD and COZORT concur.

IN THE MATTER OF: MICHAEL LEE TERRY, SR., AND LAVERNE CRABTREE TERRY, FOR THE ADOPTION OF MAGGIE LYNN TERRY

No. 8414SC1093

(Filed 3 September 1985)

Adoption § 4— revocation of consent—not timely

The three-month period for revocation of consent to adoption by the natural parent under G.S. 48-11(a), as amended, applied to a natural mother who signed a consent form on 13 July 1983 which stated that she had six months to revoke consent where the amendment was effective 1 June 1983, and a written revocation was filed in November 1983. The natural mother, like everyone, is responsible for knowing public laws and the amendment which reduced the time allowed for revocation helps to create security in newly adoptive homes; to hold that the six month term applied would be in direct opposition to legislative intent and public policy.

APPEAL by petitioners from *Farmer, Judge.* Order entered 30 July 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 19 August 1985.

On 16 February 1983, a female child was born out of wedlock to Sandra K. Kinder and Michael Lee Terry, Jr. The natural mother and father each signed and filed a Consent to Adoption form on 13 July 1983 which gave permission for the paternal grandparents to adopt the infant. The form stated that consent could be revoked for up to six months unless an interlocutory

decree or final order of adoption had been issued. G.S. 48-11 had been amended, however, to only allow three months for revocation effective 1 June 1983. New forms had not yet been issued to the clerk of court's office nor had the clerk's office been informed of the change.

The natural father's parents filed a Petition for Adoption on 28 July 1983. The natural mother returned to her home in Florida and in early August mailed a letter to the grandparents stating that she wished to revoke her consent. However, she did not inform the court that she wished to revoke her consent. She returned to Durham three months later. During the morning of 15 November 1983 Ms. Kinder went to the office of the Clerk of Superior Court and informed an assistant clerk that she desired to revoke her consent. She was told that she was too late but to see the Department of Social Services across the street. There she was informed that the period allowed for revocation had expired. An employee of the Department of Social Services called the grandparents' attorney and informed him of the situation. That same day Ms. Kinder telephoned the local Legal Services office and made an appointment to see the attorney first thing the next morning. A Final Order of Adoption was filed later that day. On 16 November 1983 Sandra Kinder kept her appointment at Legal Services and then filed a written revocation at the clerk's office.

The natural mother, on 14 December 1983, moved to set aside the Final Order of Adoption. It was denied. On 6 April 1984 she appealed the clerk's ruling to superior court. The superior court judge issued an order granting Kinder's motion to set aside the judgment, thus vacating the Final Order of Adoption. From this order, the adoptive parents appeal to this Court.

Arthur Vann for petitioner appellants.

Gail T. Donovan and William J. Riley for respondent appellee.

ARNOLD, Judge.

The main issue involved in this appeal is which period of revocation governs, the six month term listed in the signed consent form or the three month term embodied in the statute at the

time the consent was given. We hold that the statutory language overrides the outdated consent form.

It is unfortunate that the form misstated the time allowed for revocation. The fact still remains, however, that when Ms. Kinder signed her Consent to Adoption, the statute had been amended. The law at that time allowed only three months for the revocation of consent.

One is presumed to know the law and will be held to it. *In re Forestry Foundation*, 296 N.C. 330, 342, 250 S.E. 2d 236, 244 (1979). Ms. Kinder, like everyone, is responsible for knowing public laws. The fact that G.S. 48-11 had been amended could have been discovered with reasonable diligence.

The primary purpose of Chapter 48 is to protect children "from interference long after they have become properly adjusted in their adoptive homes by biological parents who may have some legal claim because of a defect in the adoption procedure." *See* G.S. 48-1. The amendment which reduced the time allowed for revocation holds true to this stated purpose. It helps to create security in newly adoptive homes. The legislature believed the six month term did not achieve this goal.

The amendment to G.S. 48-11(a) states that all consents on or after 1 June 1983 would be governed by the three month term. Sandra Kinder signed her Consent to Adoption over a month after the effective date. With the exercise of due diligence Ms. Kinder would have known of this change and could have conformed with the requirements of this statute. Thus, to hold that the six month term applied would be in direct opposition to legislative intent and public policy,

We reverse the trial court's decision.

Reversed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. MICHAEL LYNN SNIDER

No. 8417SC1053

(Filed 3 September 1985)

1. **Homicide § 19— exclusion of evidence of provocation—absence of prejudice**

A defendant convicted of second degree murder was not prejudiced by the trial court's refusal to permit defense counsel to cross-examine State's witnesses concerning deceased's statements to them about how many fights he had been in on the night of his death where the jury was allowed to hear the gist of deceased's conversation with the witnesses in which he advised them to leave because "he had been in so much trouble tonight" and didn't want them to become involved.

2. **Jury § 7.11— death qualification of jury**

The trial court properly denied defendant's pretrial motion to prohibit death qualification of the jury in a prosecution for first degree murder.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 12 April 1984 in Superior Court, SURRY County. Heard in the Court of Appeals 19 August 1985.

Defendant was charged in a proper bill of indictment with the first degree murder of Leo Cagle. The State's evidence tends to show the following: Cagle went out drinking at about 6:30 p.m. on the evening of 23 August 1983. He was seen stunt-driving his moped in the parking lot of the Ice Cream Factory by an employee of that establishment approximately three hours later. The owner also saw defendant in the lot and directed both defendant and Cagle to leave. A few minutes later, three women spoke with Cagle briefly. He told them that he expected trouble and asked them to leave. As they were leaving the parking lot, they saw defendant run up some nearby steps and hit Cagle with a board. Cagle fell down and defendant hit him several more times.

Defendant testified, and his evidence tends to show that after having a few beers, he was on his way home through the parking lot when Cagle greeted him and suddenly grabbed his sunglasses off his face. Defendant grabbed them back and a brief fistfight ensued. Cagle pulled a knife, and defendant retreated down some stairs, falling down on the lower portion. He hit his head and lost consciousness briefly. After regaining con-

sciousness, defendant grabbed a stick, ran up the stairs and hit Cagle.

The jury found defendant guilty of second degree murder, and from a judgment imposing a sentence of 45 years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

[1] By Assignment of Error No. 2 based on Exceptions Nos. 2 and 3, defendant contends the trial judge erred in not allowing him to bring out on cross-examination of the State's witnesses statements made to those witnesses by the deceased to the effect that "he told us that he had been in about ten fights that night" and "[h]e said he had been in a bunch of fights." Defendant argues that in disallowing this evidence, he was denied the right to show that his conduct with regard to the fatal altercation was provoked by the deceased. The record discloses that the three witnesses in question saw and talked to the deceased approximately five minutes before the defendant ran up the steps and struck Cagle with a board. The witnesses were allowed to tell generally of their conversation with the deceased, and that he, Cagle, advised them to leave the parking lot because "he had been in so much trouble tonight and he didn't want to cause us any problems" (testimony of witness Bonnie Kistler), "You all better go on. I've been in some trouble and don't want you all to get involved" (testimony of witness Carlene Jones), and "You ladies better go on. I don't want to get you all involved in anything" (testimony of witness Frances Sechrist).

Assuming *arguendo* that the testimony in question was not hearsay and was relevant, it is obvious that defendant was not prejudiced in any way by the rulings of the trial judge regarding the admissibility of the testimony, since the jury was allowed to hear the gist of the deceased's conversation with the witnesses. This assignment of error has no merit.

[2] Defendant's first assignment of error is set out in the record as "[t]he trial court's denial of the defendant's pretrial motion to prohibit death qualification of the jury." In his brief, regarding this assignment of error, defendant says, "Defendant might prefer not to press this claim of error in the Appellate Division of this State, but to pursue it, if necessary, only in a federal forum since the North Carolina Supreme Court has consistently and recently rejected the claim." This assignment of error is likewise without merit.

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

No error.

Judges ARNOLD and COZORT concur.

STATE OF NORTH CAROLINA v. JO ANN G. BURGESS

No. 847SC1141

(Filed 3 September 1985)

Criminal Law § 102.6; Homicide § 19.1— murder—self-defense—jury argument concerning record of decedent improper

In a prosecution in which defendant relied on self-defense and was convicted of voluntary manslaughter, the trial court erred by allowing the district attorney in his closing argument to bring to the jury's attention the fact that there was no evidence that the deceased had a criminal record. Evidence of prior convictions of a deceased person is not admissible to show that a deceased has a reputation for violence and it was therefore improper to argue to the jury regarding the lack of evidence of the deceased's criminal record. Moreover, the error was prejudicial because defendant's only defense was that she acted in self-defense and she attempted to prove this by showing that she was afraid of decedent because he was a violent and mean person. There is a reasonable possibility that the State's improper argument convinced the jury to discount defendant's self-defense contentions. G.S. 15A-1443.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 6 June 1984 in Superior Court, WILSON County. Heard in the Court of Appeals 21 August 1985.

Defendant was charged in a proper bill of indictment with second degree murder. At trial the State offered evidence which

tended to show the following: On 27 November 1983, the defendant and the victim, her estranged husband, met at the Strawberry Lounge to discuss their son. At some point in the evening the couple quarreled and the defendant left the club. Later the defendant returned to the club and told the doorman that she had shot her husband. The deceased's body was found beside the defendant's vehicle. Cause of death was determined to be a gunshot wound.

The defendant offered evidence which tended to show that as she was leaving the nightclub the deceased followed her to the car, leaned inside and began to choke her. She struggled with him and during the struggle she retrieved a pistol from her purse and shot him. She also offered evidence that the deceased had beaten her in the past, had threatened to kill her and that he had a reputation as being a mean and violent person.

The jury convicted the defendant of voluntary manslaughter, and from a judgment sentencing her to the presumptive term of six years imprisonment, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney J. Mark Payne, for the State.

Farris and Farris, by Robert A. Farris, for defendant appellant.

ARNOLD, Judge.

The defendant contends the trial court committed prejudicial error by allowing the District Attorney in his closing argument to bring to the jury's attention the fact that there was no evidence that the deceased had a criminal record. We agree, and award defendant a new trial.

At trial the defendant offered substantial evidence tending to show that the deceased had a reputation of being mean and violent. In his closing argument the District Attorney, over timely objection of defense counsel, was allowed to argue to the jury that no evidence had been introduced to show that the deceased had ever been convicted of any crime which would show that he was a mean and violent person.

Evidence of prior conviction of a deceased person is not admissible to show that a deceased has a reputation for violence.

State v. Corn, 307 N.C. 79, 296 S.E. 2d 261 (1982). It was, therefore, improper to permit the District Attorney to argue to the jury regarding the lack of evidence of the deceased's criminal record.

Having determined that it was error to allow the District Attorney to make the complained of argument, we now must determine whether such error was prejudicial. G.S. 15A-1443 provides in part that "[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." The appellant's only defense was that she acted in self-defense, and she attempted to prove this by showing that she was afraid of him because he was a violent and mean person. The District Attorney's method of attacking this theory of defense was to raise the question of why the deceased's record was not introduced to prove deceased's violent character. There is a reasonable possibility that this improper argument convinced the jury to discount defendant's self-defense contentions. Therefore, we hold the error to be prejudicial and award defendant a

New trial.

Chief Judge HEDRICK and Judge COZORT concur.

BRENDA LOUISE WILKINS v. HERBERT CLINTON TAYLOR

No. 846DC1150

(Filed 3 September 1985)

Automobiles and Other Vehicles §§ 55.1, 76.2— vehicle parked partly on highway— negligence and contributory negligence

The evidence was sufficient for the jury on the issue of defendant's negligence where it tended to show that defendant's pickup truck was parked on the shoulder of the highway so that he could examine his soybean crop in an adjoining field and that, although the shoulder was wide enough to accommodate the truck, the left front wheel and bumper extended into the north lane of the highway far enough that cars traveling in a northerly direction had to go into the other traffic lane in order to pass the truck. Furthermore, the

evidence failed to establish contributory negligence by plaintiff as a matter of law where there was evidence tending to show that plaintiff, after rounding a curve, saw defendant's pickup truck about twenty feet away blocking part of the highway, swerved into the left lane to avoid it but saw an oncoming car in that lane, swerved back to the right, lost control, and ran into a ditch. G.S. 20-161.

APPEAL by plaintiff from *Long, Nicholas, Judge.* Judgment entered 29 August 1984 in District Court, BERTIE County. Heard in the Court of Appeals 15 May 1985.

Carter W. Jones, Charles A. Moore, and Kevin M. Leahy for plaintiff appellant.

Baker, Jenkins & Jones, by W. Hugh Jones, Jr., for defendant appellee.

PHILLIPS, Judge.

Upon the trial of this automobile negligence case the court directed a verdict against the plaintiff at the close of all the evidence. In doing so the trial court deemed that the evidence was insufficient to establish defendant's negligence and that the evidence established plaintiff's contributory negligence as a matter of law. Both determinations were erroneous in our opinion and we reverse the judgment dismissing plaintiff's complaint.

Viewed in the light most favorable for the plaintiff, the evidence recorded tends to show that at the time involved defendant's pickup truck, which was not disabled, was parked on the east shoulder of N.C. Highway 305, a much-traveled, two-lane highway, so that defendant could examine his soybean crop in an adjoining field, and that though the shoulder was wide enough with room to spare to accommodate the truck, the front left wheel and bumper of the truck extended into the main traveled portion of the highway far enough so that cars traveling north on the highway could not pass the truck without going into the other traffic lane. This was evidence enough of defendant's negligence and the issue was for the jury to determine, rather than the court. Even if G.S. 20-161 had not been interpreted to require that no part of a parked vehicle be left protruding into the traveled portion of the highway, except where it is reasonably necessary to do so, *Sharpe v. Hanline*, 265 N.C. 502, 144 S.E. 2d 574 (1965), common sense and prudence would necessarily lead to

the same conclusion. Because in this over motorized country few things are better known, we believe, than that highways are built and maintained for motor vehicles to travel on; and prudent operators do not park their vehicles on the traveled portion of the highway except when necessity requires them to do so.

The evidence presented when viewed favorably for the plaintiff also tends to show that plaintiff, in driving her car at a lawful speed northwardly along the highway, after rounding a curve to the right that blocked her view of the highway, saw defendant's pickup truck about 20 feet away blocking part of the highway, swerved into the left lane to avoid it, but saw an oncoming car in that lane and swerved back to the right, lost control, and the car ran off the road into a ditch. This evidence tends to show, if anything, that plaintiff reacted prudently to the danger that defendant created; it certainly does not establish plaintiff's contributory negligence as a matter of law. The weight and credibility of this evidence does not concern us; nor is it relevant to our decision that when the evidence is viewed favorably to the defendant a different picture is presented. Under our system, such matters are for juries to decide, not judges.

The obvious inexpediency of taking from juries cases that are but an hour or so away from being concluded by either a judgment on the verdict or a judgment notwithstanding a verdict has been remarked on many times by this Court. For example *see, Woodruff v. Shuford*, 73 N.C. App. 627, 327 S.E. 2d 14 (1985); *DeHart v. R/S Financial Corp.*, 66 N.C. App. 648, 311 S.E. 2d 694 (1984); *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982). Nevertheless, hardly a session goes by that we are not required to order that a case that has already been tried almost to completion be tried again *ab initio* by another judge and jury, to the extra cost and inconvenience of lawyers, litigants and witnesses alike.

Reversed.

Judges BECTON and EAGLES concur.

WACHOVIA BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF MARION L. TARGETT, DECEASED v. BEA KETCHUM AND MAGALINE BANKS

No. 855SC297

(Filed 3 September 1985)

Wills § 28.4— construction of will—intent of testatrix

The trial court correctly construed a will where the testatrix appointed Wachovia as her attorney-in-fact on 7 August 1978, executed her will on 20 August 1978, bequeathed in her will one-third of the cash left at her death to Bea Ketchum, and disposed of the residue of her estate to Magaline Banks; Wachovia converted savings accounts and certificates of deposit to a treasury note which matured after the testatrix's death; and the trial court ruled that the proceeds of the treasury note be distributed according to the cash devise. It was clear that testatrix intended that Bea Ketchum be a beneficiary of a substantial portion of her estate; Wachovia's business judgment to convert assets from one form to another in the administration of testatrix's affairs should not be allowed to defeat her true intent.

APPEAL by defendant Banks from *Llewellyn, Judge*. Judgment entered 13 April 1984 in NEW HANOVER County Superior Court. Heard in the Court of Appeals 14 August 1985.

Plaintiff Wachovia brought this action to have the will of Marion Lewis Targett construed by the Court.

In her will, Ms. Targett provided for certain specific bequests of personal property. One of those bequests was set out in Item 6 of the will, as follows:

> I give and bequeath to BEA KETCHUM one-third (1/3) of the cash left at my death, including checking accounts, savings accounts, and certificates of deposit.

Item 7 of the will disposes of the residual of Ms. Targett's estate, as follows:

> All of the rest, residue, and remainder of my estate, real, personal, and mixed, of whatsoever nature, and wheresoever situate [sic], I give, devise, and bequeath to MAGALINE BANKS. . . .

Ms. Targett's will was executed on 20 August 1978. On 7 August 1978, Ms. Targett appointed Wachovia as her attorney-in-fact. Ms. Targett died on 8 July 1982. During the year 1978, in the course of managing Ms. Targett's affairs, Wachovia withdrew

$41,311.23 from Ms. Targett's various savings accounts and cashed certificates of deposit totalling $42,124.69. On 2 July 1979, Wachovia purchased a $70,000.00 (United States) treasury note which matured in July 1983, after Ms. Targett's death.

Wachovia petitioned the court to construe the will so as to allow it to correctly distribute the proceeds of the treasury note. After finding the foregoing facts, the trial court concluded that a correct construction of Ms. Targett's will required that the proceeds of the treasury note be distributed according to the terms and conditions of Item 6 of the will, and entered judgment accordingly. Defendant Banks has appealed from that judgment.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, Jr., for defendant appellee, Bea Ketchum.

Keith, Hinn & Blackburn, by Ray C. Blackburn, Jr. and Helen Kelly Hinn, for defendant appellant, Magaline Banks.

WELLS, Judge.

In construing disputed provisions of a will, the task of the courts is to ascertain the true intent of the testator. *Pittman v. Thomas*, 307 N.C. 485, 299 S.E. 2d 207 (1983). The language used, and the sense in which it is used by the testator is the primary source of information to determine the testator's intentions. *Id.* The will is to be construed in the light of the circumstances existing at the time the will was made, including the condition, nature, and extent of the testator's property. *Id.*

Applying these principles of construction to the case before us, we hold that the trial court ruled correctly. It appears from the findings made by the trial court that at the time Ms. Targett made her will, she had at least $80,000.00 of assets in the types of assets included in Item 6 of her will. Thus, it is clear that Ms. Targett then intended that Bea Ketchum be a beneficiary of a substantial portion of her estate. Wachovia's business judgment to convert Ms. Targett's assets from one form to another in the administration of her affairs should not be allowed to defeat her true intent to substantially benefit Ms. Ketchum.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 SEPTEMBER 1985

BLACKMAN v. STEVENS No. 8411SC1276	Johnston (82CVS1572)	Affirmed
BRYANT v. ROSE CRAFT BOATWORKS No. 843SC906	Carteret (82CVS449)	New Trial
DEPT. OF TRANS. v. WILLIAMSON No. 8513SC127	Brunswick (83CVS480)	Dismissed
EVANS v. HANOVER IRON WORKS No. 8510IC328	Industrial Commission (H-3668)	Affirmed
HARRISON REALTY v. GEN. HOMES CORP. No. 8427DC1267	Gaston (81CVD2692)	Affirmed
LYNCH v. GOODEN No. 8510SC307	Wake (84CVS3668)	Dismissed
LYNCH v. GOODEN No. 8510SC308	Wake (84CVS3669)	Dismissed
LYNCH v. GOODEN No. 8510SC309	Wake (84CVS3670)	Dismissed
NEW HANOVER COUNTY v. BURTON No. 855SC430	New Hanover (80CVS2955)	Affirmed
RIGGS v. RIGGS No. 854DC17	Onslow (84CVD120)	Vacated & Remanded
STATE v. AUSBAND No. 855SC35	New Hanover (83CRS17587)	No Error
STATE v. BAILEY No. 8530SC258	Graham (83CRS49)	No Error
STATE v. BROWN AND GOODING No. 848SC1128	Lenoir (84CRS124) (Brown) (84CRS125) (Gooding)	No Error
STATE v. BYNUM No. 857SC157	Wilson (83CRS2834) (83CRS2835) (83CRS2836)	No Error

STATE v. CARLOS No. 845SC1115	New Hanover (84CRS5911) (84CRS5913)	No Error
STATE v. COUCH No. 8514SC171	Durham (84CRS29922) (84CRS29923)	No Error
STATE v. CUMBER No. 845SC1301	New Hanover (83CRS16605) (83CRS16606)	New Trial
STATE v. DAVIS No. 846SC1147	Halifax (83CRS12250)	No Error
STATE v. EDWARDS No. 858SC263	Wayne (84CRS4721)	No Error
STATE v. GREEN No. 855SC178	New Hanover (84CRS6225) (84CRS6226) (84CRS6227)	Affirmed
STATE v. LIVENGOOD No. 8521SC249	Forsyth (84CRS33258) (84CRS33921) (84CRS33925)	Affirmed
STATE v. McDANIEL No. 8418SC959	Guilford (83CRS36062) (83CRS36063) (83CRS36064)	No Error
STATE v. McMILLAN No. 845SC1345	New Hanover (84CRS6421) (84CRS6422) (84CRS6423) (84CRS6424) (84CRS6425) (84CRS6426)	No Error
STATE v. MACKINS No. 8426SC1197	Mecklenburg (83CRS48845) (83CRS48848) (83CRS48850) (83CRS48860) (83CRS48862) (83CRS48870) (83CRS48874) (83CRS48869) (83CRS48872) (83CRS48871)	No Error

STATE v. MOSS No. 855SC133	New Hanover (84CRS5956) (84CRS5957) (84CRS5961)	No Error
STATE v. PARRISH No. 8414SC722	Durham (83CRS12827)	No Error
STATE v. WHITE No. 845SC1310	New Hanover (81CRS19621) (81CRS19622)	Affirmed
STATE v. WILLIAMS No. 857SC283	Edgecombe (83CRS9002)	Appeal dismissed; certiorari denied
WHITE v. BLACKWELL BURNER CO. No. 8425SC1299	Catawba (83CVS50)	New Trial

THABLE ROBERTS TALENT v. COY EUGENE TALENT

COY EUGENE TALENT v. THABLE ROBERTS TALENT

No. 845DC1295

(Filed 17 September 1985)

1. Divorce and Alimony § 16.8— wife not dependent spouse—insufficient findings

The trial court's findings were insufficient to support its determination that the wife was not a dependent spouse where the court made no findings as to the standard of living to which the parties became accustomed during the marriage, the total value of the estate of each spouse, the length of the marriage, and the contribution of each party to the financial status of the marital unit over the years; the findings made regarding the estates, expenses and current incomes of the parties were inadequate; the court should have made a finding as to whether the wife's prospective earning capacity is uncertain because of health problems; and the limited findings made tend to indicate that the wife is a dependent spouse and the husband is the supporting spouse.

2. Divorce and Alimony § 30— equitable distribution—valuation of marital property—action pending on 1 August 1983—date of separation

The 1983 amendments to G.S. 50-20(b)(1) and G.S. 50-21(b) require that the date of the parties' separation rather than the date the divorce action was filed be used in identifying and valuing marital property where the action between the parties for absolute divorce and equitable distribution was pending in the district court on 1 August 1983.

3. Divorce and Alimony § 30— equitable distribution—amount in joint accounts—portion spent by wife—marital property

Where $68,000 in savings accounts and certificates of deposit was acquired by the parties during the marriage and was owned by them on the date of their separation, the trial court correctly determined that the full $68,000 was marital property even though the wife withdrew such amount and had possession of only a portion thereof at the time of the hearing. G.S. 50-20(b)(1).

4. Divorce and Alimony § 30— equitable distribution—indebtedness of wife—repaid loan

The trial court in an equitable distribution proceeding properly found that the wife had no indebtedness where the evidence showed that a loan which she had been repaying was completely repaid prior to the time of the equitable distribution hearing. G.S. 50-20(c)(1).

5. Divorce and Alimony § 30— equitable distribution—business as separate property—value

The evidence in an equitable distribution proceeding supported the trial court's findings that the husband purchased a business prior to the marriage, that it was his separate property, and that it has a current net worth of $7,000.

6. Divorce and Alimony § 30— equitable distribution—admission that jewelry was separate property

The trial court erred in treating certain jewelry given to the wife by the husband during the marriage as marital property where the husband admitted at the equitable distribution hearing that the jewelry was the wife's separate property.

7. Divorce and Alimony § 30— equitable distribution—equity in mobile home—repayment of loan from marital funds—marital property

The equity in a mobile home and lot purchased by the husband after the parties separated with money from repayment from a loan originally made from marital funds constituted marital property.

8. Divorce and Alimony § 30— equitable distribution—consideration of separate property—necessity for finding

In determining an equitable division of marital property, the trial court should have made a finding indicating its consideration of separate realty and cemetary lots acquired by the wife prior to the marriage and owned by her at the time the property division was to become effective. G.S. 50-20(c)(1).

9. Divorce and Alimony § 30— equitable distribution—net value of property

The division of marital property 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 market value. G.S. 50-20(c).

10. Divorce and Alimony § 30— equitable distribution—determination before alimony

When both permanent alimony and equitable distribution are requested, the equitable distribution should be decided first since the court, in determining whether a party is entitled to alimony, must consider the estates of both parties, and the estates cannot definitely be determined until it is decided how the marital property is to be distributed.

APPEAL by Thable Roberts Talent from *Rice, Judge.* Judgments entered 7 May 1984 and 18 May 1984 in NEW HANOVER County District Court. Heard in the Court of Appeals 12 August 1985.

Appellant Thable Roberts Talent and appellee Coy Eugene Talent were married on 28 November 1974 and separated on 26 September 1980. In September 1980, appellant wife instituted civil action No. 80CVD2312 seeking a divorce from bed and board, *pendente lite* and permanent alimony, counsel fees, and other relief. Subsequently, appellant's request for alimony *pendente lite* and counsel fees was denied. In October 1981, appellee husband instituted civil action No. 81CVD2401 seeking an absolute divorce based on one year's separation and an equitable distribution of

the marital property. Judgment of absolute divorce was entered on 23 November 1981.

Approximately one year later, a hearing was held on the distribution of the marital property. In May 1983, a jury trial was held to determine whether appellant had grounds for alimony under N.C. Gen. Stat. 50-16.2 (1984). The jury returned a verdict in favor of appellant finding that appellee had both committed adultery and, without provocation, offered such indignities to appellant as to render her condition intolerable and life burdensome. Shortly thereafter, a hearing was held to determine whether appellant was a dependent spouse, thus qualifying for an award of alimony.

The trial court concluded that appellant was not a dependent spouse and appellee was not a supporting spouse and denied appellant's request for permanent alimony by judgment entered in civil action No. 80CVD2312 on 7 May 1984. That same day, a judgment was entered in civil action No. 81CVD2401 distributing the parties' marital property. On 18 May 1984, a further judgment was entered in the latter action ordering the transfer of title of certain marital property. Appellant wife appealed from the judgments entered.

Goldberg & Anderson, by Frederick D. Anderson, and Mary E. Lee for appellant.

No brief for appellee.

WELLS, Judge.

I. *Alimony*

Appellant argues that the judgment denying her request for permanent alimony must be reversed because the trial court failed to make adequate findings of fact to support it. To be entitled to alimony, a spouse must not only have one of the grounds set forth in N.C. Gen. Stat. 50-16.2 (1984), he or she must also be a "dependent spouse." N.C. Gen. Stat. 50-16.1(3) (1984) defines a "dependent spouse" as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." Conversely, a "supporting spouse" is "a spouse, whether husband or wife, upon

whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support." N.C. Gen. Stat. 50-16.1(4) (1984).

For a spouse to be "actually substantially dependent" upon the other spouse, he or she must have actual dependence on the other in order to maintain the standard of living to which he or she became accustomed during the last several years prior to the spouses' separation. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). To determine whether such actual dependence exists, the trial court must evaluate the parties' incomes and expenses measured by the standard of living of the family as a unit. *Id.*

If the court determines that one spouse is not actually dependent on the other for such support, the court must then determine if one spouse is "substantially in need of maintenance and support" from the other, *i.e.*, whether one spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other. *Id.* In doing so, the court must determine and consider the following: (1) the standard of living, socially and economically, to which the parties as a family unit became accustomed during the several years prior to their separation; (2) the present earnings, prospective earning capacity, and any other condition, such as health, of each spouse at the time of the hearing; (3) whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the parties' accustomed standard of living, taking into consideration the spouse's reasonable expenses in light of that standard of living; and (4) the financial worth or "estate" of both spouses. *Id.* The court must also consider fault and other facts of the particular case such as the length of the marriage and the contribution made by each spouse to the financial status of the family over the years. *Id.*

The conclusions made by the court as to whether a spouse is "dependent" or "supporting" must be based on findings of fact sufficiently specific to indicate that the court properly considered the factors set out in *Williams*. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982); *Roberts v. Roberts*, 68 N.C. App. 163, 314 S.E. 2d 781 (1984). In the absence of such findings, appellate courts cannot appropriately determine whether the order of the

trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings. *Quick, supra.* It is not enough that there is evidence in the record from which such findings could have been made because it is for the trial court, and not this court, to determine what facts are established by the evidence. *See Quick* and *Roberts, supra.*

[1] The findings contained in the judgment now before us are deficient in several respects. First, the trial court made no findings of fact as to the following factors required to be considered: (1) the standard of living to which the parties became accustomed during the marriage prior to their separation, (2) the total value of the estate of either spouse, (3) the length of the marriage, and (4) the contribution of each party to the financial status of the marital unit over the years.

Second, the findings made concerning the parties' estates are inadequate. The court did not place a value on any of the property owned by the parties, except for certain jewelry given to appellant wife, and failed to establish all of the property owned by appellant. Specifically, the court failed to find that appellant owns 1.4 acres of land in Murraysville and some cemetary lots as is shown by the evidence. In addition, the court found that appellant withdrew $68,000 from a joint account of the parties in September 1980 but failed to make a finding with respect to the amount of money remaining in appellant's possession at the time of the dependency hearing. The evidence tended to show that appellant had spent all but approximately $18,500 of the $68,000 by the time of the dependency hearing and that the money had been spent on attorney's fees, traveling, and maintaining the standard of living to which she had become accustomed prior to the parties' separation.

The findings made regarding the expenses of the parties are similarly inadequate. The court found that appellant wife incurred monthly expenses for newspapers and magazines, medicine and medical care, eyeglasses, dental care, hair appointments, food, utilities, automobile maintenance and insurance, and yard work which totaled approximately $553. The evidence clearly shows, however, that the reasonable monthly expenses incurred by appellant to maintain the standard of living to which she had

become accustomed prior to the parties' separation was much greater than $553 and included expenses for items not mentioned by the court such as clothing, insurance, and birthday and Christmas presents. The finding as to the appellee husband's monthly expenses contains very little information and is for that reason inadequate. Furthermore, the court's finding that appellee's monthly expenses are "minimal" does not appear to be supported by the evidence. Appellee's testimony shows that he spends over $500 a month for food alone and that he has other substantial monthly expenses as well.

The findings are also questionable or deficient in other respects. The court found that appellant's health "is good, except she has some nervous problem and needs an operation on her hand at some time in the future. . . ." The evidence tends to show, however, that appellant has pain in both wrists, that she had surgery on her right wrist prior to the parties' separation to relieve the pain, that it has been recommended that she have surgery on her left wrist to relieve her pain and that she has very bad varicose veins. The evidence further tends to show that appellant's job requires that she stand on her feet most of the day and that she continually use and bend her wrists, that appellant works in constant pain, that she has no possibility of a promotion to a sedentary type job with her present employer, and that she has no training for any other type of work. This evidence does not support the finding that appellant's health is good with no further qualification other than that stated by the court. Moreover, this evidence requires a finding as to whether appellant's prospective earning capacity is uncertain.

The court further failed to make sufficient findings regarding the parties' current incomes. Detailed evidence was presented at the dependency hearing on this subject; however, this evidence is not reflected in the findings made. Rather, the findings made with respect to the parties' incomes reflect evidence presented at a hearing in July 1981 and thus show only the parties' past incomes.

Lastly, the limited findings made tend to indicate that appellant wife is, in fact, a dependent spouse and that appellee husband is the supporting spouse. Thus, we conclude that the findings made do not support the conclusions reached by the trial court.

Because of the inadequacy of the findings contained in the judgment denying appellant's request for alimony, that judgment must be vacated. We remand civil action No. 80CVD2312 to the district court for a redetermination of the issue of appellant's dependency and entry of a proper judgment containing findings of fact sufficiently specific to show that the court properly considered the guidelines and factors set forth in *Williams, supra.* Because we have determined that this judgment must be vacated, we need not address the remaining arguments made by appellant regarding it.

II. *Equitable Distribution*

Appellant contends that the court erred in several respects in distributing the parties' marital property and that therefore the judgment of equitable distribution must be vacated. The findings and conclusions in the judgment may be summarized as follows: the court found that the marital property acquired by the parties consisted of certificates of deposit and savings accounts having a total value of $68,000, certain real estate, furniture, a 1979 Oldsmobile automobile, a 1977 Ford truck, jewelry, and a grandfather clock, and that the total fair market value of this marital property as of the date of separation was $150,700. The court found that appellant had contributed $1500 of her separate property towards the acquisition of part of the real estate for which she was entitled to reimbursement and that therefore a total of $149,200 in marital property remained to be distributed. The judgment next contains numerous findings which demonstrate the court's consideration of evidence presented on the factors set forth in N.C. Gen. Stat. 50-20(c) (1984).

The court further found that prior to their separation the parties owned approximately $16,000 which was located in a safe in the marital residence; that the $16,000 disappeared from the safe; that both parties deny taking it or knowing what happened to it; that the trial court was unable to determine what happened to the money or whether either party has, or had at the time of separation, the money; but that each party is entitled to a one-half interest in the money wherever it might be. In addition, the court found that appellant surreptitiously took the $68,000 in savings accounts and certificates of deposit which were owned jointly by the parties on the date of their separation.

The court concluded that an equal division of the marital property was equitable, divided the tangible marital property between the parties, and ordered appellant to pay appellee a certain sum of money so as to equalize the distribution.

[2] Appellant first argues that the court erred in using the date of the parties' separation, instead of the date the absolute divorce action was filed, in identifying and valuing the marital property. Appellant's argument is premised on her assumption that the 1983 amendments to the Equitable Distribution Act, N.C. Gen. Stat. 50-20 and 50-21 (1984), do not apply to this case. This assumption, however, is incorrect.

The Equitable Distribution Act was enacted in 1981 and made applicable only when the action for an absolute divorce is filed on or after 1 October 1981. 1981 N.C. Sess. Laws, ch. 815. G.S. 50-20(b)(1) as originally enacted provided: " 'Marital property' means all real and personal property acquired by either spouse during the course of the marriage and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section." In 1983, the General Assembly amended G.S. 50-20(b)(1) so that its first sentence now reads: " 'Marital property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property. . . ." 1983 N.C. Sess. Laws, ch. 640.

That same year, the General Assembly also amended G.S. 50-21 by adding a new subsection which reads in pertinent part: "(b) If the divorce is granted on the ground of one year separation, the marital property shall be valued as of the date of separation as determined under G.S. 50-6." 1983 N.C. Sess. Laws, ch. 671. The amendments in both Chapter 640 and Chapter 671 were made effective on 1 August 1983 and made applicable to actions pending in district court on that date and to actions filed thereafter. 1983 N.C. Sess. Laws, chs. 640 and 671.

The action between the parties here for absolute divorce and equitable distribution was pending in district court on 1 August 1983; therefore, the amendments in Chapters 640 and 671 are applicable. These amendments dictate that in the present case the date of the parties' separation be used in identifying and valuing

the marital property. Thus, we conclude that the trial court ruled correctly on this question.

Appellant next argues that the court erred in including in its award the $16,000 missing from the parties' safe. She contends that the court's attempt to divide the non-existent funds was a vain act arising from sheer speculation. Although the court made the finding summarized previously herein with respect to the missing $16,000, it did not include the $16,000 in its listing of the marital property, nor apparently did it in any way consider the $16,000 in dividing the marital property. We conclude, therefore, that any error committed by the court in its treatment of the $16,000 was harmless.

[3] Appellant assigns as error the court's inclusion of the $68,000 in savings accounts and certificates of deposit in its award. She argues that the court should have made a finding regarding how much of the $68,000 remained in her possession at the time of the hearings on these issues and suggests that the full $68,000 was not marital property because it was not "presently owned" as required by G.S. 50-20(b)(1). We disagree. Since the $68,000 was acquired by the parties during their marriage and was owned by them on the date of their separation, under the circumstances of this case, the court correctly determined that the full $68,000 should be considered marital property as defined in G.S. 50-20(b)(1). The evidence shows that the $68,000 was an asset of the marriage which appellant took and used as her separate property before it was determined that she was entitled to it; thus, she should be required to account for it. This assignment of error is overruled.

Appellant argues the court erred in failing to attempt to trace the contribution made by her of her separate property towards the acquisition of part of the marital real estate. We disagree. Contrary to appellant's assertion, the court did attempt to trace the source of the funds used to purchase the real estate in question. The court found that appellant had contributed $1500 of her separate property towards the acquisition of the real estate and in effect reimbursed her for that contribution by dividing the marital property in such a way that she received a $1500 greater share of it. The court's finding is supported by the evidence and

appellant has not shown that the reimbursement or credit awarded her was inadequate or unfair in any respect.

[4] Appellant next contends that the court erred in finding that she has no obligations or indebtedness. In determining an equitable division of marital property, the court must consider the liabilities of each party at the time the property division is to become effective. G.S. 50-20(c)(1). Appellant argues that the finding made here regarding her liabilities is erroneous because the evidence shows that she had been repaying a loan through payroll deduction at the rate of approximately $274 a month. The evidence also shows, however, that appellant had completely repaid the loan prior to the time of the equitable distribution hearing; thus, the loan was not outstanding at the time the property division was to become effective. Accordingly, we reject this argument.

[5] Appellant asserts that error appears in the finding made concerning appellee's business. The court found that appellee purchased the business prior to the marriage, that it was his separate property, and that it has a current net worth of approximately $7,000. Appellant has not shown that this finding is inadequate or that it is not supported by the evidence. We conclude that appellant's argument must be overruled.

[6] We find merit, however, in other arguments made by appellant. Appellant contends, and we agree, that the court erred in treating certain jewelry given to appellant by appellee during the marriage as marital property. At the equitable distribution hearing, appellee admitted that the jewelry was appellant's separate property and clearly indicated that he did not contend that it was marital property. Despite this, the court classified and distributed the jewelry as marital property. This was error. Appellee's admission was binding on the court and required that the jewelry be treated as separate property. *See Woods v. Smith*, 297 N.C. 363, 255 S.E. 2d 174 (1979).

[7] We also agree that the court erred in finding that a mobile home and lot purchased by appellee after the date of the parties' separation was entirely separate property. The evidence shows that after the parties separated appellee used $10,000, which he had collected as repayment for a loan made during the marriage from marital funds, as a down payment on the mobile home and

lot. Clearly, the $10,000 collected by appellee should be considered marital property because it was a repayment of a loan of marital funds. The fact that this marital property was used to acquire other property after the date of the parties' separation did not cause it to lose its marital character. *See Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E. 2d 63 (1985) (the characterization of property as separate or marital depends not on whether it was acquired after the date of separation but on whether the source of funds for its purchase was marital property or separate property). *See also Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E. 2d 668 (1985), *disc. rev. denied*, 314 N.C. 121, 332 S.E. 2d 490 (1985). We conclude that the equity acquired in the mobile home and lot by appellee because of the $10,000 down payment of marital funds should be considered marital property and that the court erred in failing to recognize this. Additionally, we note that the court erroneously found that the amount of the down payment was $2,000 rather than $10,000 as shown by the evidence.

[8] Appellant argues the court further erred by failing to find that she owned as separate property the realty in Murraysville and the cemetery lots referred to previously herein. Again, we agree. In determining an equitable division of the marital property, the court must consider the separate property owned by each party at the time the property division is to become effective. *See* G.S. 50-20(c)(1); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). The uncontradicted evidence shows that the above-mentioned property was acquired by appellant prior to the marriage and was therefore her separate property, *see* G.S. 50-20(b)(2), and that it was owned by her at the time the property division was to become effective. Thus, the court was required to consider it in determining an equitable division and should have made a finding indicating its consideration of the property.

We conclude that because of the errors committed by the court as just described, the judgment of equitable distribution must be vacated and the cause remanded for a redetermination of an equitable division of the marital property and entry of a new judgment not inconsistent with this opinion. Since the judgment of equitable distribution must be vacated, the judgment entered on 18 May 1984 in furtherance of the property division must also be vacated.

[9] We remind the trial court that the division of the marital property 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 market value. *See* G.S. 50-20(c); *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). Here, the court found the fair market value of the property and that there were no liens, mortgages, or other encumbrances on any of the property. Thus, the findings show that the net value of the property was the same as its fair market value. Accordingly, we find no error in the values used in this cause.

[10] We further instruct the court that on remand it should first determine an equitable distribution of the marital property and then determine whether appellant is entitled to alimony. When both permanent alimony and equitable distribution are requested as in this case, the equitable distribution should be decided first. *See Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984); *see also McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E. 2d 600 (1985). The court, in determining whether a party is entitled to alimony, must consider the estates of both parties. Until it is decided how the marital property is to be distributed, the parties' estates cannot definitely be determined.

Consistently with this opinion, the judgments appealed from are vacated and remanded.

Chief Judge HEDRICK and Judge WEBB concur.

JENNIFER LEE, BY HER GUARDIAN AD LITEM, E. S. SCHLOSSER, JR., PLAINTIFF v. MOWETT SALES COMPANY, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. KYU C. LEE, THIRD-PARTY DEFENDANT

No. 8518SC37

(Filed 17 September 1985)

1. Parent and Child § 2.1— riding lawnmower not motor vehicle—parent-child immunity—action for contribution against parent barred

A riding lawnmower is not a "motor vehicle" within the meaning of G.S. 1-539.21, the statute creating an exception to the doctrine of parent-child immunity for tort actions arising out of the operation of motor vehicles. Therefore, in an action against the manufacturer and seller of a lawnmower to

recover for injuries received by the minor plaintiff when she was struck by the blade of a riding lawnmower operated by her father, the doctrine of parent-child immunity barred the manufacturer's third-party action against the father for contribution based on an allegation that his negligent operation of the lawnmower was one of the proximate causes of the minor plaintiff's injuries.

2. Parent and Child § 2.1— doctrine of parental immunity—no judicial expansion

The Court of Appeals will not judicially expand the limited statutory exception to the doctrine of parental immunity by providing unemancipated minors with a right to maintain an action for personal injury against their parents in all cases where the injury does not arise from a negligent act involving the exercise of parental authority or discretion.

Judge BECTON dissenting.

APPEAL by Defendant and Third-Party Plaintiff, Mowett Sales Company, Inc., from *Washington, Judge.* Order entered 15 October 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 August 1985.

This civil action was brought on behalf of the minor plaintiff, Jennifer Lee, to recover damages for personal injuries which she received as a result of being struck by the moving blade of a riding lawnmower operated by her father. The minor plaintiff alleged negligence and breach of warranties by defendants, Mowett Sales Company, Inc. (Mowett), the manufacturer of the lawnmower, and Lowe's of N. C. (Lowe's), the seller. Mowett answered, denying fault, and filed a third-party complaint against the minor plaintiff's father, Kyu C. Lee, alleging that his negligent operation of the lawnmower was at least one of the proximate causes of the minor plaintiff's injuries and seeking contribution for any damages which she might recover.

The third-party defendant, Kyu C. Lee, moved to dismiss the third-party complaint of Mowett on the grounds that it was barred by the doctrine of parent-child immunity. The trial court dismissed the third-party complaint for failure to state a claim upon which relief could be granted and further ordered, pursuant to G.S. 1A-1, Rule 54(b), that the order be entered as a final judgment. Mowett appealed.

Nichols, Caffrey, Hill, Evans & Murrelle, by Karl N. Hill, Jr. and Clyde H. Jarrett, for defendant and third-party plaintiff appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and Margaret E. Shea, for third-party defendant appellee.

MARTIN, Judge.

[1] Defendant and third-party plaintiff Mowett Sales Company, Inc. asserts on appeal that the trial court incorrectly relied upon the doctrine of parent-child immunity in dismissing the third-party complaint. Since, under present North Carolina law, parental immunity would have barred a personal injury action brought by the minor plaintiff directly against her father, it also bars this action by a third party to recover contribution from the father for inujuries to his minor child. We affirm the order dismissing the third-party action.

It is the general rule in North Carolina that unemancipated minors may not maintain an action against their parents to recover damages for an unintentional tort. *Skinner v. Whitley*, 281 N.C. 476, 189 S.E. 2d 230 (1972); *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923). Since the parent cannot be held liable in a direct action against him by the injured child, a third-party may not maintain an action against the parent, based on allegations of joint negligence, to recover contribution for damages awarded to the minor. *Watson v. Nichols*, 270 N.C. 733, 155 S.E. 2d 154 (1967).

By the enactment of G.S. 1-539.21, the legislature created a limited exception to the common law doctrine of parent-child immunity in North Carolina. G.S. 1-539.21 provides:

> The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the *operation of a motor vehicle* owned or operated by such parent.

(Emphasis added.) This statutory exception applies solely to tort actions arising out of the operation of motor vehicles. We do not believe that a riding lawnmower is a "motor vehicle" within the meaning of G.S. 1-539.21 and therefore hold that the limited statutory exception created thereby does not apply to this case.

[2] Mowett concedes the North Carolina rule to be as stated above but, citing the trend in other jurisdictions toward abrogation of the doctrine of parent-child immunity, urges that we judicially expand the limited statutory exception to the doctrine by providing unemancipated minors with a right to maintain an action for personal injury against their parents in all cases where

the injury does not arise from a negligent act involving the exercise of parental authority or discretion. Our responsibility, however, is to follow the decisions of the Supreme Court of North Carolina; those decisions continue to recognize the common law doctrine of parental immunity except as abrogated by G.S. 1-539.21. *See e.g., Carver v. Carver*, 310 N.C. 669, 314 S.E. 2d 739 (1984); *Gillikin v. Burbage, supra.* Moreover, as stated by Justice Huskins in *Skinner v. Whitley, supra*, in response to a similar argument:

> If the immunity rule in ordinary negligence cases is no longer suited to the times, as some decisions suggest, we think innovations upon the established law in this field should be accomplished *prospectively* by legislation rather than *retroactively* by judicial decree. Such changes may be accomplished more appropriately by legislation defining the areas of non-immunity and imposing such safeguards as may be deemed proper. Certainly that course is much preferred over judicial piecemeal changes in a case-by-case approach.

Id. at 484, 189 S.E. 2d at 235.

Affirmed.

Judge WEBB concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

While mindful of the legal precedent in this State and the role of the Supreme Court as the final authority on the interpretation of state law, I believe the issue presented in this appeal has not been fully or adequately addressed in light of the trend in the modern jurisprudence of parental immunity. The current state of the law in North Carolina is succinctly and accurately reflected by the majority. And although the law may not be in a constant state of flux, variations in facts and circumstances or the changing times sometimes prompt courts to reverse themselves. Because the issue is ripe for Supreme Court review, because I believe the courts in this State have the authority and obligation to modify or abolish inequitable and outdated judicial doctrines

when the need arises, and because, in my view, the need has arisen, I dissent.

The doctrine of parental immunity from liability for negligence causing injury to a child is purely a creation of American courts. Prosser and Keeton on the Law of Torts Sec. 122 (W. Keeton 5th ed. 1984); 1 Harper & James, Law of Torts Sec. 8.11 (1956). The doctrine took root in 1891, *see Hewlett v. George*, 68 Miss. 703, 9 So. 885, and spread to North Carolina in 1923, *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12. In *Small*, the Supreme Court relied upon the early American cases, *Hewlett*, *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903), and *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), and held that no action in negligence would lie between an injured unemancipated child and her father. The majority also held that no cause of action could be maintained against the father's insurer, although Chief Justice Clark dissented from this ruling. The decision in *Small* was grounded squarely in "practical considerations of public policy, which discourage causes of action that tend to destroy parental authority and to undermine the security of the home." 185 N.C. at 584, 118 S.E. at 15. The Court continued:

> To permit a minor child to sue its father for a tortious wrong would be to allow the child to take from its parent that which is already dedicated to its support and maintenance; because the law says that a parent must provide, according to his means, for the support, care, and maintenance of his minor children. It would also allow one minor child to gain an advantage over his minor brothers and sisters at the expense of the common fund which has been dedicated to a fair and equal support of them all. And further, even taking the plaintiff's view, a suit would do no more than award to the injured child that which the simple dictates of family life have already impressed with a trust in its favor. In this respect, it is permissible to observe that generosity is not a stranger to a willing hand, but it is to a forced one.

Id. at 585, 118 S.E. at 15.

The policies originally advanced in support of parental immunity no longer justify the doctrine for most purposes.

> In light of the ever-increasing criticism of the general rule that an action for personal injuries cannot be maintained

> between parent and child, and the growing number of exceptions to the rule, it seems that the time has arrived for its abolishment. We should frankly recognize that the earlier cases were wrongly decided. The reasons therein stated are no longer convincing.

3 Lee, North Carolina Family Law Sec. 248, at 298 (1981) (footnote omitted) (extensively reviewing the current problems with the parental immunity rule in this State). For example, the argument that there should be no action by a child against her parent for personal injuries because it would disrupt the domestic tranquility of the home is deeply flawed. Why should this rationale bar actions for personal torts but not for property damage, trespass to land or contract actions? We allow a child to sue his parent's employer on a respondeat superior theory. *Wright v. Wright*, 229 N.C. 503, 50 S.E. 2d 540 (1948). Would this not engender discord in the family of a parent whose employer is forced to pay for the parent's negligence in the course of employment? "It can hardly aid family reconciliation to deny an injured child access to the courts and, through them, to any liability insurance which the family might maintain." *Nocktonic v. Nocktonic*, 227 Kan. 758, 611 P. 2d 135 (1980) (rejecting parental immunity in automobile negligence cases).

It has been asserted that N.C. Gen. Stat. Sec. 1-539.21 (1983) is a justifiable exception to the parental immunity rule because, under this State's compulsory automobile insurance rules, parents are necessarily insured and domestic tranquility is not jeopardized by a child's suit. This argument fails because nothing in the statute limits recovery against a parent to the limits of the parent's insurance coverage. Thus, the statute allows a child to sue a parent for an amount greater than that covered by insurance. To this extent, the legislature has rejected the policies underlying the parental immunity rule.

Moreover, a moment's reflection casts the concern for domestic tranquility in a different light. No doubt the vast number of potential negligence actions by children against their parents never surface because of the presence of sufficient domestic tranquility. It is those cases in which such tranquility is absent, or indeed is not jeopardized because of the availability of liability insurance, that children sue their parents. Certainly in these

cases, there is no reason to propagate a policy of favoring negligent parents and their insurers over injured children. It is for this same reason that we should reject the related argument that allowing one injured child to recover depletes the family resources at the expense of other children. *See generally* Restatement (Second) of Torts Sec. 895G, comment c, at 427 (1979). After all, one parent may sue the other, N.C. Gen. Stat. Sec. 52-5 (1984), but a child cannot sue a parent even when the child is injured in the same accident. *See Prosser, supra*, Sec. 122 (this situation creates the "height of inconsistency") (citing *Redding v. Redding*, 235 N.C. 638, 70 S.E. 2d 676 (1952)); *see also Watson v. Nichols*, 270 N.C. 733, 735, 155 S.E. 2d 154, 156-57 (1967) (in dicta) (siblings may be able to sue each other).

The argument that abolishing parental immunity would open the door to insurance fraud is, at best, a secondary concern. The potential for fraud and collusion exists in all litigation and does not justify precluding the cause of action for an injured child. The proper forum for a determination of the extent of an allegedly negligent parent's collusion is a trial court with its rules for impeachment by cross-examination.

The assertion that allowing a child to recover against a negligent parent potentially allows the parent to profit from his own negligent wrongdoing by inheritance is a specious argument because we already allow children to recover for the *intentional* wrongdoing of their parents.

The final justification for the parental immunity doctrine is that we must not interfere with the parents' right to maintain their authority and exercise their discretion. This is a valid reason to preserve parental immunity, at least in situations in which this policy is implicated. Each of three modern standards for the limited applicability of parental immunity recognizes and implements this policy of respecting the discretionary parental domain. Each of these standards is briefly noted below and, I believe, should be weighed and considered by the Supreme Court or the legislature or both.

Several states have adopted the well-reasoned approach taken by the Wisconsin Supreme Court in *Goller v. White*, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963). Parental immunity was abolished except in two situations:

(1) Where the alleged negligent act involves an exercise of parental authority over the child; and

(2) Where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

Id. at 413, 122 N.W. 2d at 198; *see* Restatement, *supra*, Sec. 895G comment j, at 430.

A second approach was adopted by the California Supreme Court in *Gibson v. Gibson*, 3 Cal. 3d 914, 92 Cal. Rptr. 288, 479 P. 2d 648 (1971). The standard in California is now: "what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?" *Id.* at 921, 92 Cal. Rptr. at 293, 479 P. 2d at 653.

The third approach mentioned here is that offered by the American Law Institute in the Restatement (Second) of Torts Sec. 895G:

(1) A parent or child is not immune from tort liability to the other solely by reason of that relationship.

(2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or not tortious.

The Restatement's commentaries are especially appropriate today, six years after their publication, because the trend identified in 1979 continues to gain adherents:

Constant criticism of the immunity has led to its erosion by the development of numerous exceptions to it, which have been more or less sporadically recognized by many courts, until there are now very few jurisdictions if any, in which the immunity exists in any complete form. . . .

* * *

The *Goller* case has now been followed by a substantial minority of jurisdictions. The Institute regards these decisions as establishing a clear and accelerating trend, which is expected to extend to other courts. This Section approves

that trend and takes the position that under the better law the immunity between parent and child is entirely abrogated.

See Carver v. Carver, 310 N.C. 669, 314 S.E. 2d 739 (1984) (expanding the applicability of G.S. Sec. 1-539.21 to include actions for wrongful death, rather than only for personal injury or property damage).

It is significant that the Restatement approach, as well as the *Goller* and *Gibson* approaches, abolishes the doctrine and replaces it with a narrow rule respecting the role of parental discipline. This is to be preferred over an *ad hoc* approach, maintaining the parental immunity rule but carving out exceptions as they arise. Although the result is theoretically the same narrow doctrine, the Supreme Court's advice in *Skinner v. Whitley*, 281 N.C. 476, 484, 189 S.E. 2d 230, 235 (1972) is well taken: "Piecemeal abrogation of established law by judicial decree is, like a partial amputation, ordinarily unwise and usually unsuccessful." I am also mindful of the view taken by the Supreme Court in 1972:

> If the immunity rule in ordinary negligence cases is no longer suited to the times, as some decisions suggest, we think innovations upon the established law in this field should be accomplished prospectively by legislation rather than retroactively by judicial decree. Such changes may be accomplished more appropriately by legislation defining the areas of non-immunity and imposing such safeguards as may be deemed proper. Certainly that course is much preferred over judicial piecemeal changes in a case-by-case approach. A similar conclusion has been reached by others. "The simplest way to effectuate a change in the law is to enact a statute doing so. The courts have frequently said that the question of public policy is to be determined by the legislature and not by the court." 3 Lee, North Carolina Family, Sec. 248.

Id. (Emphasis omitted.) Nevertheless, this view may have been at least partially prompted by the belief that a judicial approach necessarily would be piecemeal. As mentioned above, the three approaches now firmly entrenched in other states are judicial innovations, in response to the inadequacy of the judicially-created parental immunity rule, that are not piecemeal.

Perhaps the simplest way to effectuate a change in this doctrine would be by statute. But this is not the only way. After all,

courts, not legislatures, created the doctrine. And most states that have abolished parental immunity have done so by court decision, not by statute. Lee, *supra*, Sec. 248, at 301. In my view, judicial action here would be consistent with the legislative intent behind the enactment of G.S. Sec. 1-539.21. That statute allows an unemancipated child to bring an action against his or her parent for the negligent operation of a motor vehicle. This was a rational legislative response to a specific problem of automobile accidents. *Ledwell v. Berry*, 39 N.C. App. 224, 226, 249 S.E. 2d 862, 864 (1978), *disc. rev. denied*, 296 N.C. 585, 254 S.E. 2d 35 (1979) ("We believe it is less than realistic to hold that the problem of automobile accidents is not sufficiently large to acquire a uniqueness of its own."). It is clear that the legislature did not intend to occupy the entire field of parental immunity, but merely provided a remedy when one was badly needed. In fact, it was suggested in *Carver* that the statute was enacted in response to judicial invitations to curtail the parental immunity rule. 310 N.C. at 673, 314 S.E. 2d at 742. In my view, the legislature appears to be taking the piecemeal approach feared by our Supreme Court.

It is appropriate for the courts to modify or abolish doctrines that they have created that no longer serve the interests of justice. Our courts created the parental immunity rule by relying on other states' decisions and must be able to alter it by relying on other states' decisions, at least when, as here, the legislature has not codified the common law. This State should not become the notable exception to the growing list of jurisdictions embracing the modern trend toward the abrogation of the parental immunity doctrine.

BETTYE JO LaFALCE AND HUSBAND, ANTHONY J. LaFALCE v. ROY EMERY WOLCOTT

No. 8428SC1271

(Filed 17 September 1985)

1. Appeal and Error § 6.2— disposal of fewer than all issues—no determination of no just cause for delay—appealable

A substantial right of the plaintiffs was affected and plaintiffs' appeal was not premature where the trial judge directed a verdict against plaintiffs,

denied plaintiffs' motion for a new trial and granted defendant's motion for a new trial on his counterclaim. Plaintiffs have completed one trial, will undergo a second on defendant's counterclaim if this appeal is not allowed, and then will undergo a third trial to relitigate the original action if their exceptions are meritorious. G.S. 1-277(a), G.S. 7A-27.

2. **Automobiles and Other Vehicles § 59.1— collision while defendant was making left turn—directed verdict against plaintiffs—improper**

A directed verdict against plaintiffs in an automobile collision case was improper where the evidence, in the light most favorable to plaintiffs, tended to show that plaintiff was driving in the outside lane of a four-lane street; she saw defendant's car while still several hundred feet away; defendant's car was in the driveway of a doctor's office; plaintiff passed on the left a slow-moving car, maintained her speed of about 30 or 35 miles per hour in the inside lane, and saw no cars ahead of her; plaintiffs' car was struck on the right side in her lane by defendant's car; defendant was attempting a left turn when his car stalled; plaintiffs' car was damaged on the right side; the damage to defendant's car was to the front bumper; and defendant's passenger was thrown forward and to the left as a result of the impact. It is a reasonable inference that defendant had stalled in the outside lane and rather than start the car and back into the driveway to wait for traffic to clear, defendant decided to proceed across plaintiff's lane to complete his left turn.

3. **Automobiles and Other Vehicles § 76.1— collision while defendant making left turn—directed verdict for plaintiffs on contributory negligence—improper**

Directed verdict against plaintiffs in an automobile collision case was improper where the collision occurred while defendant was making a left turn across a four-lane street and the damage was to the right side of plaintiffs' car and the front bumper of defendant's car. Plaintiff offered evidence from which defendant's negligence could be inferred and the evidence of plaintiff's contributory negligence was not overpowering.

4. **Damages § 13.1; Witnesses § 8.3— automobile accident—cross-examination on plaintiff's emotional problems—no error**

The trial court did not err in an action arising from an automobile collision by admitting testimony on cross-examination of plaintiff's past emotional problems, past institutionalization, and post-accident allegedly excessive drinking. These issues were relevant to the issue of plaintiff's "great pain of body and mind" allegedly caused by the accident.

APPEAL by plaintiffs from *Allen, Judge*. Judgment entered 16 March 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 August 1985.

Long, Howell, Parker & Payne, P.A., by Mary E. Arrowood, for plaintiff appellants.

Morris, Golding, Phillips and Cloninger, by Thomas R. Bell, Jr. and James N. Golding, for defendant appellee.

BECTON, Judge.

Plaintiffs, Bettye Jo and Anthony J. LaFalce, appeal from the trial court's judgment (a) allowing defendant's motion for a directed verdict and dismissing plaintiffs' personal injury and property damage action; and (b) allowing defendant's motion to set aside the verdict and granting defendant's motion for a new trial on defendant's counterclaim for property damage.

On 26 July 1983, Bettye Jo LaFalce was driving south in the outside lane of Asheland Avenue, a four-lane street. According to Ms. LaFalce, she saw a dark car in the driveway of a parking lot of a doctor's office ahead of her on the right side of the road. The only southbound traffic near her was a light-colored vehicle moving slowly in her lane, ahead of her, apparently preparing to turn right. Plaintiff changed lanes to the inside lane to pass the slower vehicle. At that time, the car of defendant, Mr. Wolcott, had stalled while he was attempting a left turn across the southbound lanes. The Wolcott and LaFalce cars collided.

Plaintiffs filed a claim for personal injury and property damage. Defendant counterclaimed for property damage, alleging plaintiff's negligence in failing to stop after seeing defendant's car stalled in the street. At the close of plaintiffs' case, the trial court allowed defendant's motion for a directed verdict. Defendant then presented evidence on his counterclaim, and the trial court denied plaintiffs' motion for a directed verdict. After the jury returned a verdict finding the plaintiff negligent but awarding no damages to the defendant, the court allowed defendant's motions to set aside the verdict and for a new trial on the counterclaim. Plaintiffs' Motion for Relief from Judgment and New Trial was denied.

Plaintiffs assert the trial court erred on three grounds: (1) plaintiffs' evidence was sufficient to go to the jury; (2) testimony that plaintiff had had emotional problems in the past, had been institutionalized and drank excessively after the accident was erroneously admitted; and (3) plaintiffs' Motion for Relief from Judgment and New Trial should have been granted because plaintiffs' attorney was not prepared and the jury disregarded the court's instructions. Defendant asserts that this interlocutory appeal should be dismissed. We disagree with defendant and allow the appeal. We agree with plaintiff that the evidence was sufficient to go to a jury, but disagree on the second and third grounds.

I

[1] The initial question is whether this appeal is premature. Clearly, the trial court's orders and judgments in this case disposed of fewer than all of the issues. Indeed, the court retained jurisdiction for a new trial on the defendant's entire counterclaim, and there has been no determination by the court that "there is no just reason for delay" under North Carolina Rule of Civil Procedure 54(b). Nevertheless, this appeal is permissible if it affects a substantial right of the plaintiff under N.C. Gen. Stat. Secs. 1-277(a) (1983) and 7A-27 (1981). *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 148, 229 S.E. 2d 278, 281 (1976); *Oestreicher v. Amer. Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Narron v. Hardee's Food Sys., Inc.*, 75 N.C. App. 579, 331 S.E. 2d 205 (1985).

As our Supreme Court candidly admitted, the "substantial right" test is "more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context. . . ." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978). Nonetheless, several principles emerge from the many interlocutory appeals this Court has considered. For example, the mere avoidance of a rehearing on a motion or the avoidance of a trial when summary judgment is denied is not a "substantial right." *Waters*, 294 N.C. at 208, 240 S.E. 2d at 344; *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 336, 299 S.E. 2d 777, 781 (1983) ("avoidance of a *portion* of an administrative hearing is not a 'substantial right' "). Similarly, an order granting a partial new trial is not immediately appealable, despite the language of N.C. Gen. Stat. Sec. 1-277(a) ("An appeal may be taken from every judicial order or determination [which] . . . grants or refuses a new trial."). *Johnson v. Garwood*, 49 N.C. App. 462, 463, 271 S.E. 2d 544, 545 (1980); *Unigard Carolina Ins. Co. v. Dickens*, 41 N.C. App. 184, 186-87, 254 S.E. 2d 197, 198 (1979) (jury verdict on liability allowed; grant of new trial on damages not immediately appealable); *accord Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E. 2d 431, 433-34 (1980) (order forcing plaintiffs to undergo full trial rather than trial on damages only, not appealable); *Tridyn Indus., Inc. v. Amer. Mutual Ins. Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979) (trial judge granted summary judgment on issue of liability only).

In another line of cases, our Supreme Court determined that a substantial right was affected by an order granting defendant's motion for partial summary judgment on plaintiff's claim for punitive damages. *Oestreicher v. Amer. Nat'l Stores, Inc.* In *Oestreicher*, the Supreme Court adopted the definition of "substantial right" found in *Webster's Third New International Dictionary* (1971): "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." 290 N.C. at 130, 225 S.E. 2d at 805. The Supreme Court then noted that the punitive damages claim was closely related to the other two claims in plaintiff's action.

> To require him possibly later to try the second cause of action for punitive damages would involve an indiscriminate use of judicial manpower and be destructive of the rights of both plaintiff and defendant. Common sense tells us that the same judge and jury that hears the claim on the alleged fraudulent breach of contract should hear the punitive damage claim based thereon. . . .
>
> We believe that a "substantial right" is involved here. If the causes of action were not subject to summary judgment, plaintiff had a substantial right to have all three causes tried at the same time by the same judge and jury. The case falls squarely within the definition of "substantial right" as defined by Webster's, *supra.*

Id. (citation omitted); *see Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 108, 229 S.E. 2d 297, 299 (1976) ("that this case involves a dismissal under Rule 12(b)(6) rather than a summary judgment does not affect the applicability of our holding in *Oestreicher*"). In short, the rule of *Oestreicher* and *Newton* is intended to prevent "a bifurcated trial." *See Tridyn*, 296 N.C. at 493, 251 S.E. 2d at 448.

In the case at bar, the trial judge directed a verdict against the plaintiffs, denied plaintiffs' motion for a new trial and granted defendant's motion for a new trial on his counterclaim. We believe this affects a substantial right of the plaintiffs. Plaintiffs have already completed one trial, and if this appeal is not allowed, they will undergo a second trial on defendant's counterclaim.

Then, if plaintiffs' exceptions are meritorious, they will undergo a *third* trial to relitigate plaintiffs' original action because the second trial will not include the issues of the extent and amount of plaintiffs' injuries or property damages. We find this case similar to *Roberts v. Heffner*, 51 N.C. App. 646, 650-51, 277 S.E. 2d 446, 449 (1981):

> In our opinion, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice makes it clear that the judgment in question works an injury to defendants if not corrected before an appeal from a final judgment. The burden on defendants in this case of being forced to undergo two full trials is much greater than that suffered by the appellant in *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978) (the necessity of rehearing its summary judgment motion), or by the appellant in *Bailey v. Gooding, supra* (the necessity of undergoing a full trial on the merits instead of a trial solely on the issue of damages) or by the appellant in *Industries, Inc. v. Insurance Co., supra* (the necessity of undergoing a trial on the issue of damages). We conclude that the judgment in question affects a substantial right of the defendants. . . .

Accordingly, we hold that this appeal affects a substantial right of the plaintiffs under N.C. Gen. Stat. Secs. 1-277(a) and 7A-27.

II

[2] The plaintiffs' first assignment of error is that the directed verdict against the plaintiffs was improper. It is not clear from the record whether the trial judge directed the verdict because plaintiffs failed to establish defendant's negligence or on the basis of plaintiff's apparent contributory negligence, or both. The judgment states, "the Court [is] of the opinion that the plaintiffs' evidence was insufficient to establish the allegations of negligence against the defendants and in effect indicated the plaintiffs' contributory negligence as a matter of law. . . ." The standard for allowing a directed verdict is well established.

> In passing upon a motion for a directed verdict, . . . the court must consider the evidence in the light most favorable to the non-movant, deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts

> favorably to him and giving the non-movant the benefit of all inferences reasonably to be drawn in his favor. . . . A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence.

Daughtry v. Turnage, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978) (citations omitted).

The evidence, in the light most favorable to plaintiffs, tends to show the following relevant facts. Plaintiff saw defendant's car while still several hundred feet away. Defendant's car was in the driveway of a doctor's office. As plaintiff passed on the left a slow-moving light-colored car, she maintained her speed of about 30-35 miles per hour in the inside lane and saw no cars ahead of her. Her car was struck on the right side, in her lane, by defendant's car. Defendant was attempting a left turn when his car stalled. Damage to plaintiff's car was to the right side. Damage to defendant's car was to the front bumper. Defendant's passenger was thrown forward and to the left as a result of the impact.

From these facts, a jury could reasonably infer that defendant had stalled in plaintiff's lane, and plaintiff negligently failed to stop. On the other hand, it is a reasonable inference that defendant had stalled in the outside lane, and, rather than start the car and back into the driveway to wait for traffic to clear, defendant decided to proceed across plaintiff's lane to complete his left turn. If the latter inference were drawn, it would be based on the testimony of plaintiff that she had a clear lane and was hit on the right; on the defendant's testimony that he had stalled while attempting a left turn; and on the physical evidence that the plaintiff's car was struck on the right side and defendant's passenger was thrown partially in a forward direction. This evidence supports the inference that defendant started his car after it had stalled and negligently ran into plaintiff's car without waiting for traffic to clear. This would not be *presuming* negligence improperly from the occurrence of an accident, as defendant contends. This would be drawing reasonable inferences, well within the province of the jury. *See Daughtry*, 295 N.C. at 546, 246 S.E. 2d at 791. We find that plaintiff has offered sufficient evidence, more than conjecture or surmise or mere proof of injury, to allow

a jury to infer negligence by the defendant. *See McDonald v. Moore Sheet Metal and Heating Co., Inc.*, 268 N.C. 496, 151 S.E. 2d 27 (1966).

[3] The issue of plaintiff's contributory negligence is also a jury question, unless the evidence indicates so clearly that plaintiff was negligent that reasonable minds may not differ and no other conclusion is possible. *Cowan v. Laughridge Const. Co.*, 57 N.C. App. 321, 326, 291 S.E. 2d 287, 290 (1982). In this case, reason allows an inference that plaintiff was suddenly struck from the side by a negligent defendant. Had there been uncontradicted evidence that defendant's car was stalled in plaintiff's lane, the question of plaintiff's contributory negligence, as a matter of law, would have been closer. *See, e.g., Blankton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967) (nonsuit proper); *Cummins v. Southern Fruit Co., Inc.*, 225 N.C. 625, 36 S.E. 2d 11 (1945) (no error in denying motion for nonsuit); *Williams v. Frederickson Motor Express Lines, Inc.*, 198 N.C. 193, 151 S.E. 197 (1930) (no contributory negligence as a matter of law); *Dunn v. Herring*, 67 N.C. App. 306, 313 S.E. 2d 22 (1984) (motion for directed verdict improper).

In *Carrigan v. Dover*, 251 N.C. 97, 110 S.E. 2d 825 (1959), plaintiff changed lanes because the car ahead of him had signaled to turn. A tractor-trailer was stopped about forty feet ahead in plaintiff's lane. Although it was night, there were street lights. Plaintiff testified he did not see the tractor until he was about thirty feet from it, and there was no evidence that plaintiff used his brakes. The Supreme Court concluded:

> In our opinion, opposing inferences are permissible from plaintiff's proof as to whether or not he ought to have seen in the exercise of ordinary care for his own safety the tractor-trailer in time to have avoided running into it, and as to whether or not he used ordinary care in the interest of his own safety, and therefore, the case was properly submitted to the jury.

251 N.C. at 103, 110 S.E. 2d at 829; *see Dunn* (citing *Carrigan* with similar facts). Thus, even if the plaintiff in our case had conceded that defendant's car was in her lane before the impact, the issue of contributory negligence still would be appropriate for the jury. The plaintiff was not required to anticipate that a car would be stopped in her lane or to anticipate defendant's negligence. *Dunn*,

67 N.C. App. at 310, 313 S.E. 2d at 24 (relying on *Cummins v. Southern Fruit Co., Inc.*).

Doubts and close cases should not be resolved by directed verdicts. In *Daughtry* the Supreme Court said, "evidence of plaintiff's contributory negligence, while strong, is not so overpowering as to preclude all reasonable inferences to the contrary." 295 N.C. at 544, 246 S.E. 2d at 789. We believe plaintiff offered evidence from which defendant's negligence could be inferred, and the evidence of plaintiff's contributory negligence was not overpowering. The trial judge improperly granted defendant's motion for a directed verdict, and plaintiffs are entitled to a new trial on their original action.

III

[4] Plaintiffs' second and third assignments of error are without merit. The trial court did not err in admitting testimony on cross-examination of plaintiff's past emotional problems, past institutionalization and post-accident allegedly excessive drinking. These issues were relevant to the issue of plaintiff's "great pain of body and mind" allegedly caused by the accident, as well as the other mental and physical manifestations claimed by the plaintiffs. The testimony objected to was elicited from Dr. James Sloan, plaintiff's personal physician. Moreover, this State's liberal rules of substantive cross-examination permit questioning "to bring out new and different facts relevant to the whole case." 1 H. Brandis, *North Carolina Evidence* Sec. 35, at 145 (2d rev. ed. 1982). Plaintiff introduced the subject of her mental and emotional state, and defendant's cross-examination was proper.

Plaintiffs' final contention is that they were denied a fair trial because their attorney was not properly prepared, failed to inform plaintiffs of defendant's counterclaim, told plaintiffs of the trial only thirty-five minutes before it began, and insisted that the trial could not be postponed. In light of our disposition of this case, remanding plaintiffs' claim for a new trial, any irregularity with respect to plaintiffs' trial attorney is harmless error.

Based on the foregoing, this case must be remanded for a new trial on plaintiffs' claim, to be tried together with defendant's counterclaim.

Reversed and remanded for a new trial.

Judges WEBB and MARTIN concur.

ROMER G. TAYLOR v. RAMON A. BRITTAIN AND WIFE, NELLIE TAYLOR BRITTAIN

No. 8425SC845

(Filed 17 September 1985)

1. Appeal and Error § 6.2— boundary dispute—partial summary judgment—appealable

The Court of Appeals in its discretion entertained an appeal from a partial summary judgment in a special proceeding to determine a disputed boundary even though the trial court merely held that a common corner was marked by a Ford axle and left the location on the ground of the corner for determination by the trier of fact where resolution of the question of the terminus of the parties' common corner effectively resolved the case. G.S. 38-1 *et seq.* (1984).

2. Reformation of Instruments § 1— deed of correction—not valid

A 1982 deed of correction was without legal effect where the grantors of the deed had divested themselves of legal title to the land thirty years before the deed of correction, the rights of third parties in the land were implicated by the correction deed, there was apparently no formal action instituted to reform the original deed, and the applicable statute of limitations barred reformation of the deed. G.S. 1-52(9) (1983).

3. Boundaries § 15.1— disputed corner—summary judgment improper

There was a triable issue of fact and summary judgment was improperly granted for respondent in a special proceeding to determine a disputed boundary where the titles of both parties were derived from deeds referring to an iron stake or an axle corner, a Ford axle was driven into an oak stump during a 1947 survey using 1927 calls, the 1927 deed referred to a Spanish oak, petitioner's evidence was that the Spanish corner was at a different location from the axle corner and that people familiar with the area knew the Spanish oak marked the common corner, a recent surveyor testified that the axle was driven into a red oak tree, respondent's evidence was that the axle corner had been recognized as the common corner since 1947, and a farmer familiar with the land in question testified that the axle was driven into a Spanish oak stump.

4. Adverse Possession § 2— adversity of possession not shown

There was no triable issue of fact by application of the doctrines of adverse possession or color of title in a special proceeding to determine a disputed boundary where respondent's deed purported to give them title to

the land in question, but petitioner had sold some timber off the land, petitioner's cattle used some of the land, and the male respondent stated that he knew where all the boundary lines were on his land, "all except the problem we got with this one."

APPEAL by petitioner from *Howell, Judge.* Judgment entered 20 February 1984 in Superior Court, BURKE County. Heard in the Court of Appeals 4 April 1985.

Simpson, Aycock, Beyer & Simpson, P.A., by Samuel E. Aycock and Michael Doran, for petitioner appellant.

McMurray & McMurray, by John H. McMurray, for respondent appellees.

BECTON, Judge.

I

This appeal arises from a special proceeding brought under N.C. Gen. Stat. Secs. 38-1, *et seq.* (1984), by petitioner, Romer Taylor, to establish the true location of a disputed boundary line between Taylor's tract of land and an adjoining tract owned by respondent spouses Nellie Taylor Brittain and Ramon A. Brittain. The heart of the controversy is the location of a common corner of the two tracts: Taylor's northwest corner and the Brittain's southwest corner. The various allegations made and defenses raised in the numerous pleadings can be distilled thusly: both parties contend that the descriptions in their respective deeds control; both parties also argue that regardless of deed language, they are entitled to prevail under theories of either adverse possession or color-of-title.

The Brittains moved for partial summary judgment to determine the location of the common corner, contending specifically that a Ford axle marked the corner in question. The trial court entered summary judgment in favor of the Brittains. Taylor appeals, arguing that (1) summary judgment was improvidently granted because the materials presented raised a genuine issue of material fact as to the location of the boundary line; and (2) the trial court erred in considering affidavits submitted by the Brittains containing material improper for summary judgment. For the reasons set forth below, we conclude that summary judgment

was erroneously granted, and we reverse. Therefore, we need not consider Taylor's second assignment of error.

II

In 1927, Lester Taylor's property was divided into eleven tracts of land pursuant to a special proceeding. Petitioner Romer Taylor's land is part of lot seven. Respondent Brittains' land is lot six. The county commissioners' report in the 1927 proceedings describes the northwest corner of lot seven as "a spanish oak and pointers West of an old road . . ."; it describes the southwest corner of lot six as "a spanish oak and pointers near an old road. . . ."

Respondent Nellie Taylor Brittain (then Nellie Taylor) was allotted lot six in the 1927 proceedings. In 1947, Nellie and Ramon Brittain conveyed lot six in trust, and the trustees reconveyed the property to them as a tenancy by the entirety. Prior to this transfer, the Brittains had the property surveyed to obtain a more accurate description of lot six. Ramon Brittain testified that in making the survey, the surveyor used the description of lot six contained in the 1927 county commissioners' report. The pertinent call in the report stated that the southwest corner of lot six was "44½ poles" from its northwest corner and was marked by the Spanish oak. Mr. Brittain testified that upon measuring the distance called for, the surveyor found that the terminus of the call was located at an old oak stump with a six to seven foot "sucker" (shoot) growing out of it. He testified that, at the direction of the surveyor, he drove a Ford axle into this stump to mark the southwest corner of the property and that the sucker has now grown into a tree around the axle. The 5 December 1947 deed to the Brittains creating the tenancy by the entireties describes the southwest corner of the property as "an iron stake in the line of Lot No. 8. . . ." While the Brittains contend that the surveyor accurately ran the call contained in the 1927 county commissioners' report to the spot where the axle is now located, Taylor maintains that another tree located 65½ feet to the north of the axle is the Spanish oak referred to in the report.

Mae F. H. Lowman acquired lot seven from the original grantee, Lewis Taylor, in 1947. Mr. and Mrs. Lowman conveyed part of this land by deed to petitioner Taylor in 1952. This deed describes the northwest corner of the land as "a Ford axle, Brit-

tain & Lowman's corner. . . ."[1] The northwest corner was the subject of a deed of correction executed by the Lowmans in 1982. The corrected deed describes the northwest corner as "a dead oak stump, Ramon Brittain's southwest corner. . . ." There was testimony in several affidavits submitted by Taylor that the Spanish oak is now dead, and the "dead oak stump" in the corrected deed refers to the Spanish oak corner.

III

Ordinarily, in a special proceeding brought under N.C. Gen. Stat. Secs. 38-1, *et seq.* (1984), "the only question presented is the location of the true dividing line," *Lane v. Lane*, 255 N.C. 444, 449, 121 S.E. 2d 893, 898 (1961), title or ownership to land not being directly at issue. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E. 2d 604 (1964). Particularly, "*[w]hat* are petitioners' lines is determinable as a matter of law from the calls in the description of their lands. *Where* these lines are located on the earth's surface is determinable as a matter of fact." *Id.* at 218, 136 S.E. 2d at 608 (emphasis added); *accord Combs v. Woodie*, 53 N.C. App. 789, 281 S.E. 2d 705 (1981) (what are termini is question of law; where termini are is question of fact).

[1] In the case *sub judice*, the Brittains moved "for summary judgment that the Ford axle in a tree marks the Northwest corner of [Taylor's] land and the Southwest corner of [Brittains'] land." The trial court held that the common corner was marked by the Ford axle and left the location on the ground of this corner for determination by the trier of fact. Although this order was for partial summary judgment and is interlocutory, its resolution of the question of the terminus of the parties' common corner effectively resolves this case. We therefore choose to exercise our discretion and entertain this appeal. *See Brown v. Hodges*, 232 N.C. 537, 61 S.E. 2d 603 (1950) (when court declares where boundary is, and location of boundary is either admitted or uncontroverted, the whole inquiry resolves itself into question of law).

Taylor argues that partial summary judgment was erroneously granted because the Brittains failed to establish the absence of a genuine issue of material fact and that they were entitled to judgment as a matter of law. We agree.

1. The trial judge deemed this deed controlling in granting summary judgment.

[2] The deeds alone are insufficient to satisfy the Brittains' initial burden of proof, even though the 1982 deed of correction was without legal effect. Taylor alleges that this deed, with its reference to the Spanish oak corner as the divisional point between lots six and seven, is the controlling instrument as to his rights in the land, superseding his 1952 deed. Pertinent authority, however, refutes Taylor's position.

> In an action for reformation of a written instrument, the plaintif [sic] has the burden of showing that the terms of the instrument do not represent the original understanding of the parties and must do so by clear, cogent and convincing evidence. . . . Additionally, there is 'a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety.' . . . This presumption is strictly applied when the terms of a deed are involved in order 'to maintain the stability of titles and the security of investments.'
>
> * * *
>
> As a general rule, reformation will not be granted if the rights of an innocent bona fide purchaser would be prejudiced thereby.

Hice v. Hi-Mil, Inc., 301 N.C. 647, 651, 653, 273 S.E. 2d 268, 270, 272 (1980) (citations and emphasis deleted); *see Buell Cabinet Co., Inc. v. Sudduth*, 608 F. 2d 431, 434-35 (10th Cir. 1979) ("As against third persons an alleged defective deed can be cured only by a bill in equity, and not by a confirmation assuming to relate back to the original deed." (quoting 26 C.J.S. *Deeds* Sec. 31 (1956))); 26 C.J.S. *Deeds* Sec. 31 (no amending deed when rights of third persons have intervened; also, once grantor has divested self of title, grantor cannot correct a mistake by a subsequent conveyance).

At bar, (1) the Lowman, Taylor's grantors, had divested themselves of legal title to the land thirty years before the second deed, (2) the rights of third parties in the land, the Brittains, were implicated by the correction deed, and (3) there was apparently no formal action instituted to reform the original deed. Further, it appears that the applicable statute of limitations

barred Taylor from reforming his deed. *See Huss v. Huss*, 31 N.C. App. 463, 230 S.E. 2d 159 (1976) (applying three year statute of limitations, N.C. Gen. Stat. Sec. 1-52(9) (1983) to action to reform deed on ground of mistake). We conclude that the deed of correction was void. We note that petitioner Taylor's only citation of authority as to the validity of the corrected deed is some general language found in J. Webster, *Real Estate Law in North Carolina* Sec. 466 (Hetrick rev. ed. 1981). Concluding as we do that the corrected deed was without legal effect, we do not reach the Brittains' contention that the 1982 deed, by its reference to "Ramon Brittain's southwest corner," is in the nature of a junior deed and is controlled by the description in the senior deed to which it necessarily refers, the 1947 deed to Nellie and Ramon Brittain.

[3] Once we remove the 1982 deed from our consideration, it appears that the respective titles of both parties are derived directly from deeds describing the controverted corner as the axle corner: the Brittains' 1947 deed uses the phrase "iron stake"; Taylor's 1952 deed refers to a "Ford axle." However, as noted earlier, the 1947 deed was based on a survey made from the 1927 report, which report exclusively referred to the "Spanish oak" in describing the common corner of lots six and seven.

Ramon Brittain testified that during the 1947 survey, when the surveyor measured the distance to the southwest corner of lot seven, by using the 1927 calls, the surveyor's corner was not the Spanish oak, but another oak stump 65½ feet further south, and the surveyor directed Ramon Brittain to drive the Ford axle into the stump at that more southerly location. Taylor contends that the oak stump into which Brittain drove the axle was not the Spanish oak referred to in the 1927 report, but was another oak tree altogether, located 65½ feet south of the Spanish oak.

Evidence in the record supports the positions of both parties. Taylor's evidence tends to show that the Spanish oak corner was at a different location than the axle corner, and people familiar with the area testified that they knew the Spanish oak marked the common corner. Furthermore, in the affidavit submitted by Taylor of a surveyor who did some recent surveying of the disputed line, the surveyor testified that the axle is driven into a red oak tree. The Brittains put on evidence showing that since 1947, the axle corner has been recognized as the common corner.

Theodore Hildebran, who testified that he has farmed the land in question and is familiar with it, further testified that the axle was driven into a Spanish oak stump.

Thus, the issue remains whether the oak stump with the axle or the Spanish oak tree is the Spanish oak intended to be the monument in the 1927 proceeding. This issue is material because if the oak stump with the axle were intended, the Brittains would be entitled to judgment as long as the Taylors failed to establish adverse possession. If the Spanish oak were intended, there would be a conflict in the deed between a natural monument and a distance, and the monument would control. *Brown v. Hodges.* Thus, Taylor would prevail on the deeds alone.

We conclude, then, that whether the Ford axle correctly identified the common corner as described in the 1927 survey, or whether that survey referred to the now-dead Spanish oak 65½ feet north of the axle, is a triable issue of material fact, and must be resolved by a jury.

IV

[4] On the deeds alone, then, we conclude that the Brittains failed to meet their burden of proof that, as a matter of law, the common corner is marked by a Ford axle. Therefore, the inquiry presents itself whether a lack of any triable issue of fact and entitlement to judgment as a matter of law was made out by application of the doctrines of adverse possession or color-of-title.

"Adverse possession is defined 'as the actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another' for the statutory period." *Casstevens v. Casstevens*, 63 N.C. App. 169, 171, 304 S.E. 2d 623, 625 (1983) (quoting Webster, *supra*, Sec. 286). "Adverse possession under 'color of title' is occupancy under a writing that purports to pass title to the occupant but which does not actually do so. . . ." Webster, *supra*, Sec. 294 (rev. ed. 1981); *see First-Citizens Bank & Trust Co. v. Parker*, 235 N.C. 326, 69 S.E. 2d 841 (1952). Adverse possession, to ripen into title after seven years, must be under color of title. N.C. Gen. Stat. Sec. 1-38 (1983). Otherwise, a period of twenty years is required. N.C. Gen. Stat. Sec. 1-40 (1983); *Justice v. Mitchell*, 238 N.C. 364, 78 S.E. 2d 122 (1953). A color-of-title situation can arise when the person executing the writing does not ac-

tually have title. Webster, *supra*, Sec. 294. A deed may constitute color of title for the land therein described. *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E. 2d 59 (1965). When a person claims ownership through color of title, as long as that person has some actual possession of a part of the land, he or she is deemed the constructive possessor of the remainder of the land described in the instrument constituting color of title. Webster, *supra*, Sec. 294; *see Carswell v. Morganton*, 236 N.C. 375, 72 S.E. 2d 748 (1952). Finally, and crucial to this case, a deed which is color of title without adverse possession does not afford the grantee protection of the statute. *Morehead v. Harris*, 262 N.C. 330, 337, 137 S.E. 2d 174, 182 (1964).

Applying the law to the case at hand, we conclude that the Brittains have failed to make out a *prima facie* case of adverse possession under color of title. Although their 1947 deed is color of title as it purports to give them title to land in question, sufficient evidence of adverse possession of the land is lacking. In his deposition, Ramon Brittain testified that he moved onto the land in 1969 and lived there continuously since that time. However, he also testified that, at an unspecified time after 1952, Romer Taylor had sold some timber off the land, Taylor had a dairy farm, and Taylor's cattle used some of the land. Further, when asked whether he knew where all the boundary lines were on his land, Brittain replied, "All except the problem we got with this one." In our opinion, this evidence does not demonstrate the requisite adversity of possession. *See generally* Webster, *supra*, Secs. 287-91. Thus, neither on the deeds alone nor pursuant to theories of adverse possession or color-of-title have the Brittains established that they are entitled to judgment as a matter of law.

V

On a motion for summary judgment, the moving party has the burden of showing the absence of a genuine issue as to any material fact and entitlement to judgment as a matter of law. *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979). However, if the movant fails in this showing, summary judgment is not proper regardless of whether the non-movant has responded. *See Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). As we have shown, neither by the deeds nor by the other evidence did the movants, Ramon and Nellie Brittain, meet their burden of

proof. Thus, summary judgment should have been denied, and the order is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges WEBB and PARKER concur.

ELAINE S. ELMORE v. BROUGHTON HOSPITAL

No. 8410IC1353

(Filed 17 September 1985)

Master and Servant § 64.1— workers' compensation—compensability of injuries from attempted suicide

The Industrial Commission did not err in finding that plaintiff's suicide attempt was caused by her "mental depression and derangement" directly related to and caused by a prior compensable back injury and that plaintiff was thus entitled to compensation for injuries received as a result of the suicide attempt where there was evidence tending to show that plaintiff attempted to take her own life because she could not bear the pain resulting from the back injury, felt there was no hope for improvement and became severely depressed by reason thereof. G.S. 97-12(3).

APPEAL by defendant from the North Carolina Industrial Commission Opinion and Award entered 5 July 1984. Heard in the Court of Appeals 22 August 1985.

Plaintiff received a compensable injury to her back on 1 July 1975 while working for defendant as a health care technician. She underwent two surgical operations: a laminectomy and fusion in February 1979 and a refusion in May 1981. In October 1981 plaintiff resumed work with defendant. On 1 November 1981 plaintiff suffered another injury by accident to her back when a patient grabbed her right arm and pulled her to the floor. Plaintiff was diagnosed as having fibrosis of the back secondary to her injury and surgeries. The parties stipulated that this injury arose out of and in the course of plaintiff's employment with defendant.

On 20 April 1982 plaintiff attempted suicide by jumping off the deck of her house, sustaining numerous and disabling injuries

as a result. She requested additional compensation for those injuries, claiming that her suicide attempt was caused by depression which resulted directly from her 1 November 1981 injury. The Full Commission, with Chairman Stephenson dissenting, found plaintiff to be entitled to additional compensation due to the additional injuries suffered in the suicide attempt. Defendant appeals.

Daniel and Kuehnert, P.A., by Daniel A. Kuehnert for plaintiff appellee.

Attorney General Lacy H. Thornburg and Russell, Greene & King, P.A., by Sandra M. King, for defendant appellant.

MARTIN, Judge.

The sole issue on appeal is whether the Industrial Commission erred in finding that plaintiff's suicide attempt was due to "mental depression and derangement," directly caused by and related to her compensable November 1981 injury, and in concluding therefrom that she was entitled to compensation for injuries sustained as a result of the suicide attempt. We discern no error in the award.

The scope of review on appeal from an award of the Industrial Commission is whether the Commission's findings of fact are supported by competent evidence in the record, and whether such findings support its legal conclusion. *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). This Court does not weigh the evidence; if there is any evidence of substance which directly or by reasonable inference supports the Commission's findings, we are bound by such findings even though there may be evidence to the contrary. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 201 (1981); *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980).

Evidence before the Commission included the following: Dr. Eugene Willett, an orthopedic surgeon, testified that, in his opinion plaintiff had reached maximum medical improvement with respect to her 1 November 1981 injury on 27 January 1982, and suffered from chronic pain. As a result of her suicide attempt on 20 April 1982, plaintiff fractured her right heel, fractured her pelvis on both sides, dislocated her right elbow, fractured her

right wrist, fractured her left leg and fractured a vertebra in her back. By reason of these injuries, Dr. Willett testified that plaintiff sustained an additional 5% permanent partial disability to her back, 20% permanent partial disability to her right arm, and 10% permanent partial disability to her right hand. Dr. Willett testified that plaintiff had not yet reached maximum medical improvement from those injuries. Dr. John Sherrill testified that plaintiff was totally disabled as a result of her 20 April 1982 injuries.

Dr. Norman Boyer, plaintiff's psychiatrist, testified that he had known plaintiff for ten or eleven years. In late 1971 and 1972 plaintiff had been depressed and suicidal, but prior to her 1981 injury she was "getting along beautifully." Dr. Boyer said that prior to her injury plaintiff was an excellent worker, that she was interested in her job and had a great deal of self-esteem because of her abilities, and she was happy. In his opinion, her prior psychiatric problems were completely behind her at the time of her November 1981 injury. That injury caused plaintiff's depression because of the pain and the change in lifestyle caused by the injury. Plaintiff was unable to work, and her self-esteem due to her abilities at her job was lost. She could no longer do the things she enjoyed due to her physical condition and financial difficulties. She became fearful of losing her home. All of these factors added to plaintiff's depression. Because of the pain, there was more depression than there otherwise would have been. Along with the depression she suffered a personality change, consisting of irrationality, anti-social feelings, irritability and paranoid feelings. On 20 April 1982 plaintiff had become "more and more depressed and hopeless and desperate about the situation" and, because of "an accumulation of all of these things," she attempted suicide. Dr. Boyer also testified that "hopelessness about the future is generally the *sine qua non* of suicide" and that "the maximum severity of depression is suicide." When asked whether, in his opinion, plaintiff's suicide attempt could have been caused by her back pain and the problems which she developed following her back injury, Dr. Boyer answered, "I think it is all connected, yes, all part of the same syndrome."

Barbara Burns, who lived with plaintiff, testified that plaintiff had undergone a personality change after the 1 November 1981 injury. She was withdrawn, discouraged and depressed and was obviously suffering from a great deal of pain. She also testi-

fied that after plaintiff's medical appointment on 20 April 1982, plaintiff was "completely withdrawn" and "completely depressed." Plaintiff testified that she attempted suicide because she wanted to die after learning from her physician that her pain was something she "was going to have to live with."

Defendant argues that the following findings of fact made by the Commission are not supported by sufficient competent evidence:

> 6. . . . Plaintiff became mentally depressed and deranged as a result of her continuing back pain and her inability to work and carry out other activities as a consequence of her stipulated injury. On 20 April 1982, after a visit to Dr. Willett, plaintiff stood on a chair on the deck of her home and jumped off in a suicide attempt.
>
> . . . .
>
> 8. Plaintiff's mental depression and derangement, her feelings of hopelessness and desperation, which caused her suicide attempt and her resulting injuries, were directly related to and caused by plaintiff's 1 November 1981 injury which disabled her from work and forced her disability retirement. Plaintiff has been totally disabled since 20 April 1982 as a result of her 1 November 1981 injury and the injuries suffered in her suicide attempt.

On the basis of its findings, the Commission concluded that plaintiff was entitled to compensation for a specified period of time "for an additional five percent permanent partial disability of the back resulting from her compensable injury of 1 November 1981" and "to compensation at the same weekly rate from the date of her suicide attempt for as long as she remains totally incapable of earning wages."

Defendant argues that, although there was evidence that plaintiff was depressed, the evidence does not show that she was "deranged." According to defendant, without proof of derangement, plaintiff is barred from recovery under G.S. 97-12 which provides:

> No compensation shall be payable if the injury or death to the employee was proximately caused by:
>
> . . . .

(3) His willful intention to injure or kill himself or another.

Defendant bases its argument on its interpretation of *Petty v. Associated Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970). In our view, this reliance is misplaced. In *Petty*, Edgar Petty's widow sought to recover death benefits under G.S. 97-38. Petty had been working for defendant as a truck driver, and was injured on 13 February 1966 when a two-pound hunk of concrete fell into his truck and fractured his right cheek and shattered his jawbone. His doctor drilled holes in his jaw and wired it together and placed wires around his teeth. Petty could not talk or eat and he lost forty pounds. He suffered severe pain from muscular spasms in his face, neck and jaw, could not yawn, and had numbness in his lower lip and jaw. Prior to the accident Petty was happy, healthy and well-adjusted. After the accident he was depressed and anxious, and had thoughts of killing his wife and mother-in-law. On 8 July 1966 Petty shot himself in the head and died. Dr. W. D. Clarkson testified that in his opinion the injury Petty received on 13 February could have contributed to Petty's depression. Dr. Clarkson described his condition as "involutional psychotic depression." Nonetheless, the Full Commission found that Petty's death "was occasioned by his willful and premeditated intention to kill himself," and concluded that G.S. 97-12 barred plaintiff from recovering any compensation. In reversing the Commission, our Supreme Court adopted the "chain of causation" test, holding that "an employee who becomes mentally deranged and deprived of normal judgment as a result of a compensable accident and commits suicide in consequence does not act wilfully within the meaning of G.S. 97-12." *Id.* at 428, 173 S.E. 2d at 329. The case was remanded to the Industrial Commission for a specific finding as to whether Petty's death was attributable to "an abnormal mental condition" resulting from his injury by accident. *Id.* at 429, 173 S.E. 2d at 330.

More recently this issue was addressed in *Thompson v. Lenoir Transfer Co.*, 48 N.C. App. 47, 268 S.E. 2d 534, *disc. rev. denied*, 301 N.C. 405, 273 S.E. 2d 450 (1980). In that case John H. Thompson injured his leg in an automobile accident in the course of his employment. He died in December 1976 as a result of an overdose of pain medication. The Deputy Commissioner found as fact that prior to the accident Thompson had been well-adjusted, active and fun-loving, but between his accident and his suicide he

was "quite depressed and dejected." The Deputy Commissioner denied death benefits to Thompson's widow, based on his conclusion that the depression was not shown to be sufficient to cause the suicide, and therefore, the suicide was willful and intentional. This court vacated and remanded the opinion and award, and held that the Commission erred in excluding evidence of Thompson's physical and mental condition, because the evidence was relevant to appellant's theory that the work related injury caused Thompson such pain and depression that he was caused to commit suicide. The court discussed *Petty* noting that the issue is not whether the employee has knowledge that he is killing himself, but whether there is an unbroken chain of causation from the compensable injury to the suicide. The court reviewed the testimony of Thompson's doctor, wife and friends: Thompson's orthopedic surgeon testified that "the severe pain and depression could have contributed to decedent's death." Thompson's wife said he had been despondent and "in real bad pain." Thompson's friends testified that he was depressed, "could hardly stand the pain," was "down in the dumps," and had cried. The court held that under *Petty*, if the Commission were to find the above stated facts as true, Thompson's wife would be able to recover death benefits. In other words, a finding that decedent's injury caused him to be very depressed and in a lot of pain, which caused him to commit suicide, was sufficient to come within the *Petty* exception to G.S. 97-12.

The evidence in the instant case clearly satisfied the standard set forth in *Petty* and applied in *Thompson*. In both cases, the abnormal mental condition shown by the evidence was precipitated by pain, manifested by personality change and described as "depression," evidence strikingly similar to that presented by plaintiff. There was considerable evidence that plaintiff attempted to take her life because she could not bear the pain which resulted from her injury, felt that there was no hope for improvement in her situation and became severely depressed by reason thereof. This was sufficient evidence of an abnormal mental condition to support the Commission's finding that plaintiff suffered from "mental depression and derangement" directly related to and caused by her compensable injury and that such condition caused her suicide attempt and resulting injuries. This finding supports the Commission's award of compensation.

In her brief, plaintiff attempts to argue that the Commission erred in failing to award permanent and total disability benefits. Although the evidence would arguably support such an award, plaintiff failed to cross-appeal from the complained-of portion of the Commission's award. We therefore decline to disturb it.

Affirmed.

Judges WEBB and BECTON concur.

MARY NANCY ALMOND McMANUS v. JOSEPH BRINSON McMANUS

No. 8420DC1032

(Filed 17 September 1985)

1. **Appeal and Error § 24.1— burdensome assignments of error—proper procedure**

An issue can be raised by filing one assignment of error that states the issue just once and which cites all exceptions on which it is based. Rules of App. Procedure Rule 10(c).

2. **Divorce and Alimony § 30— findings of marital property—no error**

The trial court did not err in an equitable distribution action by finding that cash, stock, and a Dodge van were marital property, and that deck furniture was the separate property of plaintiff. Although the evidence does not directly show that defendant had the cash when the parties separated, it clearly permits that inference; although defendant testified that the stock was a gift from his father and therefore separate property, the stock was acquired during the marriage and G.S. 50-20 creates the presumption that all property so acquired was marital property; the weight and credibility of defendant's testimony was for the trial court to determine; the van was a 1973 model which was originally titled in defendant's name and defendant testified that he did not know whether he sold it before or after the separation, which is hardly "cogent and convincing" proof that the van or the sale proceeds were not marital property; and the trial court found that the deck furniture had no value. G.S. 50-20(c).

3. **Divorce and Alimony § 30— equitable distribution—closely held corporation—properly determined**

The trial court in an equitable distribution action properly determined that defendant's interest in a closely held corporation was worth $29,865. Defendant's interest included 35 shares of stock for which defendant paid $14,000, an option to complete the purchase of 215 more shares at the same price of $400 a share by weekly payments of $200 each, the right to vote all

250 shares while the rest of the stock was being paid for, and the preemptive right to buy the remaining 250 shares of outstanding stock whenever the other owner desired to sell; defendant received an average annual dividend on the stock of $15,865 for the years 1981, 1982 and 1983.

4. Divorce and Alimony § 30— equitable distribution—mathematical inadvertence in judgment—no new trial

Where the trial court's judgment in an action for equitable distribution recited that the value of the property allocated to defendant exceeded that distributed to plaintiff by $2,747.36 and the actual difference in the value of the distributions according to the various other values found was $2,447.36, the error was but a typographical and mathematical inadvertence which was not a basis for a new trial and which was corrected by the Court of Appeals.

Judge EAGLES concurs in the result only.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from *Burris, Judge.* Judgment entered 27 February 1984 in District Court, STANLY County. Heard in the Court of Appeals 8 May 1985.

Defendant's appeal is from an equitable distribution made pursuant to G.S. 50-20. After finding that both parties had acquired certain individually owned property which they were entitled to keep, the court found that during the thirteen years between their marriage in 1968 and their separation in October, 1981 that the parties had acquired certain marital properties, determined their values, distributed them in kind between the parties, and the articles distributed to defendant being worth more than the articles distributed to plaintiff, defendant was directed to compensate plaintiff for the difference. Defendant contends that the court erred in determining the status of certain properties and in determining the values of others.

Brown, Brown & Brown, by Charles P. Brown, for plaintiff appellee.

James, McElroy & Diehl, by David M. Kern, for defendant appellant.

PHILLIPS, Judge.

[1] At the threshold the inaptness and burdensome prolixity of defendant's assignments of error requires comment. *They fill*

seven record pages, 8 inches by 11 inches in size, an inordinate length for a case so limited in length and scope. Most of them do not comply with our appellate rules and are utterly superfluous, even though their purpose was to preserve every one of the myriad exceptions that were made to virtually every finding and ruling of the court, except the incidental findings concerning the marriage, separation and employments of the parties. For example, the court's ruling that a witness was an expert is the subject of one assignment and the court's acceptance of the witness's testimony is the subject of another; the court's finding that a 1973 Dodge van was marital property is the subject of three different assignments, one of which questions whether the evidence supports the finding that it was a 1973 model; and the court's finding that $9,799.25 in cash was marital property and therefore divisible between the parties is the subject of three different assignments, only one of which raises a legal issue for our determination, one of the others inexplicably asserting that the court erred in including the fund "in its judgment because no evidence exists with regard to disposal or use of the fund." By one assignment that has *nineteen separate subdivisions*—16 of which are supported by the same, identical 15 exceptions—defendant asserts that the "trial court erred in its valuation of the following items" and then lists 16 household articles and 3 other assets; but this multifarious assignment raises no issue of law for our determination, of course, since "the basis upon which error is assigned" is not stated in the assignment, as Rule 10(c) of our Rules of Appellate Procedure requires. *Town of Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351 (1950). But in addition to being inadequate this 19-pronged assignment was completely superfluous; for by another 19 part assignment, each supported by the identical exceptions as the previous assignment, it is finally asserted that "[t]here was insufficient evidence" to support the court's findings that the same 19 items had the values stated. An assignment of error is supposed to raise a legal issue for the Court's determination, and not every exception to a ruling by the trial judge does that; many exceptions, though soundly made, are but the prelude to a justiciable legal issue, since appellate courts do not decide abstract questions and no legal issue of consequence is raised by errors that do no harm to the litigant. Thus, when an appellant's ultimate position is that he has been harmed by the court erroneously receiving into evidence opinion testimony from

an unqualified person, that legal issue can be raised by filing one assignment of error that says that just once and which cites all exceptions that relate either to the qualifications or improper testimony of the witness. To raise the legal issue whether the court's findings that 16 articles of household furniture are marital property are sufficiently supported by evidence, it was not necessary to file what in effect were sixteen assignments of error; the issue could have been raised by one properly phrased assignment, which cited just once the many exceptions it is based on. And the few other legal issues that the defendant desired to raise by this appeal could have been raised by a like number of similarly succinct and supported assignments of error. Mercifully, most of the multitudinous assignments were not discussed in the brief and therefore require no discussion by us.

[2] Now to the assignments of error that are supported by argument. Defendant contends that the evidence does not support the court's findings that $9,799.25 in cash, certain Triad Life stock, and a Dodge van were marital property, and that the deck furniture was the separate property of the plaintiff. These contentions are without merit and we overrule them. As to the cash fund, defendant argues that under G.S. 50-20(b)(1) marital property must be "presently owned" at the time of the separation and that since the evidence does not show that he owned the cash when they separated it was not marital property. We disagree. The evidence shows, as the court found, that—

> 22. Between September 22, 1981 and October 15, 1981 Defendant had cash funds of $9,799.25 unaccounted for but which he did not use to pay any outstanding debts, loans or taxes, or to make any purchases or home repairs or improvements of items, and that such amount far exceeded their ordinary monthly expenses.

While the evidence does not directly show that defendant had the money on October 15, 1981 when they separated, it clearly permits that inference. As to the Triad Life stock, defendant contends that it was a gift from his father and therefore separate property. His testimony does tend to support this claim; but the property was acquired during the marriage and G.S. 50-20 creates the presumption that all property so acquired is marital property, and requires the party claiming otherwise to prove his claim by

"clear, cogent and convincing" evidence. *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). Under the circumstances, the weight and credibility of defendant's testimony was for the trial court to determine, and the court as trier of fact did not find defendant's testimony to be "clear, cogent and convincing." Our evaluation of the defendant's testimony cannot be substituted for that made by the trial court.

As to the 1973 Dodge van, the property division schedule incorporated into the court's judgment states that the van is a 1973 model, from which it can be inferred that it was acquired during the marriage and was marital property. Furthermore, defendant testified, in brief, that the van was originally titled in his name and that he did not know whether he sold it before or after the separation—which is hardly "cogent and convincing" proof that the van or the sale proceeds was not marital property. As to the deck furniture being plaintiff's separate property, even if this was error, as it apparently was, it was harmless, for the court found that it had no value and there was evidence to that effect. The Equitable Distribution Act requires the distribution of marital assets according to their "net value." *See* G.S. 50-20(c); *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985); Sharp, Equitable Distribution of Property in North Carolina: A Preliminary Analysis, 61 N.C. L. Rev. 247 (1983). It does not require the distribution of articles that have no net value.

[3] Defendant next contends that the trial court erred in finding that an interest in A & A Auto and Industrial Parts, Inc., a closely held corporation that defendant operated and served as president, is worth $29,865. The interest in question includes 35 shares of stock that defendant has already paid for at a cost of $14,000; the option to complete the purchase of 215 more shares at the same price of $400 a share by weekly payments of $200 each; the right to vote all 250 shares while the rest of the stock is being paid for; and the preemptive right to buy the remaining 250 shares of outstanding stock whenever the other owner desires to sell. The court's finding is based on evidence that defendant paid $14,000 for the stock, was buying more stock at the same price of $400 a share, and received an average annual dividend on the stock of $15,865 for the years 1981, 1982 and 1983. This is support enough in our opinion. The court's finding is further buttressed, however, by other evidence showing that his voting rights to both

the stock he is in the process of buying, as well as the 35 shares already paid for, enables him to be president of the company and receive a much higher salary than he was receiving as an employee of the company before he contracted to buy the stock. Control of a profitable business has value, which can be determined in many different ways. *See Lavene v. Lavene*, 162 N.J. Super. 187, 392 A. 2d 621 (1978); Business Valuation Handbook, Desmond and Kelley, Second Edition (1979). The way that the court determined the value of the stock interest involved, which was distributed to defendant, was permissible in our opinion.

[4] Finally, defendant contends that the trial court's division of the property is neither equal nor equitable and was an abuse of discretion. The only bases advanced for this argument are those already discussed and rejected plus a mistake that the court made in calculating the value of the assets distributed to each party. The judgment recites that the value of the property allocated to defendant exceeds that distributed to plaintiff by $2,747.36 and that plaintiff's interest in that excess is therefore $1,373; whereas the actual difference in the value of the distributions, according to the various other values found, is $2,447.36. Thus, the equalizing payment required of defendant is only *$1,223.68*, rather than $1,373. But this error is no basis for granting a new trial; it is but a typographical and mathematical inadvertence which we herewith correct. With this modification only the judgment of the trial court is affirmed.

Modified and affirmed.

Judge EAGLES concurs in the result only.

Judge BECTON concurs in part and dissents in part.

Judge BECTON concurring in part and dissenting in part.

The majority opinion prompts responses on two levels. First, given the number of appeals that are dismissed, not to mention the number of times attorneys are admonished, when attorneys fail to comply strictly with the Rules of Appellate Procedure, I am loathe to castigate attorneys and to find specific fault when an overly cautious attorney makes more than one assignment of er-

ror or sets forth more than one exception to a particular ruling of the trial court.

Second, I concur in the majority's analysis of all issues except the Triad stock issue. In my view Mr. McManus proved by clear, cogent and convincing evidence that the Triad stock was his separate—not marital—property. *See Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). Indeed, the uncontradicted evidence was that during the course of the marriage between the parties, Mr. McManus' father bought stock in Triad Life and placed it in the name of each of his children, including Mr. McManus. Mr. McManus specifically testified that he did not put any of his own money into acquiring the stock and that his father gave the stock to him and not to the plaintiff, Mrs. McManus. Consequently, this case presents no issue on appeal in which my "evaluation of the defendant's testimony [is] . . . substituted for that made by the trial court." Ante. p. 5.

I reject the majority's implicit suggestion, relying on the statutory presumption that property obtained during the marriage is "marital property," that the trial judge as trier of the facts simply disbelieved Mr. McManus' evidence. I find no basis upon which the trial court could have found that the Triad stock constituted "marital property," and the trial court, therefore, erred in making the Triad stock a part of the "equitable distribution."

IN THE MATTER OF THE WILL OF MOLLIE PARKER, DECEASED

No. 847SC1149

(Filed 17 September 1985)

1. **Wills § 14— prosecution bond by caveator not authorized**

The propounder, not the caveator, functions as a plaintiff in a caveat proceeding, and the trial court thus had no discretion to require the caveator to post a prosecution bond pursuant to G.S. 31-34 in addition to the $200 bond required by G.S. 31-33.

2. **Rules of Civil Procedure § 41— failure to comply with erroneous order—no dismissal with prejudice**

A G.S. 1A-1, Rule 41(b) dismissal with prejudice for failure to comply with "any order of court" cannot be premised on a party's failure to comply with an erroneous order.

Judge PHILLIPS concurring in the result.

APPEAL by caveator from *Tillery, Judge.* Order entered 1 June 1984 in Superior Court, NASH County. Heard in the Court of Appeals 15 May 1985.

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

Michael P. Peavey, for caveator appellant.

BECTON, Judge.

I

This case presents an appeal from an order dismissing with prejudice the caveat of Lucille Carey to the alleged will of Mollie Parker. The factual and procedural history follows.

Mollie Parker died in Philadelphia, Pennsylvania on 3 January 1983, at the age of 81. She had apparently lived in Nash County, North Carolina, for most of her life. On 24 September 1982, she was taken from Wilson Memorial Hospital in Wilson, North Carolina, where she had been hospitalized since 7 August 1982, to Philadelphia, by her cousin, Lucille Carey. There was evidence that Carey had not visited with Parker in North Carolina for about 50 years prior to June 1982, when she learned of Parker's illness.

A will dated 15 January 1981 was admitted to probate in Nash County on 12 January 1983, naming Peoples Bank & Trust Company as executor of her estate and naming Vivian Garcia, a longtime friend of Parker's, as her sole beneficiary. Parker had no surviving children or spouse. A caveat to the will was filed by Carey on 26 January 1983, based in part upon a Pennsylvania probate of a will dated 28 August 1982. This subsequent will named Lucille Carey as sole beneficiary. Discovery ensued, and on 24 January 1984, pursuant to a 5 January 1984 motion made by Garcia, the trial court issued its order directing Carey to complete the citation of interested parties within 60 days, and to post an additional $5,000 bond as security for costs within 30 days. Garcia filed a subsequent motion to dismiss the caveat on the grounds of noncompliance with this order, and on 7 June 1984, the trial court entered the order which is the subject of this appeal. In this

order, the trial court found and concluded that Carey had failed to post the increased bond and failed to cite additional persons, and therefore dismissed the caveat with prejudice pursuant to N.C. Rules of Civil Procedure, Rule 41(b).

Carey, the caveator, appeals, alleging that (1) it was error to require her to post an increased prosecution bond, and that therefore (2) it was error to dismiss the caveat for failure to comply with an invalid order; (3) that it was error to dismiss the caveat because Rule 41(b) of the North Carolina Rules of Civil Procedure does not apply to a caveator in a caveat proceeding, and in the alternative, (4) that the order of involuntary dismissal was defective for failing to separately state necessary conclusions of law. For the following reasons, we reverse and remand.

II

[1] In its order, the trial court ordered Carey to increase security for costs to $5,000 pursuant to N.C. Gen. Stat. Secs. 31-34 (1984) and 1-109 (1983). Carey contends that this was error because a prosecution bond cannot be required of a caveator in an action to contest a will. We agree.

In North Carolina, a propounder has the option to probate a will in either common form or solemn form. Common form is an *ex parte* proceeding, normally without notice except to the witnesses of the will. Solemn form, on the other hand, involves the citation of all interested persons to the probate proceeding. While both common and solemn form protect the will against collateral attacks, only solemn form protects against direct attacks. When a will has been probated in common form, a caveat is a demand that the propounder proceed in solemn form. N.C. Gen. Stat. Secs. 31-32 *et seq.* (1984).

N.C. Gen. Stat. Secs. 31-33 and 31-34 (1984) govern the posting of bonds in caveat proceedings. G.S. Sec. 31-33 provides that the clerk of a superior court is to transfer the cause to the superior court trial docket "[w]hen a caveator shall have given bond with surety approved by the clerk, in the sum of two hundred dollars ($200.00), payable to the propounder of the will, conditioned upon the payment of all costs which shall be adjudicated against such caveator in the superior court . . . ." A caveat filed without compliance with this bond requirement is not a valid at-

tack upon the will. *See In re Will of Winborne*, 231 N.C. 463, 57 S.E. 2d 795 (1950). In this case, the evidence is undisputed that caveator Carey filed proper security in the amount of $200 under G.S. Sec. 31-33. What is in dispute is whether the trial judge had the discretionary authority to increase the caveator's $200 bond under G.S. Sec. 31-34, which reads, in its entirety:

> When any action is instituted to contest a will the clerk of the superior court will require the prosecution bond required in other civil actions: Provided, however, that provisions for bringing suit in forma pauperis shall also apply to the provisions of this section.

G.S. Sec. 31-34 was enacted in 1937. We have found no reported cases construing this statute. The leading treatise on North Carolina wills, N. Wiggins, *Wills and Administration of Estates in N.C.* (2d ed. 1983) does not mention it. Unlike G.S. Sec. 31-33, the language of the statute does not make plain that it applies to caveators, stating only that a prosecution bond is required as in all civil actions. As a prosecution bond is, by definition, only required of a plaintiff in a civil action, N.C. Gen. Stat. Sec. 1-109 (1983), the inquiry naturally arises whether, in a proceeding in solemn form, the propounder or caveator occupies the position of a plaintiff and thus could be liable for a prosecution bond.

Although a caveat proceeding is an *in rem* proceeding without a plaintiff and a defendant as such, it is the propounder who has the initial burden of proof, namely, to prove that the instrument in question was executed with proper formalities required by law. Once this has been established, the burden shifts to the caveator to show that the execution of the will was procured by undue influence. *In re Will of Coley*, 53 N.C. App. 318, 280 S.E. 2d 770 (1981). In addition, like a plaintiff, the propounder puts on its evidence first. *Cf. In re Will of Simmons*, 43 N.C. App. 123, 133, 258 S.E. 2d 466, 472-73 (1975), *disc. rev. denied*, 299 N.C. 121, 262 S.E. 2d 9 (1980). This leads to the conclusion that it is the propounder, and not the caveator, who functions as a plaintiff in a caveat proceeding. Our conclusion is supported by the only written commentary we were able to discover on G.S. Sec. 31-34, a paragraph in "A Survey of Statutory Changes in North Carolina in 1937," 15 N.C. L. Rev. 321, 352-53 (1937). While acknowledging that the statute is "not entirely clear," the passage suggests that

it may have been enacted to require both parties to post bond: "The propounders appear as plaintiffs in the contest, and it may be the purpose of the statute to require them to give bond, when a caveat is filed, so as to have the costs secured by both parties."

Other indicia support our conclusion that G.S. Sec. 31-34 is not applicable to the caveator. First, the two statutes relating to bonds appear consecutively, and while G.S. Sec. 31-33 expressly refers to a bond given by a caveator, G.S. Sec. 31-34 refers only to a "prosecution bond." Also, both G.S. Sec. 31-33 and G.S. Sec. 1-109 (the prosecution bond statute referenced in G.S. Sec. 31-34) have bonds in the amount of $200, and we do not presume the legislature intended to promulgate a redundant statute. Finally, Garcia argues that the amount of the caveator's bond, $200, is too low realistically to cover actual costs in a caveat proceeding, which costs may include attorney's fees. *See* N.C. Gen. Stat. Sec. 6-21(2) (1981). Although it is true that the amount of the caveator's bond has remained unchanged for decades, it is the prerogative of the legislature, not the judiciary, to amend the statute and increase the bond requirement. We conclude that the trial court erred in ordering the caveator, Carey, to post the increased bond.

III

[2] Ordinarily, an action may be involuntarily dismissed with prejudice, under Rule 41(b) of the North Carolina Rules of Civil Procedure, for failure to comply with "any order of court." However, our Supreme Court recently held that a Rule 41(b) dismissal with prejudice cannot be premised on a party's failure to comply with an erroneous order. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E. 2d 423 (1981). As indicated above, the trial court order increasing the caveator's bond for court costs to $5,000 was without authority and must be set aside.

It is true that the trial court based its Rule 41(b) dismissal with prejudice on Carey's failure to post the increased bond *and* her failure to cite additional parties, pursuant to the 18 January 1984 order. The order required the caveator to post the unauthorized bond "within 30 days" and to cite all persons interested in the estate "within 60 days." Consequently, as a practical matter, it seems pointless to require the caveator to cite additional parties when she faces the imminent dismissal of her case for failure to comply with the directive regarding the increased bond.

Believing that the order dismissing the caveat was a nullity, it is not necessary for us to determine whether Carey's failure to cite additional parties is an alternative grounds for involuntary dismissal with prejudice.

Reversed and remanded.

Judge PHILLIPS concurs in the result.

Judge EAGLES concurs.

Judge PHILLIPS concurring in the result.

Though I agree with the result reached by the majority I do not agree with some of the things said in getting there. That G.S. 31-34 applies to caveators who institute actions that contest wills could not be clearer in my opinion. It forthrightly states that when "any action is instituted to contest a will" that the Clerk will require the same prosecution bond that is required in other civil actions, which is $200, of course, except for paupers and governmental agencies. G.S. 1-109. An action to contest a will is certainly instituted when a caveat is filed to a will that is being probated in common form before the Clerk of Superior Court. "A proceeding to contest a will is begun by filing a caveat or objection to probate with the Clerk of the Superior Court, . . ." *Brissie v. Craig*, 232 N.C. 701, 704, 62 S.E. 2d 330, 333 (1950). Before a caveat is filed such a probate is an informal, *ex parte* proceeding for the Clerk to determine; after the caveat is filed and the statutory bond is given the probate is a full-blown contested lawsuit under the control of the trial court. G.S. 31-33. Under the hybrid procedure that governs the litigation of will cases, who technically or theoretically is the plaintiff or has the burden of proof, as discussed in the majority opinion, has nothing to do with the problem, in my view. G.S. 31-34 requires a prosecution bond of whoever *institutes* an action to contest a will, and since this action was instituted by the caveator she is subject to the statute and requiring her to furnish the usual $200 cost bond was authorized. Which is not to say that G.S. 31-34 does not also apply to propounders in appropriate cases, for I think it does, but that question is not before us since the propounder did not institute this action.

KAREN FLIPPEN PERDUE v. MICHAEL LYNN PERDUE

No. 8521DC70

(Filed 17 September 1985)

Divorce and Alimony § 25.9— child custody—rehabilitation from alcoholism—change in circumstances

Where plaintiff had lost custody of her child to the father because of a problem with alcohol abuse, the mother's substantial progress in rehabilitation from alcoholism constituted a sufficient change in circumstances to support the trial court's return of custody of the child to plaintiff mother.

Judge BECTON concurring in the result.

Judge MARTIN dissenting.

APPEAL by defendant from *Harrill, Judge*. Judgment entered 17 August 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 29 August 1985.

The defendant appeals from an order changing the custody of a minor. The parties had been married but were divorced on 13 April 1981. The custody of the only child born to the marriage was awarded to the plaintiff in the divorce decree in which decree was incorporated by reference a separation agreement and consent judgment which gave custody to the plaintiff.

On 8 June 1983 the defendant made a motion in the cause that he be given custody of the child. At that time the plaintiff was receiving treatment for alcoholism. She had been in an institution twice in connection with alcohol abuse and had been involved in an automobile accident while intoxicated in which the child was injured. The court on 23 August 1983 gave the custody of the child to the defendant and ordered that a hearing be held in June 1984 should the plaintiff request it to determine the best interest of the child at that time.

In the summer of 1984 the plaintiff made a motion for change of custody. On 9 August 1984 a hearing was held on the plaintiff's motion. On 17 August 1984 the court entered an order in which it found facts to the effect that she had made substantial progress in rehabilitation from alcoholism and her "accomplishments . . . constitute a material change of circumstances affecting the welfare of the child." The court ordered the custody returned to the plaintiff. The defendant appealed.

Sparrow & Bedsworth, by W. Warren Sparrow and George A. Bedsworth, for plaintiff appellee.

Wolfe and Collins, by John G. Wolfe, III, for defendant appellant.

WEBB, Judge.

This appeal brings to the Court a question as to whether there has been a sufficient change in circumstance to return the custody of the parties' child to the plaintiff. G.S. § 50-13.7(a) provides in part, "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." The appellant, relying on *Harris v. Harris*, 56 N.C. App. 122, 286 S.E. 2d 859 (1982) and *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429, *disc. rev. denied*, 301 N.C. 87 (1980) argues that the courts of this state "have expanded the statutory language of G.S. 50-13.7(a)" to require for a change in custody not only a change in circumstance as stated in the statute but a change in circumstance which will adversely affect the child if custody is not changed. There is language to this effect in the cases cited by the defendant and in other cases. *See Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978); *Tucker v. Tucker*, 288 N.C. 81, 216 S.E. 2d 1 (1975); and *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974). We believe this language must be interpreted in the light of a maxim of these cases that a district court judge has a broad discretion in determining custody. In this case it is evident the court felt in the summer of 1983 that except for the plaintiff's problem with alcohol the best interest of the child would be served by continuing custody with the plaintiff. When the plaintiff's problem was ameliorated this change in circumstance removed the obstacle to making it in the child's best interest to be with her mother. In the summer of 1984 the best interest of the child would be served by awarding custody to the plaintiff. This means the change of circumstance is such within the meaning of the language of the cases that the child will be adversely affected if custody is not changed.

We believe we are bound by *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537 (1973) to hold that the findings of fact support the district court's order in this case. One of the facts in that case

which our Supreme Court held supported a finding of change in circumstance sufficient for an order for change of custody was that the mother had been emotionally unstable at the time of the hearing at which she was deprived of custody but was emotionally stable at the time of the hearing at which custody was returned to her. In this case the child was taken from the mother because of her problem with alcohol. When the court found this problem had been alleviated it could under *Spence* return the custody of the child to the plaintiff.

We hold that on the facts found in this case the court did not abuse its discretion.

Affirmed.

Judge BECTON concurs.

Judge MARTIN dissents.

Judge BECTON concurring in the result.

Although technicalists could argue that the trial court was overly concerned with the "best interest of the mother," in my view, the record supports the trial court's determination to *reinstate* custody to the mother. After all, the father was essentially given temporary custody for the 1983-84 school year, the trial court specifically noting that the mother could request a hearing "in June of 1984 after the coming school year, to determine what is then in the best interest of the minor child." And, to me, that seems imminently practical, considering (a) that the mother had exercised either joint or sole custody of the six-year-old child during the child's first five years; and (b) that the only reason the custody order was amended was because of the mother's alcoholism.

I do not believe a person's temporary incapacitation because of physical problems or sickness should evoke a different response than temporary incapacitation due to alcoholism. Significantly, in addition to finding that the mother had "adequate facilities . . . to afford generous care and love and affection for the minor child," the trial court, even when it granted the father custody "was of the opinion that [the mother] . . . was making an

effort to control her [alcohol] problem and had made substantial progress but a sufficient time had not elapsed to demonstrate that it was in the best interest of the child to award . . . custody to [the] mother." Finally, the decretal portion of the order reinstating custody in the mother is supported by what the trial court labels as finding of fact and conclusion of law number 7:

> 7. The finding in the 15 August 1983 order that both parties were fit and suitable parents remains undisturbed but the accomplishments of the child's mother since that time constitute a material change of circumstances affecting the welfare of the child and justify a reinstatement of the custody provisions contained in the 13 April 1981 divorce judgment, it being in the best interest of the child that she be returned to the mother's custody subject to her father's visitation privileges.

Judge MARTIN dissenting.

I would reverse the judgment of the District Court. It is well-settled law that the welfare of the child is the paramount consideration which must guide the judge in cases involving custody of children. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974). A prior custody decree may be modified only upon findings of fact based on competent evidence that there has been a substantial change in condition affecting the welfare of the child. *Id.; Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978).

Neither the evidence presented at the 9 August 1984 hearing, nor the court's findings in its order of 17 August 1984, disclose a material change in circumstances affecting *the welfare of the minor child* in this case. The evidence offered by plaintiff tended to show that although she had made laudable progress in overcoming her alcoholism, she was separated from her second husband and was considering a third marriage. She was steadily employed but continued to reside with her parents. Although she earned more than $20,000 per year and paid no rent, she made no contribution to the support of the minor child. She conceded that her daughter was well cared for while in defendant's home and that the child's grades in school had improved while in defendant's custody. On the other hand, the defendant's evidence indicated that the minor child had lived in a stable environment

during the year in which he had had custody of her. The court's order simply chronicled the plaintiff's progress and found that she had adequate facilities to care for the child. The court found that both plaintiff and defendant were fit and suitable parents, "but the accomplishments of the child's mother . . . constitute a material change in circumstances affecting welfare of the child . . . it being in the best interest of the child that she be returned to the mother's custody. . . ."

In my view, the only change in circumstances disclosed by the evidence and found by the court affected the welfare of the mother, rather than the minor child. The record discloses no change in circumstances affecting the welfare of the child sufficient to justify a modification of the prior order awarding custody to the defendant father.

I likewise believe the majority misapprehends the Supreme Court's decision in *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537 (1973). In that case, the finding that the plaintiff mother had become emotionally stable was only one of a number of factors which the trial court found in modifying a custody decree to award custody to the mother rather than the grandparents. Other factors relied upon by the court included findings that the mother had supported the children and provided them with a good home; was attending to their schooling, religious education and social life; that she had arranged her affairs so as to be with the children when they were not in school; and that, due to the grandparents' age, she was better able to respond to the daily needs of the children than were the grandparents. These findings, concluded the Supreme Court, were sufficient to support the trial court's holding that the best interests of the children required a modification of custody.

The evidence and findings in the case *sub judice* fall far short of *Spence*, and fail to justify a modification in custody. The judgment of the District Court should therefore be reversed.

CIBA-GEIGY CORPORATION v. WAYNE BARNETT

No. 8418SC389

(Filed 17 September 1985)

1. **Courts § 2.1— jurisdiction—refund credit and replacement goods by domestic corporation to out-of-state agent**

The trial court had jurisdiction of an action by a domestic corporation against an out-of-state salesman to recover credits or replacement products resulting from falsified customer complaints and refund requests where the refund credits and replacement goods shipped by plaintiff were "things of value" as contemplated by G.S. 1-75.4(5)d and were shipped on defendant's order or direction.

2. **Process § 14.3— minimum contacts—evidence sufficient**

North Carolina could properly assert personal jurisdiction over an out-of-state defendant in an action by a domestic corporation to recover refund credits and replacement goods shipped by the corporation to an out-of-state salesman based on falsified customer complaints and refund requests where defendant had a lengthy business relationship with a North Carolina concern, his contacts with this state were not merely fortuitous, the alleged tort which is the subject of the action arose directly out of defendant's purposeful activity in sending claims to plaintiff in North Carolina, and North Carolina has a strong interest in protecting persons doing business here against employee fraud. Simply because defendant was able to cause the injury without physically coming to this state does not defeat jurisdiction. G.S. 14-90 *et seq.*

APPEAL by defendant from *Albright, Judge.* Order entered 28 November 1983 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 August 1985.

This is a civil action in which plaintiff agricultural chemical company seeks damages allegedly incurred as a result of tortious conduct by defendant salesman, its employee. From an order denying his motion to dismiss for lack of personal jurisdiction, defendant appeals.

Plaintiff company, with its home office in Greensboro, sued defendant employee, who lived in Indiana and worked in sales territories in Indiana and Ohio. Defendant was employed by plaintiff from 1970 to 1982. Defendant's original contract of employment was entered into at plaintiff's home office in New York, but in 1972 plaintiff's home office relocated to Greensboro. Since 1972 defendant routinely submitted his purchase orders, reimbursement claims, and correspondence to the Greensboro office; his

personnel file was maintained in Greensboro; and personnel evaluations and decisions regarding his salary were made there. Defendant came to North Carolina only once, to attend a week-long sales meeting at plaintiff's headquarters.

This litigation arose out of defendant's alleged tortious conduct between 1980 and 1982 in submitting falsified customer complaints and refund requests, then converting the credits or replacement products to his own use. Plaintiff claimed that defendant's fraudulent actions caused it at least $25,000 damage. Defendant was duly served with process. Defendant moved to dismiss, claiming he had no contacts with North Carolina and had done no business here.

From the trial court's order denying his motion, defendant appeals.

Graham, Cooke, Miles & Bogan, by James W. Miles, Jr., for defendant-appellant.

Smith Moore Smith Schell & Hunter, by Maureen J. Demarest, for plaintiff-appellee.

EAGLES, Judge.

This appeal is properly before us. G.S. 1-277(b). Its resolution involves two questions: (1) Did defendant's conduct bring him within the North Carolina "long-arm" jurisdictional statutes? and (2) If so, does the exercise of that jurisdiction satisfy constitutional standards of due process? *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). For reasons discussed below, we answer both questions in the affirmative.

I

[1] Our jurisdictional statutes are to be construed liberally in favor of finding personal jurisdiction. *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, *appeal dismissed and disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985). G.S. 1-75.4(5) is relevant here:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> * * *

(5) Local Services, Goods or Contracts.—

In any action which:

* * *

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction;

. . . .

From the record we conclude that the refund credits and replacement goods (The record is silent as to whether the goods were actually shipped from North Carolina; but they were shipped under orders from plaintiff's home office in Greensboro.) shipped by plaintiff were "things of value" (or "goods") as contemplated by G.S. 1-75.4(5)d and that they were shipped "on [defendant's] order or direction." Accordingly we conclude that the court had jurisdiction under G.S. 1-75.4(5).

II

[2] The second question involves a determination of whether defendant, by his conduct, has established sufficient "minimum contacts" with this state such that requiring him to defend here will not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). The minimum contacts test is not mechanical, *id.*, but requires consideration of the facts of each case. Decisions of the United States Supreme Court control, *see Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974), as well as North Carolina precedents.

Minimum contacts do not arise *ipso facto* from actions of a defendant having an effect in the forum state. *Kulko v. Superior Court*, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690, *reh'g denied*, 438 U.S. 908, 57 L.Ed. 2d 1150, 98 S.Ct. 3127 (1978). There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228, *reh'g denied*, 358 U.S. 858, 3 L.Ed. 2d 92, 79 S.Ct. 10 (1958), such that he or she should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980). In light of modern business practices, the quanti-

ty, or even the absence, of actual physical contacts with the forum state merely constitutes a factor to be considered and is not of controlling weight. *Burger King Corp. v. Rudzewicz*, --- U.S. ---, 85 L.Ed. 2d 528, 105 S.Ct. 2174 (1985). In *Burger King*, the court rejected an individual Michigan franchisee's argument that he had never visited Florida, the franchisor's home state and the forum state, but had dealt exclusively with a Michigan district office. The court found that defendant had knowingly affiliated himself with a national organization, agreeing to close supervision from Florida over a substantial period of time in exchange for the business benefits of joining a restaurant chain, and therefore constitutionally could be sued in Florida.

Similarly, in *Calder v. Jones*, 465 U.S. 783, 79 L.Ed. 2d 804, 104 S.Ct. 1482 (1984), the court found that a Florida reporter and editor could be sued for libel in California, despite limited physical contacts with the state. The court, relying heavily on the fact that the magazine had its largest circulation in plaintiff's home state of California, concluded that defendants' intentional and allegedly tortious actions were expressly aimed at that state, and upheld California's assertion of jurisdiction. "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.* at 790, 79 L.Ed. 2d at 812-13, 104 S.Ct. at 1487.

In light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional in tort cases. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 79 L.Ed. 2d 790, 104 S.Ct. 1473 (1984); *Calder v. Jones, supra.* In two other recent tort cases the court denied review on facts similar to those here. In *Heilig v. Superior Court*, 149 Cal. App. 3d 978, 197 Cal. Rptr. 371 (1983), *appeal dismissed and cert. denied sub nom. Heilig v. Miller*, 466 U.S. 966, 80 L.Ed. 2d 811, 104 S.Ct. 2336 (1984), California asserted jurisdiction over non-residents who had signed an allegedly libelous letter outside California for distribution in the state. The key to the California court's reasoning was defendants' knowledge that their tortious acts would have direct effect in California. In *Wagman v. Lee*, 457 A. 2d 401 (D.C. Ct. App.), *cert. denied*, 464 U.S. 849, 78 L.Ed. 2d 145, 104 S.Ct. 158 (1983), the court allowed an action for breach of fiduciary duty to

be prosecuted in the District of Columbia, where the affected plaintiffs lived, even though all the tortious acts occurred in Maryland, defendant's home.

This court has repeatedly considered certain primary and secondary factors in deciding minimum contacts questions. *See e.g. Sola Basic Industries, Inc. v. Parke County Rural Elec. Membership Corp.*, 70 N.C. App. 737, 321 S.E. 2d 28 (1984); *Harrelson Rubber Co. v. Layne*, 69 N.C. App. 577, 317 S.E. 2d 737 (1984). Without going through each factor exhaustively, we note that defendant had a lengthy business relationship with a North Carolina concern; that his contacts with this state are not merely fortuitous; that the alleged tort which is the subject of this action arose directly out of defendant's purposeful activity in sending claims to plaintiff in North Carolina; that North Carolina has a strong interest in protecting persons doing business here against employee fraud, *see* G.S. 14-90 *et seq.*; and, that the convenience factors appear to be roughly balanced.

Based on the foregoing authorities and discussion, we conclude that North Carolina could and did properly assert personal jurisdiction over defendant. Defendant knowingly submitted allegedly fraudulent documents over a period of two years, causing substantial damage to a corporation doing business here. It was clear that the alleged tort would have its damaging effect in North Carolina. Simply because defendant was able to cause the injury without physically coming to this state does not defeat jurisdiction. *Calder v. Jones, supra.*

Recent federal decisions support our result. In *Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F. 2d 1062 (4th Cir. 1982) (applying North Carolina law), plaintiff alleged that defendant, a California corporation with no other contacts in North Carolina, tortiously interfered with plaintiff's contracts by means of three letters and five phone calls to this state. The court held that defendant, by intentionally making the tortious contacts in North Carolina, which became essential elements of plaintiff's action, subjected itself to jurisdiction in North Carolina. The court rejected defendant's argument that its contacts simply did not suffice on a quantitative basis. In so doing, the *Vishay* court relied heavily on *Murphy v. Erwin-Wasey, Inc.*, 460 F. 2d 661 (1st Cir. 1972), where the court noted: "Where a defendant

knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that State." 460 F. 2d at 664 (footnote omitted). We find this logic compelling, especially in light of this defendant's long term, continuing business relationship with plaintiff in North Carolina.

The order appealed from is

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. KEITH A. BAILEY

No. 844SC1089

(Filed 17 September 1985)

1. **Automobiles and Other Vehicles § 126.3; Criminal Law § 55— blood sample—drawing by qualified person—testing procedures**

The State's evidence established that a blood sample was drawn from defendant by a qualified person within the meaning of G.S. 20-139.1(c) where it showed that the person withdrawing the blood had a degree in medical laboratory technology and over three years experience as a technologist, and that her normal duties consisted of drawing blood. Furthermore, the State was not required to show the nonexistence of flaws in the testing procedures in order for the results of chemical analysis of the blood to be admissible.

2. **Automobiles and Other Vehicles § 126.2; Criminal Law § 42.6— blood sample—same blood as drawn from defendant—chain of custody**

The State sufficiently demonstrated that a vial of blood introduced into evidence was the same blood as that drawn from defendant in a hospital, although the vial was labeled "John Doe No. 2," was placed in the hospital's laboratory refrigerator to which other hospital personnel had access, and was later placed in a highway patrolman's home refrigerator where it was accessible to his family, where each witness who had custody of the vial of blood from the time it was drawn until the time of its analysis testified that nothing was done to alter or change the contents of the vial while in the witness's custody and that the vial did not appear to have been tampered with.

3. **Automobiles and Other Vehicles § 113.1— involuntary manslaughter—cause of collision—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction on two charges of involuntary manslaughter arising from a collision between two

vehicles where there was evidence that defendant was driving with a blood alcohol content of .17%, testimony by a witness who observed the vehicles immediately before the collision and by the investigating patrolmen supported an inference that defendant's automobile crossed the center line of the highway and struck the other vehicle, and the evidence showed that two persons in the other vehicle died from injuries received in the collision.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 14 December 1983 in Superior Court, ONSLOW County. Heard in the Court of Appeals 20 August 1985.

Defendant was charged with two counts of involuntary manslaughter, driving left of center and driving while under the influence of alcohol. A jury returned verdicts of guilty as to all offenses. The trial judge arrested judgment as to the misdemeanors and imposed the presumptive sentence of imprisonment for each count of involuntary manslaughter, to run consecutively. Defendant appealed.

Attorney General Lacy H. Thornburg, by T. Buie Costen, Special Deputy Attorney General, for the State.

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

MARTIN, Judge.

Defendant brings forward two assignments of error. The first relates to the admissibility of a vial of blood allegedly drawn from defendant at Onslow Memorial Hospital; the second challenges the sufficiency of the evidence to withstand his motions for dismissal of the charges. For the reasons which follow, we conclude that the challenged evidence was properly admitted and that the State presented sufficient evidence to sustain the convictions.

At trial the State's evidence tended to show that the defendant was driving an Oldsmobile automobile south on U.S. 17 in Onslow County during the early morning hours of 2 June 1983 when he was involved in a head-on collision with an M.G. automobile occupied by Zachary Lennon and Ronnie Beatty. Lennon was killed instantly and Beatty died within several hours after the collision. Approximately 10 to 15 seconds before the collision occurred, defendant's Oldsmobile passed an automobile driven by Ronnie Griffin, who was also travelling south on U.S. 17. After defend-

ant's car had gotten about a quarter mile in front of Griffin's car, Griffin saw two headlights coming from the opposite direction. As he watched, he became able to see only one headlight. He then saw the oncoming car swerve suddenly to its right and "then everything just went dark." He did not see the Oldsmobile swerve. When he arrived at the scene, he found an M.G. automobile occupied by the victims in the ditch to the right side of its travel lane; defendant's automobile was stopped crosswise in the southbound lane of the road with its front end over the center line. Trooper Dennis described damage to the left front portion of each vehicle. Most of the debris and gouge marks on the road were located in the northbound lane, which had been the travel lane for the M.G. Trooper Dennis found an empty wine bottle and an empty beer bottle in defendant's car. Both Beatty and defendant were taken to Onslow Memorial Hospital. Beatty's identity was ascertained shortly thereafter, however defendant's identity remained unknown at the time his treatment began. Trooper Dennis detected the odor of alcohol on defendant's breath at the emergency room. Medical evidence showed that both Lennon and Beatty died from injuries received in the collision.

Jacqueline Hazelton, a medical laboratory technologist, drew two samples of blood from defendant for purposes of medical treatment. Defendant was unconscious. Because she did not then know defendant's name, she labeled one of the vials "John Doe No. 2" and placed it in a refrigerator. The other vial was placed in a different refrigerator and was subsequently disposed of. The following day, Trooper John Dennis of the State Highway Patrol, the investigating officer, obtained a court order to receive possession of the vial of blood. The order was served on Cecil Jones, Chief Medical Technologist for the hospital, who removed the vial of blood labeled "John Doe No. 2" from the refrigerator where it had been placed by Ms. Hazelton and turned it over to Trooper Dennis. Trooper Dennis took the vial to his home and placed it in his refrigerator until 20 June 1983 when he arranged for another officer, Trooper Calder, to transport the vial to the SBI laboratory in Raleigh for analysis. The State and the defense stipulated that the sample was received and properly tested, in accordance with procedures approved by the Commission for Health Services, at the SBI laboratory by Carl Kempe, a forensic chemist possessing a permit issued by the Department of Human Resources for

chemical analysis of blood. The result of the analysis indicated that the defendant had a blood alcohol content of .17%.

I

[1] Defendant contends by his first assignment of error that the trial court erred in admitting evidence of the blood sample in that the evidence was insufficient to establish the integrity or identity of the sample. He argues first that the State failed to demonstrate that the blood sample was drawn according to the requirements of G.S. 20-139.1(c) or that the specimen was reliable. We find no merit in this argument. G.S. 20-139.1(c) simply provides that when a blood test is to be used to determine a person's alcohol concentration "only a physician, registered nurse, or other qualified person may withdraw the blood sample." The State presented evidence that Ms. Hazelton had a degree in Medical Laboratory Technology, over three years experience as a technologist, and that her normal duties consisted of drawing blood. This is certainly sufficient evidence that defendant's blood was drawn by a qualified person. *See State v. Watts*, 72 N.C. App. 661, 325 S.E. 2d 505 (1985). As to the reliability of the specimen for testing, defendant argues that the State failed to produce evidence that the specimen was not contaminated by testing or by procedures in obtaining the specimen, such as the use of an alcohol swab on defendant's arm or sterilization of the sampling apparatus in alcohol. There was no evidence elicited on direct or cross-examination of the technologist as to the procedures employed in drawing the specimen, or whether any tests were, in fact, performed on it at the Onslow Memorial Hospital laboratory. The State is not required to negate every possible flaw in the testing procedure in order for the results of the chemical analysis to be admissible, it is only required that the State show compliance with the provisions of G.S. 20-139.1. In this case, through its evidence and the defendant's stipulation, the State met its burden of proving compliance with the statute so as to render the evidence admissible. Defendant's argument that the State has failed to show the nonexistence of flaws in the procedures more properly relates to the weight to be given the evidence by the jury, rather than its admissibility.

[2] Defendant also contends that the evidence was insufficient to identify the blood sample labeled "John Doe No. 2" as the same

blood sample drawn from the defendant. Defendant argues that because the vial was labeled in that manner and placed in the hospital's laboratory refrigerator to which other hospital personnel had access and was later placed in Trooper Dennis' home refrigerator where it was accessible to his family, the State failed to demonstrate that the vial of blood introduced in evidence at the trial was the same blood as that drawn from the defendant. We disagree.

Proof beyond all doubt is not required. The trial judge, in his discretion, determines the standard of certainty required in showing that an object offered at trial is the same as that taken from the defendant. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). If all the evidence can reasonably support a conclusion that the blood sample analyzed is the same as that taken from the defendant then it is admissible into evidence. *State v. Karbas*, 28 N.C. App. 372, 221 S.E. 2d 98, *disc. rev. denied*, 289 N.C. 618, 223 S.E. 2d 395 (1976). The fact that the defendant can show potential weak spots in the chain of custody only relates to the weight to be given the evidence establishing the chain of custody. *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979).

The State presented the testimony of each witness who had custody of the vial of blood from the time it was drawn until the time of its analysis. Each of the witnesses testified that nothing was done by them to alter or change the contents of the vial while in their custody and that the vial did not appear to have been tampered with. The evidence was sufficient to reasonably support the conclusion that the blood sample analyzed by Agent Kempe and introduced at trial was the same as that drawn from defendant by Ms. Hazelton.

II

[3] By his second assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charges due to the insufficiency of the evidence. A defendant may be convicted of involuntary manslaughter in connection with the operation of a motor vehicle upon proof by the State that defendant (1) violated a safety statute, (2) in a culpably negligent manner, and (3) that such violation was a proximate cause of the victim's death. *State v. Gainey*, 292 N.C. 627, 234 S.E. 2d 610 (1977); *State v. Massey*, 271 N.C. 555, 157 S.E. 2d 150 (1967); *State v. Cope*, 204

N.C. 28, 167 S.E. 456 (1932). Defendant argues that the State's evidence was insufficient to prove that he was at fault in causing the collision and therefore the State failed to prove that his conduct proximately caused the deaths of Lennon and Beatty.

In order to withstand a motion to dismiss in a criminal case, there must be substantial evidence of each of the material elements of the offense charged. *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982). The evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). The test of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or both. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

An analysis of the State's evidence in this case, in the light of the foregoing rules of law, reveals that the State has produced substantial evidence that defendant's culpably negligent conduct, consisting of operating his automobile while under the influence of alcohol and to the left of the center of the highway, caused the collision. Evidence of defendant's blood alcohol content gives rise to a reasonable inference of fact that he was operating his automobile while under the influence of alcohol. Further, a reasonable inference may be drawn, from the testimony of Ronnie Griffin as to his observation of the vehicles immediately before the collision and from the testimony of Trooper Dennis as to his findings at the scene, that defendant's automobile crossed the center line of the highway and struck the M.G. automobile. That the collision resulting in the deaths of Lennon and Beatty was proximately caused by the defendant's culpable negligence is supported by sufficient evidence. This assignment of error is overruled.

No error.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. RICHARD ANTHONY HOOTS

No. 8422SC1084

(Filed 17 September 1985)

1. **Criminal Law § 181.2— motion for appropriate relief—new evidence not credible—new trial denied**

Where defendant filed a motion for appropriate relief seeking a new trial for armed robbery based on newly-discovered evidence, the trial court did not abuse its discretion by finding that an accomplice who changed his testimony to exonerate defendant was not a credible witness where the accomplice stated that defendant was involved in the robbery and that a third party, Shaw, was not; that defendant was not involved and that Shaw was; that both defendant and Shaw were implicated and that he feared reprisals by defendant's family; wrote his attorney a letter in which he stated that an earlier recantation was a deliberate deception and "necessary evil" designed to get a second chance at a polygraph test; acknowledged that others believed he was merely trying to protect defendant and Shaw although he denied that he was doing so; and partially recanted his earlier recantation at the hearing while maintaining that he was fearful of defendant's family.

2. **Criminal Law § 181.2— motion for appropriate relief—new evidence—hearsay—excluded**

Where defendant sought a new trial for armed robbery based on newly-discovered evidence, the court did not err by excluding the testimony of a witness that a third party, Shaw, had declared that he had committed the robbery. The testimony was not competent as a declaration against penal interests because it was not inconsistent with defendant's guilt, the facts and circumstances offered to corroborate the declaration were clearly insufficient, and, even if the hearsay statements were admissible, a new trial would not be appropriate because the trial judge specifically found that Shaw and the witness repeating his statement were not trustworthy.

3. **Criminal Law § 181.2— motion for appropriate relief denied—newly-discovered evidence—no error**

The trial court did not err in refusing a motion for appropriate relief seeking a new trial for armed robbery for newly-discovered evidence by ruling that an accomplice who recanted his testimony implicating defendant was not a credible witness. The court merely found that the accomplice acknowledged the suspicion of others that he was protecting defendant and a third party, not that he *was* protecting them as defendant contended, and the court's finding that the accomplice's attorney could not predict his testimony was largely rhetorical and amounted to no more than a conclusion that the accomplice was not to be believed.

APPEAL by defendant from *Albright, Judge*. Judgment entered 29 May 1984, as amended 4 June 1984, in Superior Court,

DAVIDSON County.[1] Heard in the Court of Appeals 20 August 1985.

Attorney General Thornburg, by Assistant Attorney General Barry S. McNeill, for the State.

Boyan, Nix and Boyan, by Clarence C. Boyan and Robert S. Boyan, for defendant appellant.

BECTON, Judge.

From a judgment on rehearing denying defendant's Motion for Appropriate Relief, defendant, Richard Anthony Hoots, appeals. Because defendant's motion was based on "newly discovered" evidence, and the time for appeal had expired, defendant also seeks relief by writ of certiorari.

Defendant was convicted of armed robbery at a jury trial in February 1980. Defendant filed a Motion for Appropriate Relief, seeking, in substance, to have his conviction reversed and a new trial granted on the ground of newly discovered exculpatory evidence that Darrell Shaw, and not the defendant, committed the armed robbery. The motion was denied at an evidentiary rehearing, and defendant now contends (1) the newly discovered evidence was sufficient for a new trial because it exonerates defendant and is corroborated by independent evidence; (2) the court erred in excluding testimony that should have been admitted as a declaration against penal interest; and (3) the court erred in ruling that the new evidence was not credible.

We allow defendant's Petition for Writ of Certiorari. We find no error in the court's rulings and accordingly affirm the denial of defendant's Motion for Appropriate Relief.

I

At the rehearing of defendant's Motion for Appropriate Relief, defendant sought to introduce the testimony of Joyce Pegues and Jeffrey Hayes. Pegues' testimony was not admitted in evidence, but she was permitted to testify for the record that Darrell Shaw told her that he had committed the armed robbery.

1. The evidentiary rehearing on defendant's Motion for Appropriate Relief was held in the Eighteenth Judicial District by Judge Albright.

Hayes, who had entered a plea of no contest to the same robbery, made a confession that implicated Shaw as his co-felon and exonerated the defendant. Defendant contends that due process requires a new trial whenever newly discovered exculpatory evidence in the form of sworn testimony by a confessed perpetrator of the offense is corroborated by independent evidence. This contention is without merit. The standard for granting a new trial is set out in *State v. Sprinkle*, 46 N.C. App. 802, 805, 266 S.E. 2d 375, 377, *cert. denied*, 300 N.C. 561, 270 S.E. 2d 115 (1980) (citations omitted):

> A motion for a new trial on the ground of newly discovered or newly available evidence is addressed to the sound discretion of the trial judge, whose ruling thereon will not be disturbed in the absence of a clear abuse of discretion. . . .
>
> > In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.
>
> *State v. Beaver*, 291 N.C. 137, 143, 229 S.E. 2d 179, 183 (1976). . . . Defendant is required to meet all seven factors enumerated in *Beaver*.

We find no abuse of discretion in this case: the judge made extensive and specific findings, supported by substantial evidence, that the new evidence was probably *not* true; that Hayes was not a credible witness; that Shaw's statements were not competent (as declarations against penal interest); and that defendant failed to demonstrate that the new evidence would probably result in a different outcome at trial.

[1] The record discloses several conflicting accounts of the robbery by Hayes. Hayes' first statement indicated that defendant

was involved in the robbery and that Shaw was not. Then, on 26 March 1984, Hayes stated that defendant was not involved and that Shaw was. On 7 April 1984, Hayes recanted his 26 March statement, implicated both defendant and Shaw, and expressed fear of reprisals by defendant's family. Hayes later wrote a letter to his attorney to explain that the 7 April recantation was a deliberate deception and a "necessary evil," designed to get a second chance at a polygraph test. Hayes also acknowledged that others believed he was merely trying to protect defendant and Shaw, although he denied that he was protecting them. At the hearing, Hayes partially recanted his earlier recantation, implicated Shaw and exonerated defendant, while maintaining that he was fearful of defendant's family.

In light of Hayes' conflicting accounts, and after considering the record, replete with indicia of Hayes' lack of truthfulness, the court found, *inter alia*, the following:

> In willfully, deliberately, notoriously and openly adopting and embracing a strategy of falsity and deceit as a "necessary evil" to prove his point, Hayes has not aided the fact finding process in any form or fashion. He has brought confusion rather than clarity to the issues raised herein and has clouded the search for truth with more uncertainty than before. By his own word and deed, Hayes has done damage beyond measure to his credibility as a witness before this court.
>
> . . .
>
> . . . Hayes contends his second statement on or about April 7, 1984, in which he had recanted his March 26, 1984 statement was false and untrue, and if he is believed on this point, then he openly resorted, notwithstanding the presence of his own attorney, to perfidy and falsity and utter disregard for the truth, regarded such as a necessary evil to prove his point, and notoriously embraced a strategy of deceit to serve his own purpose. Hayes acknowledges without equivocation or hesitation his fear of reprisal from Hoots' family against himself and/or his child. Hayes openly acknowledges the suspicion that he is protecting both Hoots and Shaw and his words and deeds do not serve in any form or manner to diminish such suspicion.

Hayes frankly comes across to the Court as one criminal with very little to lose trying to exculpate another. Under the totality of the circumstances, stated in plain and simple terms, Hayes' testimony is not believable as to exculpation of his accomplices. Indeed it is difficult to imagine a less trustworthy or more undependable or unreliable witness on this point. His demonstrated propensities to make inconsistent and self-serving statements and his willing adoption of a strategy of deliberate falsity and wilful deceit of matters of gravest moment have done a gross disservice to those interested in these proceedings and have seriously and irreversibly undermined his credibility as a witness.

As discussed more fully below, the trial court did not err in excluding the new testimony of Pegues. The court found that both Pegues and Shaw, the hearsay declarant, were unconvincing and not reliable and that the statements were "wholly lacking in proof of trustworthiness" from reliable corroborating evidence. In light of the substantial evidence of record supporting the court's findings on the credibility of the newly discovered evidence, we hold that no clear abuse of discretion has been shown.

II

[2] Defendant asserts that the court erred in excluding the testimony of Pegues, who said that Shaw declared he had committed the robbery in question. The record shows that in July 1979 Shaw confessed to robbing a Pizza Hut and showed Pegues a large roll of money and a gun. Pegues also said that in January 1981, while both Pegues and Shaw were in jail, Shaw said he had gotten away with robbing a Pizza Hut and that a girl working in the restaurant had set it up.

Judge Albright correctly noted that this testimony by Pegues was not competent as a declaration against penal interest. There are seven conditions required for such a declaration to be admitted:

> (1) The declarant must be [unavailable]. . . .
>
> (2) The declaration must be an admission that the declarant committed the crime for which defendant is on trial, and the admission must be inconsistent with the guilt of the defendant.

(3) The declaration must have had the potential of actually jeopardizing the personal liberty of the declarant at the time it was made and he must have understood the damaging potential of his statement.

(4) The declarant must have been in a position to have committed the crime to which he purportedly confessed.

(5) The declaration must have been voluntary.

(6) There must have been no probable motive for the declarant to falsify at the time he made the incriminating statement.

(7) The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness.

State v. Haywood, 295 N.C. 709, 730, 249 S.E. 2d 429, 442 (1978).

Shaw's statements were not inconsistent with defendant's guilt. Judge Albright found, "At best, said declaration merely implicates Shaw and is silent as to the identity of others. It is by no means inconsistent with the guilt of Hoots." In fact, it would be consistent with the evidence of record for Shaw to have been a third perpetrator of the robbery or for him to have robbed a different Pizza Hut. Moreover, the facts and circumstances offered to corroborate the declaration were clearly insufficient. For example, the suggestion that the robbery was set up by a girl inside the Pizza Hut directly contradicted the evidence adduced at trial. The record reveals that, when shown photographs of Shaw at trial, an eyewitness to the robbery, who had recognized defendant because he was a previous customer of the restaurant, unequivocally rejected Shaw as one of the robbers.

Even if the hearsay statements of Shaw were admissible evidence, a new trial would only be appropriate if the *Sprinkle* standards were met. On this issue, Judge Albright specifically found that both the hearsay declarant Shaw and the witness Pegues were not trustworthy.

The witness Pegues, the sole source from which the alleged declarations against penal interest by Shaw flow is herself a most unreliable, unconvincing, and untrustworthy

witness whose testimony is inherently incredible. She openly admits dealing in heroin and admits a felonious conviction for heroin possession resulting ultimately in a sentence of imprisonment. She further admits a larceny conviction. In plain and simple language, after observing closely the witness while on the stand and hearing her testimony, both on direct and cross examination, this Court has no confidence in this witness and does not believe her testimony.

III

[3] Defendant's final assignments of error relate to Judge Albright's ruling that Hayes was not a credible witness. First, defendant contends the evidence showed only that Hayes acknowledged that people suspected he was protecting defendant and Shaw, but the court concluded Hayes *was* protecting them. Second, defendant asserts the court's finding that Hayes' attorney could not predict with certainty what Hayes' next testimony might be was not supported by substantial evidence. These contentions are without merit.

As quoted above, the court merely found that Hayes "acknowledges the suspicion" of others. Even so, this acknowledgment, combined with Hayes' open admission of fear of reprisal by defendant's family, would have supported a finding that Hayes was indeed protecting defendant by changing his story. We also believe that the court's finding that Hayes' attorney could not predict Hayes' testimony was largely rhetorical and amounted to no more than a conclusion that Hayes was not to be believed. It is clear from a review of the record that Judge Albright did not abuse his discretion and that his conclusions were supported by substantial evidence.

For the reasons set forth above, we

Affirm.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLES TERRY NORMAN AND ELLA LUCAS NORMAN

No. 8421SC1306

(Filed 17 September 1985)

1. **Narcotics § 4— conspiracy to traffick in cocaine—sufficient evidence**

Evidence that defendant told a third party that she knew a source who could supply him with a kilo of cocaine and that the third party and defendant "arrived at" a price of $55,000 for a kilo was sufficient to support defendant's conviction of conspiracy to traffick in 400 grams or more of cocaine. G.S. 90-95 (h)(3)(c).

2. **Criminal Law § 89.4— corroboration—out-of-court statements—substantial inconsistencies with trial testimony**

The trial court erred in permitting the State to introduce a witness's out-of-court statements to his attorney concerning his negotiations with defendant for the purchase of cocaine to corroborate the witness's trial testimony where the out-of-court statements were substantially inconsistent with the trial testimony.

3. **Criminal Law § 89.3— consistency of pretrial statements with trial testimony —opinion by officer**

The trial court erred in permitting a police officer to state his opinion that a witness's pretrial statements were consistent with his trial testimony where the officer was not asked to relate to the jury what the witness had said to him.

4. **Criminal Law § 34.1— evidence of other offenses—inadmissibility**

The trial court in a prosecution for conspiracy to traffick in cocaine erred in allowing a witness to testify that he had previously purchased drugs from friends who told him that the drugs came from defendant since the testimony was hearsay and was relevant only to show defendant's bad character or disposition to commit the offense for which she was being tried.

5. **Criminal Law § 96— volunteered statement by witness—error cured by instructions**

Any error in an undercover officer's volunteered testimony that he could not work in Yadkin County because defendant's co-conspirator had told him that his "friend" was a member of Hell's Angels was cured when the court sustained defendant's objection and instructed the jury not to consider it.

6. **Narcotics § 4— conspiracy to traffick in cocaine—sufficient evidence**

The State's evidence was sufficient to support a finding that the male defendant entered into and became a part of a conspiracy between his wife and a third party to sell or deliver one kilo of cocaine so as to support his conviction of conspiracy to traffick in 400 grams or more of cocaine.

APPEAL by defendants from *Wood, Judge*. Judgment entered in FORSYTH County Superior Court 16 August 1984. Heard in the Court of Appeals 27 August 1985.

Defendants were convicted of conspiracy to traffick in 400 grams or more of cocaine. At trial, the State's evidence tended to show the following circumstances and events. James Michael Patillo, a medical equipment salesman, was acquainted with defendant Ella Norman, who was employed at Baptist Hospital in Winston-Salem, and her husband, defendant Terry Norman. Patillo, a heavy user of cocaine, lost his source in August of 1983. In September of 1983, Patillo encountered Ella Norman at Baptist Hospital and inquired whether she knew of a source of cocaine. Patillo had previously purchased drugs from persons who told him the drugs came from Ella Norman. Although nothing happened as a direct result of the August conversation, in October or November, Ella Norman gave Patillo a "sample" of cocaine, less than a gram. In October of 1983, Patillo was contacted by Winston-Salem Police Officer Phil Kirkman, who was working as an undercover narcotics agent. Kirkman inquired of Patillo as to a possible source for large quantities of cocaine. Patillo then contacted Ella Norman about obtaining cocaine, but she stated she was not interested. About a month later, Ella Norman called Patillo at his home at Lake Norman and indicated that she knew of a source which could supply a large amount of drugs, and that the price for one kilo (about two pounds) of cocaine would be seventy-five thousand dollars. Patillo later had further discussion with Ella Norman about the price and "arrived" at a price of fifty-five thousand dollars for a kilo. Patillo also obtained another "sample" of cocaine from Ella Norman.

Patillo met with Kirkman on 9 November 1983, in Winston-Salem, the two of them discussing a large purchase of cocaine. Patillo then drove to Yadkinville, where he called the Norman residence and talked to Terry Norman, requesting that he meet Patillo in Yadkinville. Norman met Patillo and they then drove to the Norman residence in Norman's truck. Ella Norman arrived soon thereafter and the three of them discussed a possible sale of cocaine. Patillo informed the Normans that he wanted to make the purchase for "Scott" (Kirkman). Patillo called Kirkman from the Norman's residence to discuss where a sale might be carried out, but no agreement was reached and no sale was carried out.

Ella Norman returned Patillo to Yadkinville. During the course of these events, Patillo did not know that Kirkman was an undercover police officer. Patillo discussed "Scott" (Kirkman) at some length with the Normans, the three of them speculating as to who "Scott" might be.

From fines and sentences of imprisonment entered on the verdict, defendants have appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Charles M. Hensey, for the State.

Morrow and Reavis, by John F. Morrow and Clifton R. Long, Jr., for defendant Charles Norman.

White and Crumpler, by Fred G. Crumpler, Jr. and Robin J. Stinson, for defendant Ella Norman.

WELLS, Judge.

I. *Defendant Ella Norman's Appeal*

[1] In one of her assignments of error, defendant Ella Norman contends that the State was not able to show that she ever agreed to sell any amount of cocaine to the State's witness Patillo, and that the trial court therefore erred in denying her motion to dismiss for insufficiency of the evidence. We disagree. The evidence that Ella Norman called Patillo and told him that she knew a source that could supply Patillo with drugs Patillo needed or a larger amount of drugs needed by Patillo's friend, coupled with the evidence that in this conversation Ella Norman quoted Patillo a price for a kilo of cocaine, was sufficient to allow an inference that an agreement was reached between them to accomplish the unlawful act of sale or delivery of cocaine. The amount agreed upon, a kilo, one thousand grams, was sufficient to establish a conspiracy to violate N.C. Gen. Stat. § 90-95(h)(3)(c) (1981 Replacement), 400 grams or more. This assignment is overruled.

[2] In another assignment of error, defendant contends that the trial court erred in allowing the State to introduce Patillo's out-of-court statements made to his attorney respecting his negotiations with Ella Norman, ostensibly to corroborate his in-court testimony. The general rule in this state is that prior consistent state-

ments of a witness may be offered to corroborate the trial testimony of a witness. *See* 1 Brandis, *N.C. Evidence*, §§ 50-52 (2d rev. ed. 1982) and cases cited and discussed therein. We have found few cases in which our appellate courts have found the admission of such evidence to be prejudicial error; nevertheless, we find that the statements of the witness Patillo were at points substantially inconsistent with his trial testimony and, at other points, so substantially at variance with his trial testimony as to render them inadmissible. Our careful examination of these out-of-court statements indicates that Patillo told a far different story to his lawyers than he was either willing to tell or actually told at trial. In this conspiracy trial, where the trial testimony of an actual agreement to sell or deliver cocaine was merely adequate to overcome a motion to dismiss, these out-of-court statements were especially damaging and clearly prejudicial, and it was error to admit them.

[3] In another assignment, defendant contends that the trial court erred in allowing Officer Kirkman to testify that Patillo's post-arrest, pre-trial statements to Kirkman were consistent with Patillo's trial testimony. The questions and answers were as follows:

> Q. And he told you during those conversations essentially what he testified to here today?
>
> MR. MORROW: Objection.
>
> COURT: Overruled. Now, ladies and gentlemen, what Patillo told this officer since that time you may consider only for the purpose of corroborating Patillo's testimony under oath here at this trial if in fact you find it does corroborate his testimony. Not substantive evidence, what he told the officer.
>
> Q. The question is the discussions you have had with him, did what he told you then, was it in essential agreement with what he testified to here during this trial?
>
> MR. MORROW: Objection for the record.
>
> A. Yes, sir.
>
> COURT: Overruled.

We find defendant's exception to have merit. Witness Kirkman was not asked to relate to the jury what Patillo had said to him, only to give his opinion as to whether whatever was said by Patillo before trial was "essentially what he testified to." In our opinion, this carries the liberality of the consistent statement rule too far. At the least, Officer Kirkman should have been put to the test of recalling for the jury what Patillo had told him before trial before giving his opinion as to whether Patillo had been consistent in his pre-trial statements and trial testimony.

[4] In another assignment, defendant contends that the trial court erred in allowing Patillo to testify that he had previously purchased drugs from friends who told him that the drugs came from Ella Norman. Not only was this hearsay testimony, but its use in this conspiracy trial was only relevant to show Ella Norman's bad character or disposition to commit the offense for which she was being tried, and this was error. *See State v. Alley*, 54 N.C. App. 647, 284 S.E. 2d 215 (1981).

In another assignment, defendant contends that the trial court erred in commenting to the jury that he would see to it that the State's witness Patillo, a co-conspirator, would not get the full benefits of his plea bargain. We have carefully considered this assignment of error, and while we find that it is not without merit, we conclude that it is not likely to recur upon re-trial and therefore decline to rule on it.

[5] In another assignment, defendant contends that the trial court erred in not declaring a mistrial where Officer Kirkman "volunteered" testimony that he could not work in Yadkin County because Patillo had told him his (Patillo's) "friend" was a member of Hell's Angels. The trial court sustained defendant's objections and instructed the jury not to consider it. This instruction cured this error, one which we assume will not recur upon a new trial. *See State v. Black*, 305 N.C. 614, 290 S.E. 2d 669 (1982). This assignment is overruled.

II. *Defendant Charles Terry Norman's Appeal*

[6] In one of his assignments of error, defendant Terry Norman contends the trial court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree. In ruling upon a motion to dismiss, the trial court must consider all the evidence ad-

mitted, both competent and incompetent, in the light most favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Our careful review of the trial testimony of the witness Patillo, plus Patillo's out-of-court statements, provided substantial evidence that Terry Norman entered into and became a part of the conspiracy between Ella Norman and James Michael Patillo to sell or deliver one kilo of cocaine. This assignment is overruled.

In other assignments of error, defendant Terry Norman has raised issues presented in the appeal of Ella Norman. Our disposition of those issues in Ella Norman's appeal entitles Terry Norman to a new trial.

For the reasons stated, both defendants must have a new trial.

New trial.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. TEDDY DEWEY SLONE

No. 8422SC1262

(Filed 17 September 1985)

1. **Rape and Allied Offenses § 19— taking indecent liberties with a child—evidence sufficient**

The State's evidence was sufficient to warrant the inference that defendant willfully took indecent liberties with a child for the purpose of arousing or gratifying his sexual desire where there was evidence that the defendant led his victim, in the course of playing hide-and-go-seek, into a dark dog shed; while hiding there the defendant put his arm around the victim, placed his hand between her legs and underneath her softball shorts, and rubbed her vagina with his finger; and, when the victim tried to move away, defendant pulled her back to him and fondled her again. G.S. 14-202.1(a)(1).

2. **Rape and Allied Offenses § 19— taking indecent liberties with a child—evidence relevant**

In a prosecution for taking indecent liberties with a twelve-year-old girl, the court did not err by allowing the prosecutrix to testify about whether the defendant had on prior occasions played hide-and-go-seek with the children in the neighborhood and whether the defendant had ever hidden with her before.

The fact that defendant had previously played hide-and-go-seek with the children served to strengthen the evidence that defendant played hide-and-go-seek on the date in question, and the fact that the prosecutrix could not remember the defendant ever hiding with her before tended to explain why this was the first occasion defendant had fondled her. G.S. 8C-1, Rule 401.

3. **Rape and Allied Offenses § 19— taking indecent liberties with a child—evidence that witnesses shocked—no prejudice**

There was no prejudice in a prosecution for taking indecent liberties with a twelve-year-old girl in permitting the prosecutrix's mother and another witness to testify that the prosecutrix's story about the fondling shocked them where defendant did not make timely objections and where the defendant elicited from the prosecutrix on cross-examination that her mother had become upset when told that defendant had fondled her. G.S. 8C-1, Rule 103(a)(1).

4. **Rape and Allied Offenses § 19; Criminal Law § 50.2— taking indecent liberties with a child—opinion of mother—admissible**

The court did not err in a prosecution for taking indecent liberties with a twelve-year-old girl by admitting into evidence testimony of the prosecutrix's mother that a prior incident in which defendant allegedly cursed the prosecutrix had nothing to do with the subject charge against defendant. The questioning was permissible to counter the inference by the defendant that the victim was a liar and that the charge made by her was motivated by the cursing incident. G.S. 8C-1, Rule 701.

5. **Criminal Law § 162— taking indecent liberties with minor—objections sustained—failure to place answers in record—no prejudicial error**

In a prosecution for taking indecent liberties with a twelve-year-old girl, there was no prejudicial error in sustaining the State's objections to defendant's questions concerning what effect the divorce of the prosecutrix's parents and her mother's marital difficulties had on the prosecutrix where no sufficient offer of proof of the excluded evidence was made.

6. **Rape and Allied Offenses § 19— indecent liberties with child—witness with no personal knowledge—testimony admissible**

In a prosecution for taking indecent liberties with a twelve-year-old girl in a dog shed while playing hide-and-go-seek, the trial court did not err in allowing the prosecutrix's brother to testify about the incident even though he had no personal knowledge of the events in question and did not err in asking two questions of the brother. The brother testified that while he did not see the defendant, the prosecutrix, and another child go into the shed, he and another child found them there. The two questions asked by the trial court sought only to clarify the time frame of the event about which the witness was testifying and the brother's inability to recall the exact date in August when the game of hide-and-go-seek occurred went to the weight of his testimony and not to its admissibility. G.S. 15A-1222.

APPEAL by defendant from *Davis, Judge*. Judgment entered 11 July 1984 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 28 August 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General Daniel C. Higgins for the State.

Wilson, Biesecker, Tripp & Sink by Joe E. Biesecker and Charles E. Frye III for defendant appellant.

COZORT, Judge.

Defendant was convicted of taking indecent liberties with a child in violation of G.S. 14-202.1(a)(1). He appeals his conviction alleging, among other assignments of error, the trial court should have granted his motion to dismiss the charge against him because the State's evidence was insufficient to prove that he acted willfully and "for the purpose of arousing or gratifying sexual desire." G.S. 14-202.1(a)(1). We find no error.

The State's evidence tended to show that during the evening hours of 13 August 1982, Tammy Burkhart; her brother, Chad; the defendant; defendant's son, Wayne; and Wayne's friend, Lee, were playing hide-and-go-seek at the defendant's home. At defendant's suggestion, Tammy and Lee hid with the defendant in a dog shed. Once inside the dark dog shed defendant put his arm around Tammy, placed his hand between her legs and underneath her softball shorts and rubbed her vagina with his finger. When Tammy attempted to move away from the defendant, he pulled her closer to him and rubbed her vagina again. Tammy then quit playing hide-and-go-seek and returned to her home next door. At the time the incident occurred, Tammy was twelve years old and the defendant was thirty-two.

Defendant was convicted under G.S. 14-202.1(a)(1) which provides, in pertinent part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years *for the purpose of arousing or gratifying sexual desire* . . . . [Emphasis added.]

Defendant argues that at most the State proved that he did the prohibited act but not that he did so willfully and "for the purpose of arousing or gratifying sexual desire." *Id.*

[1] Upon a motion to dismiss in a criminal action, "all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977).

In *State v. Campbell*, 51 N.C. App. 418, 276 S.E. 2d 726 (1981), the defendant challenged his conviction under G.S. 14-202.1(a)(1) on the grounds that there was no direct evidence that he acted "for the purpose of arousing or gratifying sexual desire." There we noted that "[a] defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference." 51 N.C. App. at 421, 276 S.E. 2d at 729. Here there is evidence that the defendant led his victim, in the course of playing hide-and-go-seek, into a dark dog shed. While hiding there the defendant put his arm around the victim, placed his hand between her legs and underneath her softball shorts, and rubbed her vagina with his finger. When the victim tried to move away, defendant pulled her back to him and fondled her again. This evidence was sufficient to warrant the inference that the defendant willfully took indecent liberties with the child for the purpose of arousing or gratifying his sexual desire.

Defendant's five remaining assignments of error concern the admission or exclusion of evidence.

[2] Defendant first alleges the trial court improperly allowed the prosecutrix, Tammy Burkhart, to testify whether the defendant had, on prior occasions, played hide-and-go-seek with the children of the neighborhood and whether the defendant had ever hidden with her before. Defendant contends that testimony was irrelevant. G.S. 8C-1, Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here the fact that defendant had previously played hide-and-go-seek with

the children serves to strengthen the evidence that defendant played hide-and-go-seek on the date in question. Similarly, the fact that the prosecutrix could not remember the defendant ever hiding with her before tended to explain why this was the first occasion defendant had fondled her. Thus, the testimony was relevant to the issues in this case and, therefore, was properly admitted into evidence.

[3] Defendant's second assignment of error is that the trial court erred in allowing witnesses Vicki Thompson and Jean Joyce to testify that Tammy's story about the fondling shocked them. Defendant contends such testimony was irrelevant and prejudicial. First, we note that the record reveals that even though the prosecutor's questions to witnesses Thompson and Joyce indicated the desired answer, the defendant did not object until after the witnesses had answered. The objections were not timely, thus defendant has waived this assignment of error. *State v. Burgess*, 55 N.C. App. 443, 447, 285 S.E. 2d 868, 871 (1982); G.S. 8C-1, Rule 103(a)(1).

Assuming, however, that this assignment of error is properly before us and that the evidence was irrelevant; it was not prejudicial. The defendant, on cross-examination of the prosecutrix, had already elicited from her that her mother, Jean Joyce, became upset when she told her that defendant had fondled her. Therefore, there was no prejudice in the State showing that Tammy's mother and Vicki Thompson were both shocked by what Tammy told them.

[4] Defendant's next assignment of error is that the trial court improperly admitted into evidence certain testimony of Jean Joyce, the prosecutrix's mother. On cross-examination of the prosecutrix, defendant attempted to discredit her by asking her about a prior altercation between her and the defendant. Defendant asked the prosecutrix if, in fact, she had not admitted lying to her parents that the defendant cursed her. The prosecutrix denied admitting to her parents that she had lied because she said the defendant had in fact cursed her. On direct examination of Jean Joyce, the prosecutor asked her about the prior altercation between her daughter and the defendant, which had occurred some two weeks prior to the incident in question. The prosecutor asked Ms. Joyce whether, to her knowledge, the cursing incident had anything to do with the subject charge against the defendant. Ms.

Joyce replied that it did not. Defendant objects to this question and argues that the question was improper because it required the witness to state her personal opinion in a conclusory manner. We hold the questioning was permissible to counter the inference by the defendant that the victim was a liar and that the charge made by her was motivated by the cursing incident. To the extent that Jean Joyce's testimony on this point constituted opinion testimony, such testimony was permissible under G.S. 8C-1, Rule 701 which allows a layman to testify in the form of an opinion when such "opinions . . . are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [her] testimony or the determination of a fact in issue."

[5] By his fourth assignment of error defendant argues that the trial court erred by sustaining the State's objections to defendant's questions to Jean Joyce concerning what effect, if any, the divorce of Tammy's parents and her mother's marital difficulties had on Tammy. We find no prejudicial error. No sufficient offer of proof of the excluded evidence was made. Defendant has the burden of establishing that the exclusion of evidence was prejudicial to his case. Therefore, "answers the [witness] would have given must be placed in the record in order to determine the alleged error was prejudicial." *State v. Boykin*, 298 N.C. 687, 699, 259 S.E. 2d 883, 890 (1979).

[6] Finally, defendant contends the trial court erred by allowing Chad Burkhart to testify about the 13 August 1982 incident because he allegedly had no personal knowledge of the events in question. Defendant further argues that the trial court's asking two questions of Chad Burkhart constituted an opinion on the believability of the witness. These contentions are without merit. Chad Burkhart testified concerning playing hide-and-go-seek with his sister, Tammy, the defendant, and several other children in August of 1982. He testified that while he did not see the defendant, Lee, and Tammy go into the shed, he and Wayne found them there. While Chad Burkhart could not recall the exact date in August when this game of hide-and-go-seek occurred, his inability to recall the specific date goes to the weight of his testimony and not its admissibility. As to the two questions asked by the trial court, the record shows that the trial court sought only to clarify the time frame of the event about which the witness was testifying. These questions were permissible because they in no way

suggested an opinion as to the witness's credibility or the defendant's guilt or innocence. G.S. 15A-1222.

In sum, we find the evidence sufficient to go to the jury and the trial court's evidentiary rulings without prejudicial error.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

CANDID CAMERA VIDEO WORLD, INC., IOWA NATIONAL MUTUAL INSURANCE COMPANY, THE HOME INSURANCE COMPANIES AND BORG-WARNER ACCEPTANCE CORPORATION, PLAINTIFFS-APPELLANTS v. ROBIN M. MATHEWS AND S. L. NUSBAUM & COMPANY, INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS-APPELLEES v. MODENE C. GILBERT, EXECUTRIX OF THE ESTATE OF CHARLES G. GILBERT, SR., AND MODENE GILBERT, INDIVIDUALLY AND SEVERALLY, TRADING AS CANDID CAMERA, THIRD-PARTY DEFENDANTS-APPELLANTS

No. 8418SC1304

(Filed 17 September 1985)

Indemnity § 2; Landlord and Tenant § 6; Principal and Agent § 11— indemnification and exculpatory clauses in lease—no exoneration of lessor's agents

Indemnification and exculpatory clauses in a lease between plaintiff and a mall owner did not exonerate the corporate mall manager and its employee, as agents of the owner, from liability for damages caused by their negligence. Therefore, plaintiff is entitled to a trial on the issue of negligence by the mall manager and its employee in the loss by theft of items from plaintiff's store.

APPEAL by plaintiff from *Washington, Judge*. Judgment entered 25 October 1984 in GUILFORD County Superior Court. Heard in the Court of Appeals 20 August 1985.

Plaintiff Candid Camera Video World, Inc. is a North Carolina corporation doing business in High Point Mall. After a theft of valuable items from its store, plaintiff instituted this action to recover damages from S. L. Nusbaum & Company, Inc., manager of the mall, and its employee, Robin M. Mathews, alleging that the loss was due to the negligence of these defendants. The Equitable Life Assurance Society of the United States is the owner of the mall and is not a party to this action.

Defendants moved for summary judgment on the grounds that plaintiff's lease with Equitable entitled the defendants to be exculpated and indemnified from any damages due to negligence of the defendants, and that defendants were not in fact negligent.

Judge Washington's judgment, entered 25 October 1984, denied summary judgment on the issue of negligence, but granted summary judgment to defendants on the lease provisions, thereby dismissing plaintiff's action with prejudice. Plaintiff appealed.

Tuggle, Duggins, Meschan & Elrod, by J. Reed Johnston, Jr. and Joseph F. Brotherton, for plaintiffs and third-party defendants-appellants.

Smith Moore Smith Schell & Hunter, by Robert A. Wicker and Catherine C. Eagles, for defendants and third-party plaintiffs-appellees.

WELLS, Judge.

Summary judgment should be granted when the movant establishes that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Ipock v. Gilmore*, 73 N.C. App. 182, 326 S.E. 2d 271 (1985). Here the relevant lease provisions constitute all the material facts; therefore, the sole question is whether either party is entitled to judgment as a matter of law. *See Old Dominion Distributors v. Bissette*, 56 N.C. App. 200, 287 S.E. 2d 409 (1982).

The issue of law before this Court concerns application to defendants of the exculpatory and indemnification clauses found in the lease between Candid Camera and Equitable.

The relevant clauses read:

> 17. TENANT'S INDEMNIFICATION AND LIABILITY INSURANCE.
>
> (a) Tenant agrees that it will hold Landlord harmless from any and all injury or damage to person or property in, on or about the Leased Premises. . . .
>
> (b) Landlord shall not be liable for any damage to persons or property sustained in or about the Leased Premises during the term hereof, howsoever caused.

Though there has been some confusion to the contrary, the law with respect to exculpatory clauses is different from that with respect to indemnification clauses.

> There is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts. The contract in the instant case is of the latter class and is more favored in law.

Kirkpatrick & Assoc. v. Wickes Corp., 53 N.C. App. 306, 280 S.E. 2d 632 (1981), *citing Gibbs v. Light Co.*, 265 N.C. 459, 144 S.E. 2d 393 (1965).

The "hold harmless" language of clause 17(a) indicates that this is an indemnification clause. *See Kirkpatrick & Assoc. v. Wickes Corp., supra.* In interpreting a contract of indemnity, the court should give effect to the intention of the parties. *Triplett v. James*, 45 N.C. App. 96, 262 S.E. 2d 374, *disc. rev. denied*, 300 N.C. 202, 269 S.E. 2d 621 (1980). But where the contractual language is clear and unambiguous, the court must interpret the contract as written. *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E. 2d 377 (1981). Indemnity against negligence must be made unequivocally clear in the contract, particularly in a situation where the parties have presumably dealt at arm's length. *Cooper v. Owsley & Son, Inc.*, 43 N.C. App. 261, 258 S.E. 2d 842 (1979).

Defendants contend that intent to include them is expressed by a clause in the lease granting all burdens and benefits of the parties to their "respective personal representatives, heirs, successors and . . . assigns." The foregoing quoted language includes only those who may succeed to Equitable's ownership interest and does not include agents or those who purport to be agents of Equitable. There is nothing in the lease that demonstrates an "unequivocal" intent of Equitable and Candid Camera to include defendants under the indemnification clause. On the contrary, the preamble to and clause 25 of the lease clearly denote Equitable as "Landlord":

> THIS DEED OF LEASE (herein called LEASE), Made this 20th day of February, 1981 by and between THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New

> York Corporation having its principal place of business at 1285 Avenue of the America [sic], New York, N. Y., 10019 ("Landlord"). . . .
>
> 25. . . . The term "Landlord" as used in this lease, so far as covenants or agreements on the part of the Landlord are concerned, shall be limited to mean and include only the owner or owners of the Landlord's interest in this lease. . . .

The lease as written clearly indicates that "Landlord" means Equitable alone, to the exclusion of all others.

Defendants cite Restatement (Second) of Agency §§ 343, 347 (1957) for the proposition that an agent may benefit from a contract lowering the standard of care of its employer. This was also called the "apparent New York rule" by the Second Circuit in *Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F. 2d 800 (2d Cir. 1971). The "New York rule" has been derogated by that court as derived "almost exclusively" from the Restatement. *Rupp v. International Terminal Operating Co., Inc.*, 479 F. 2d 674 (2d Cir. 1973). This rule is an anomaly among the states and defendant can cite no authority to support it in North Carolina. We will not apply it in this case.

General principles of the law of agency lend no aid to defendants' position. "[A]n agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged." *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed. 2d 820 (1959). *Accord, Picker v. Searcher's Detective Agency*, 515 F. 2d 1316 (D.C. Cir. 1975); *see also Trust Co. v. R.R.*, 209 N.C. 304, 183 S.E. 620 (1936).

The exculpatory clause must be even more strictly construed than the indemnification clause. *Kirkpatrick & Assoc. v. Wickes Corp., supra.* For the above reasons, defendants are not protected by either the exculpatory or indemnification clause. In the appropriate case, summary judgment may be rendered against the moving party. *Greenway v. Insurance Co.*, 35 N.C. App. 308, 241 S.E. 2d 339 (1978). Because we hold that there is no genuine issue of material fact and that plaintiffs are entitled to judgment as a matter of law, summary judgment on this issue is reversed as to defendants and the case is remanded with instructions to enter

summary judgment for plaintiff on this issue and for trial on the issue of defendants' negligence.

Defendants also attempt to appeal from the trial court's denial of their motion for summary judgment on the issue of negligence. The denial of a motion for summary judgment is not appealable and is not properly before this Court. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983).

Reversed and remanded.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. ALLIE BRYAN ALDRIDGE, III

No. 848SC1213

(Filed 17 September 1985)

1. **Criminal Law § 138.2; Constitutional Law § 79— recidivist sentence—30 years—not cruel and unusual punishment**

The imposition of a 30-year sentence for a habitual felon who could have received a maximum sentence of life imprisonment under G.S. 14-1.1 was within constitutional limits and did not constitute cruel and unusual punishment. G.S. 14-7.6, Eighth Amendment to the U. S. Constitution.

2. **Criminal Law § 138— aggravating factor—attempted taking of property of great monetary value**

The trial judge did not err in resentencing defendant for possession of stolen goods by marking on the revised Felony Judgment Sentencing Factors Form aggravating factor number twenty-one, that the offense involved an attempted taking of property of great monetary value, where the original form had listed one aggravating factor for attempted or actual taking of property of great monetary value. The gist of G.S. 15A-1340.4(a)(1)(m) is the value of property and not whether there was a taking or attempted taking of property. G.S. 14-72(c).

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 23 September 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 28 August 1985.

This is a criminal action in which the defendant in a bifurcated trial was convicted of possession of stolen goods in violation of G.S. 14-71.1 and being a habitual felon in violation of G.S.

14-7.1. The trial court sentenced the defendant to a term of 40 years. On appeal this court in *State v. Aldridge*, 67 N.C. App. 655, 314 S.E. 2d 139 (1984), upheld the conviction but remanded the case for re-sentencing.

At the original sentencing hearing the trial court found as aggravating factors (1) that the offense was committed for hire or pecuniary gain, (2) that the offense involved property of great monetary value or caused great monetary loss, and (3) that the defendant had a prior conviction or convictions. The trial court found no mitigating factors. On appeal this court held that the trial court erred in finding as an aggravating factor that the defendant committed the offense for hire or pecuniary gain but found no error as to the two remaining aggravating factors. *State v. Aldridge, supra.*

At re-sentencing on 17 September 1984, Judge Barefoot found the same two aggravating factors found earlier, i.e., (1) that the offense involved an attempted taking of property of great monetary value and (2) that the defendant had a prior conviction or convictions. Defendant received a 30 year sentence.

Defendant appealed.

Attorney General Thornburg, by Assistant Attorney General Grayson G. Kelley, for the State.

Barnes, Braswell and Haithcock, by Tom Barwick, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns as error the thirty year sentence. The defendant objects to the sentence as being cruel and unusual punishment in violation of the North Carolina and United States Constitutions. We disagree.

We note at the outset that the defendant correctly concedes that a sentence which does not exceed the maximum prescribed by statute does not constitute cruel and unusual punishment, that a habitual felon may be sentenced as a Class C felon under G.S. 14-7.6 and 14-1.1 to as much as life imprisonment, that a 30 year sentence is not in excess of the statutory maximum allowed under

G.S. 14-7.6 and 14-1.1, and that this State's recidivist statute is constitutional.

Defendant contends that his sentence should be set aside because the punishment he received was disproportionate to the offense of which he was convicted, possession of stolen property. The primary purpose of a recidivist statute is

> to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation *and its duration* are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. [Emphasis added.]

Rummel v. Estelle, 445 U.S. 263, 284, 63 L.Ed. 2d 382, 397, 100 S.Ct. 1133, 1144-45 (1980). Defendant has prior convictions of (1) felonious breaking and entering and felonious larceny, (2) felonious possession of a firearm by a felon, and (3) felonious breaking and entering. Clearly, this past criminal conduct brings the defendant within the statute's primary purpose as stated in *Rummel*. Further, in sentencing a habitual felon, the duration of the sentence is not based on the defendant's most recent offense but on his past criminal conduct as well.

It is not our role as an appellate court to substitute our judgment for that of the sentencing judge as to the appropriate length of the sentence. "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E. 2d 436, 441 (1983).

We hold that imposition of a thirty year sentence for a habitual felon who under these facts could have received a maximum sentence of life imprisonment under G.S. 14-1.1 is within constitutional limits and does not constitute cruel and unusual punishment.

II

Defendant's next two assignments of error deal with the sentencing judge's finding of the remaining two aggravating factors. We find no error. In *State v. Aldridge, supra,* this court found no error as to the remaining two aggravating factors found by the sentencing judge. Therefore, our earlier opinion forecloses consideration of defendant's second and third assignments of error, except to note one procedural change since our opinion in *State v. Aldridge, supra,* filed 17 April 1984.

[2] Defendant contends that it was error for the sentencing judge in using the revised Administrative Office of the Courts' form to find that the offense involved "an attempted taking of property of great monetary value" because the defendant was convicted only of possession of stolen goods under G.S. 14-72(c). This aggravating factor originates from G.S. 15A-1340.4(a)(1)(m) which provides: "The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband." In the original Felony Judgment Sentencing Factors Form, promulgated by the Administrative Office of the Courts, the sentencing judge found as an aggravating factor number thirteen (13) listed on the form and set out in the verbatim language of G.S. 15A-1340.4(a)(1)(m). We found no error with this factor in *State v. Aldridge, supra.*

In October 1983 the Felony Judgment Sentencing Factors Form (form #AOC-CR-303) was revised and aggravating factor number thirteen (13) was changed as a result of the October revision. Factor number thirteen (13) was divided into four separate factors on the revised form as follows:

> 21. The offense involved an attempted taking of property of great monetary value.
>
> 22. The offense involved the actual taking of property of great monetary value.
>
> 23. The offense involved damage causing great monetary loss.
>
> 24. The offense involved an unusually large quantity of contraband.

At re-sentencing, the sentencing judge, using the revised form, marked the form in the place indicating that the offense involved an attempted taking of property of great monetary value, aggravating factor number 21.

The gist of G.S. 15A-1340.4(a)(1)(m) is the value of the property and not whether there was a taking or attempted taking of property. The aspect of the designated aggravating factor which permits enhancing the punishment is the great value of the personal property in possession of the defendant. As we held in *State v. Aldridge, supra*, we find no error with the finding by the trial court that the offense involved property of great monetary value. Accordingly, we find no error in the sentencing judge's marking aggravating factor number 21, that the offense involved an attempted taking of property of great monetary value.

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE FRANKLIN GREEN

No. 855SC19

(Filed 17 September 1985)

1. **Criminal Law § 44— dog tracking evidence**

Evidence of tracking by a dog is admissible where the dog is not a bloodhound as long as the final three foundation requirements set forth in *State v. McLeod*, 196 N.C. 542, 146 S.E. 409 (1929), are satisfied.

2. **Criminal Law § 44— dog tracking evidence—acuteness of scent—training, experience and proven ability—sufficient showing**

The State made a sufficient showing of acuteness of scent and training, experience and proven ability in tracking by a Doberman and a Rottweiler for the admission of testimony of tracking by such dogs where the dog handler testified as to the acute and highly discriminating sense of smell possessed by both dogs; the handler described the extensive training of the two dogs, how they acquired reliability through their training and experience, and the fact that they were extremely adept at pursuing a human track by virtue of their keen sense of smell, intelligence, and training; and the handler noted that he had worked with the two dogs ever since they were born and that the Doberman had 75 felony arrests to his credit, most of which involved tracking humans.

3. Criminal Law § 44— dog tracking evidence—substantial assurance of identification

The State sufficiently showed that tracking by two dogs occurred under circumstances that permit substantial assurance of identification where the dog handler testified that the dogs followed a combined scent which began with a scent source consisting of clothing articles taken from defendant and a codefendant; this scent source was placed at the scene of a break-in and the dogs were ordered to track that scent; the tracking took place the same night as the break-in; and the dogs followed a trail to the point where stolen goods were recovered and further to the point where the defendant and codefendant were apprehended by the police.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 12 June 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 August 1985.

Defendant was found guilty by a jury of felonious breaking or entering and felonious larceny. The trial court entered a judgment on the verdict sentencing him to ten years in prison. Defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Dolores O. Nesnow, for the State.

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

WEBB, Judge.

The State's case relied on tracking evidence from two police dogs. The dogs, a Rottweiler and a Doberman pinscher, started with a scent source consisting of gloves and shoes taken from defendant and a codefendant. The scent source was placed at the scene of the crime, a broken store window, and on command the Doberman tracked the scent to a location where two microwave ovens taken from the store had been abandoned. The Doberman was then taken off the trail to protect it from cold rain. The Rottweiler then traced the scent along the same path and further to a point where the defendant and codefendant were apprehended by the police.

Defendant contends the dog tracking evidence should have been excluded and the charges dismissed for insufficiency of the evidence because there was no testimony establishing the characteristics of either breed of dog. Defendant did not object to the

lack of foundation at trial. He did move to suppress the dog tracking evidence on the basis that his constitutional right against self-incrimination was violated when the articles used as a scent source were taken from him, but this argument has been abandoned on appeal. Defendant's failure to object to the lack of testimony establishing the characteristics of the dog breeds renders this assignment of error subject to dismissal. N.C. Rules of Appellate Procedure, Rule 10. We nonetheless consider it in our discretion.

[1] Defendant relies on the oft-quoted rule from *State v. McLeod*, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929), that:

> It is fully recognized in this jurisdiction that the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification. (Citations omitted.)

Like *McLeod*, all the reported decisions we have found that involve dog tracking speak of bloodhounds. The first requirement, that bloodhounds be of pure blood and of a stock characterized of acute scent, has been relaxed somewhat in later cases. *State v. Rowland*, 263 N.C. 353, 359, 139 S.E. 2d 661, 665 (1965), held that pedigree was unimportant, for "if the dog has been identified as a bloodhound, it has been the conduct of the hound and other attendant circumstances, rather than the dog's family tree, which have determined the admissibility of his evidence." *Rowland* held that the dog in question had "pedigreed himself" by his performance. *Id.* at 360, 139 S.E. 2d 666. Similarly, *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981), held that the "pure blood" requirement of *McLeod, supra*, could be satisfied simply by identifying the dog as a bloodhound and showing that he performed well in following human scent. The "pure blood" requirement was further qualified in *State v. Bines*, 8 N.C. App. 1, 4, 173 S.E. 2d 605,

607, *cert. denied*, 277 N.C. 113 (1970), *cert. denied*, 405 U.S. 1040, 31 L.Ed. 2d 580, 92 S.Ct. 1318 (1972), which allowed testimony as to the tracking of a defendant by a dog which was "a three-way cross, being part bloodhound, part black and tan coon hound, and part red bone coon hound." *See also, State v. Hawley*, 54 N.C. App. 293, 283 S.E. 2d 387 (1981), *disc. rev. denied*, 305 N.C. 305, 291 S.E. 2d 152 (1982). The foregoing cases demonstrate a decreasing emphasis on the requirement that the tracking dog be a pure blood bloodhound yet they continue to require the dog to have training, experience, and proven ability in tracking. None of the cases hold that a tracking dog must be a bloodhound and no other breed. We conclude that evidence of tracking by a dog is admissible where the dog is not a bloodhound as long as the final three foundation requirements quoted from *McLeod, supra*, are satisfied.

[2] The dog handler in the present case testified as to the acute and highly discriminating sense of smell possessed by the Doberman and Rottweiler. He described their extensive training, how they acquired reliability through their training and experience, and the fact that they were extremely adept at pursuing a human track by virtue of their keen sense of smell, intelligence, and training. He noted that he had worked with the two dogs ever since they were born, and that the Doberman had 75 felony arrests to his credit, most of which involved tracking humans. This testimony satisfied the second and third requirements of *McLeod, supra.*

[3] Defendant maintains that the fourth *McLeod* requirement—that the tracking occur under circumstances that permit substantial assurance of identification—was not met in this case. The dog handler testified that the dogs followed a "combined scent" which began with a scent source consisting of clothing articles taken from defendant and the codefendant. This scent source was placed at the scene of the break-in and the dogs were, in turn, ordered to track that scent. The tracking took place the same night as the break-in. The dogs followed a trail to the point where the stolen goods were recovered and further to the point where the defendant and codefendant were apprehended by the police. The record shows no possibility that the dogs were tracking only the codefendant because the handler repeatedly testified that they were following a combined scent from the clothing articles of both men.

The dogs' tracking actions were consistent with each other. We hold that these circumstances meet the *McLeod* requirement of a substantial assurance of identification.

The evidence was therefore sufficient to support defendant's conviction.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

JOHN W. SHERRILL AND JOSEPH T. WALSH v. TOWN OF WRIGHTSVILLE BEACH, NORTH CAROLINA, BOARD OF ALDERMEN OF THE TOWN OF WRIGHTSVILLE BEACH, NORTH CAROLINA; EUGENE N. FLOYD, INDIVIDUALLY AND AS MAYOR; CORNIELLE SINEATH, INDIVIDUALLY AND AS ALDERMAN, FRANCES L. RUSS, INDIVIDUALLY AND AS ALDERMAN, CARLTON B. HALL, AS ALDERMAN, AND JAMES W. SUMMEY, III, INDIVIDUALLY AND AS ALDERMAN; JOHN T. NESBITT, TOWN BUILDING INSPECTOR

No. 855SC422

(Filed 17 September 1985)

1. **Municipal Corporations § 30.6— zoning—denial of variance—no error**

The board of aldermen, sitting as a board of adjustment, did not have legal authority under G.S. 160A-338(d) to grant petitioners' requested variance from an R-1 zoning classification to allow duplexes on petitioners' lots. A board of adjustment has a quasi-judicial power to vary or modify zoning regulations only so long as the spirit of the ordinance continues to be observed; construction of a duplex would violate the spirit as well as the letter of the R-1 zoning classification. G.S. 160A-338(d).

2. **Municipal Corporations § 31.2— constitutionality of zoning ordinance—not properly raised**

The issue of whether a zoning ordinance was unconstitutional was not properly before the Court of Appeals because the board of aldermen, sitting in their quasi-judicial capacity as the board of adjustment, only had the authority to grant or deny a variance under the ordinance; the superior court, and hence the Court of Appeals through derivative appellate jurisdiction, had the statutory power to review only the issue of whether the variance was properly denied; the constitutionality of the zoning ordinance was a separate issue not properly a part of these proceedings since the denial of the variance request never addressed the validity of the zoning ordinance; and the superior court sat in the posture of an appellate court and was not in a position to address constitutional issues that were not before the board.

Sherrill v. Town of Wrightsville Beach

APPEAL by petitioners from *Reid, Judge*. Orders entered 6 December 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 August 1985.

Petitioners own lots located inside the boundaries of respondent Town of Wrightsville Beach. The lots and surrounding area are zoned R-1, which is primarily for single family residences and which prohibits duplexes. The town building inspector denied petitioners' applications to build duplexes on the lots. The Wrightsville Beach board of aldermen refused petitioners' rezoning request that would have allowed duplexes in R-1 areas. The board of aldermen, sitting as the board of adjustment, then denied petitioners' request for a variance. Petitioners then petitioned superior court for writs of certiorari to review respondent's decisions denying their variance requests. After making findings of fact and conclusions of law, the court dismissed the petitions. Petitioners appealed.

Allen and MacDonald, by James A. MacDonald, and John W. Sherrill, pro se, for petitioner appellants.

Martin, Wessell & Raney, by John C. Wessell, III, for respondent appellee.

WEBB, Judge.

[1] In their first two issues presented on appeal the petitioners argue that (1) the superior court should have remanded the case back to the board of adjustment for findings of fact with regard to the denial of the variance request, and (2) the superior court should have compelled respondent to grant the requested variances. We disagree. G.S. 160A-388(d) provides:

> (d) When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall have the power, in passing upon appeals, to vary or modify any of the regulations or provisions of the ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

A board of adjustment has a quasi-judicial power under this statute to vary or modify zoning regulations only so long as the spirit of the ordinance continues to be observed. *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128 (1946). A nonconforming building or use that conflicts with the general purpose or spirit of the zoning ordinance can only be authorized by the board of aldermen acting in their legislative capacity to rezone, not under the guise of a variance permit. *Id.* In *Lee* the North Carolina Supreme Court held that a board of adjustment had no authority under former G.S. 160-172 and 160-178 (the predecessors of G.S. 160A-388) to issue a variance allowing a grocery store-service station to be constructed in a residential area. The Court reasoned that such a substantial departure from the zoning ordinance did violence to the spirit of the ordinance and therefore could be achieved only through rezoning.

The decision in *Lee* controls the present case. Petitioners attempt to distinguish *Lee* on the grounds that it involved a commercial use in an area zoned for residential use, whereas the present case involves a nonconforming residential use in an area zoned for residential use. We nonetheless believe that construction of a duplex would violate the spirit as well as the letter of the R-1 zoning classification. The purpose of an R-1 designation is to limit density. The purpose and effect of a duplex is to increase density. Consequently, the requested variance is directly contrary to the zoning ordinance. In these circumstances the board of adjustment had no legal authority under G.S. 160A-388(d) to grant the requested variance, and thus there was no need for it to make findings on the merits of the request.

Petitioners also argue that they deserve a variance because surrounding lots contain duplexes. We cannot pass on what the petitioners deserve. The board of adjustment did not have the power to allow the petitioners to violate the ordinance on the facts of this case.

[2] Petitioner Sherrill maintains that the zoning ordinance is unconstitutional as applied to him. Although he cites no constitutional provisions and no North Carolina case law on this issue, it appears that he is arguing that (1) the R-1 designation is unconstitutional since more than half the area is devoted to nonconforming uses, and (2) the ordinance bears no relation to G.S. 160A-383 or any legitimate public purpose.

These arguments are not properly before us. G.S. 160A-388(e) states in pertinent part: "Every decision of the board [of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." The board of aldermen, sitting in their quasi-judicial capacity as the board of adjustment in this case, only had the authority to grant or deny a variance under the zoning ordinance. G.S. 160A-388(d); *Lee, supra.* The Board's decision was to deny the variance. Under G.S. 160A-388(e) the superior court, and hence this Court through our derivative appellate jurisdiction, had the statutory power to review only the issue of whether the variance was properly denied. The constitutionality of the zoning ordinance is a separate issue not properly a part of these proceedings since the denial of the variance request never addressed the validity of the zoning ordinance. Furthermore, the superior court sat in the posture of an appellate court, *see Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980), so it was not in a position to address constitutional issues that were not before the board.

The orders of the superior court are

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

HARRIS-TEETER SUPERMARKETS, INC. v. ALICE W. HAMPTON

No. 8514SC72

(Filed 17 September 1985)

1. Vendor and Purchaser § 1.3— option contract—condition precedent—issue for jury

An issue as to whether the parties to an option contract intended plaintiff's purchase of other property to be a condition precedent to the exercise of its option to purchase defendant's property constituted an issue of fact for the jury, and the trial court erred in entering summary judgment for defendant on that issue.

2. Vendor and Purchaser § 2.1— duration of option—genuine issue of material fact

A genuine issue of material fact was presented as to when an option to purchase expired where it is unclear from the face of the option contract when the contract was made, and it is unclear from the terms of the contract whether the option was to be for a period of ninety days from the execution of the contract or merely until the date set forth in the option.

APPEAL by plaintiff from *Martin, John C., Judge.* Order entered 22 October 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 August 1985.

Harris-Teeter Supermarkets, Inc. (hereinafter Harris-Teeter) and Alice W. Hampton entered into an option contract which gave Harris-Teeter the right to purchase certain land owned by Mrs. Hampton. The contract stated that it was made on the 12th of October 1983. It contained the following terms and conditions which are pertinent to this appeal.

> This option shall be for a period of Ninty [sic] (90) days and shall exist and continue through 12:00 noon on the 10th day of January, 1984.
>
> . . . .
>
> 1. Buyer may extend at his option the term of this contract by 3/30 day extensions with the payment of 1% of the sales price per month or $2,250 per mon.
>
> . . . .
>
> 3. The purchase of parcels of property subject tract to the south owned by E. A. Blackwood and wife and additional tract owned by Inez Hall and husband to be purchased simultaneously with this transaction.

The signatures at the bottom of the lease were not dated. However, several changes were made to the contract and these were all initialed and dated 17 October 1983. From the dates which appear on checks in record, it appears that Harris-Teeter sent checks to Mrs. Hampton on 11 January 1984, 22 February 1984 and 22 March 1984 to exercise the right to obtain extensions to the option. These payments were accepted by Mrs. Hampton.

On 9 April 1984, Harris-Teeter questioned Mrs. Hampton as to when she believed the option was to expire. She responded

that she was not sure and referred them to her accountant who also failed to give an answer. Harris-Teeter attempted to exercise its option on 10 April 1984 by delivering a letter to Mrs. Hampton. She refused to accept tender claiming that the option had expired on the previous day and that Harris-Teeter had failed to meet a certain condition precedent listed in the contract.

On 30 May 1984, Harris-Teeter brought suit against Mrs. Hampton seeking to compel specific performance. Mrs. Hampton made a motion for summary judgment on 17 September 1984. After a hearing on the motion, the trial judge granted summary judgment for Mrs. Hampton on 22 October 1984. From this order, plaintiff appealed.

Powe, Porter and Alphin, by W. Travis Porter and David E. Fox, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Deborah H. Hartzog, and William C. Matthews, Jr., for defendant-appellee.

ARNOLD, Judge.

The defendant's motion for summary judgment was based upon two grounds. She argued that the option was not timely exercised, and that the conditions precedent to her obligations were not fulfilled. Summary judgment is appropriate only where there are no genuine and material issues of fact to be resolved. *Texaco, Inc. v. Creal*, 310 N.C. 695, 314 S.E. 2d 506 (1984). However, if summary judgment was proper for either of these reasons, the judgment must be affirmed.

[1] First we will determine whether summary judgment based upon Mrs. Hampton's claim that she was not required to perform because Harris-Teeter had failed to perform a condition precedent to the exercise of the option. She alleged that Harris-Teeter had failed to purchase the property owned by the Blackwoods and the Halls, thus they had failed to meet a condition precedent to its exercise of the option to purchase her property. Harris-Teeter admitted that they had not purchased the Blackwood and Hall property, however, they argue that the purchase was not a condition precedent to the exercise of their option. Conditions precedent are not favored by our law, and contract provisions will not be found to be conditions precedent in the absence of language

plainly requiring such a construction. *See, Financial Services v. Capital Funds*, 23 N.C. App. 377, 209 S.E. 2d 423 (1974), *aff'd* 288 N.C. 122, 217 S.E. 2d 551 (1975). Furthermore, whether conditions are conditions precedent or conditions subsequent depends entirely upon the intention of the parties shown by the contract, as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence admissible to aid the court in determining the intention of the parties. *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). Issues regarding the intent of the parties are issues of fact. Thus, summary judgment was not properly granted on this ground.

[2] Next, we must determine whether summary judgment was proper based upon Mrs. Hampton's contention that the option was not timely exercised. Mrs. Hampton argues that under the clear terms of the contract, Harris-Teeter's right to exercise their option expired on 9 April 1984, one day prior to the date of acceptance. Harris-Teeter argues that there is an issue of fact regarding when the option expired and that as such this is not a proper subject for summary judgment.

When the terms of a contract are clear and unambiguous the express terms of the contract control in determining its meaning. *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976). However, if there is some ambiguity on the face of the document it may be explained by extrinsic evidence, and the meaning of the document becomes a question for the jury, under proper instructions, to determine. *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962). The option in the case *sub judice* contains an issue for the jury. It is unclear from the face of the document when the contract was made. There are two dates, October 12, 1983, and October 17, 1983, present on different portions of the document both of which purport to govern when the contract was executed. Since it is unclear when the contract was made, it is unclear from the terms of the contract whether the option to purchase was to be for a period of ninety days from the execution of the contract or merely until the date set forth in the option. This ambiguity is a question which can only be resolved by the admission of extrinsic evidence. The plaintiff offered evidence in the form of affidavits sufficient to create an issue of material fact regarding the duration of the lease. This showing was sufficient

to defeat Mrs. Hampton's motion for summary judgment. The judgment of the trial court is, therefore,

Reversed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. ADAM GLIDDEN

No. 845SC1044

(Filed 17 September 1985)

1. **Constitutional Law § 28— misdemeanor committed in secrecy and malice—raised to felony—no violation of equal protection**

Defendant's equal protection and due process rights were not violated where he was charged with writing and transmitting an unsigned threatening letter, a misdemeanor under G.S. 14-394, and with acting in secrecy and malice, which raises the misdemeanor to a felony under G.S. 14-3(b). G.S. 14-3(b) and 14-394 set up different punishment levels for the same criminal act without discriminating against any class of defendants, and defendant did not show a discriminatory pattern or intent by the prosecutor in his application of the statutes. G.S. 14-1.

2. **Anonymous Threats § 1— transmitting a threatening letter—instructions correct**

In a prosecution for sending an anonymous threatening letter, there was no error in the court's instruction on transmitting a threatening letter where the instruction was in substance the same as the instruction requested by defendant and the instruction was a correct statement of law.

3. **Anonymous Threats § 1— transmitting threatening letters—evidence sufficient**

There was sufficient evidence to support a conviction for writing and transmitting unsigned threatening letters in violation of G.S. 14-394 where the recipient of the letters was familiar enough with defendant's handwriting to identify him as the author; some of the letters appeared in the victim's classroom during or immediately following the time period when defendant attended class there; some of the envelopes were folded, indicating they could have been mailed to an accomplice who then mailed them from the postmarked location while defendant was in another location; and no more letters were mailed to the victim after defendant was arrested.

APPEAL by defendant from *Tillery, Judge*. Judgment entered 27 January 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 August 1985.

Defendant was convicted by a jury of ten counts of feloniously writing and transmitting anonymous threatening letters in violation of G.S. 14-394 and 14-3(b). The trial court sentenced him to a presumptive term of three years on each count, with the sentences combined into two groups of concurrent sentences so that his total prison time is six years. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Shipman & Lea, by James W. Lea, III, and Gary K. Shipman, for defendant appellant.

WEBB, Judge.

[1] Defendant first contends that his equal protection and due process rights were violated when the State charged him with a felony indictment by combining G.S. 14-3(b) and 14-394. G.S. 14-394 makes it unlawful to write and transmit an unsigned threatening letter. It appears that G.S. 14-394, standing alone, is a misdemeanor. G.S. 14-1 states that a crime is a misdemeanor unless (1) it was a felony at common law, (2) it is punishable by death, (3) it is punishable by imprisonment in the State's prison, or (4) it is denominated as a felony by statute. We are unaware of the offense stated in G.S. 14-394 ever being a common law crime, and none of the other G.S. 14-1 conditions are set forth in G.S. 14-394, so it must be a misdemeanor. Additionally, *State v. Robbins*, 253 N.C. 47, 116 S.E. 2d 192 (1960), refers to G.S. 14-394 as a misdemeanor. However, G.S. 14-3(b) provides: "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." Defendant was charged with a felonious violation of G.S. 14-394 on the basis that he acted in secrecy and malice under G.S. 14-3(b).

Defendant argues that the secrecy and malice elements of G.S. 14-3(b) are also inherent in G.S. 14-394, and therefore the statutes set up two different possible punishments for the same crime. He cites *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970), and *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978), for the rule that a statute violates equal protection if it prescribes different punishments for the same acts committed un-

der the same circumstances by persons in like situations. The rule enunciated in *Benton* and *Killian* has no application to the present case. A statute would violate equal protection rights if it provided for different punishments for different classes of people without any rational basis for the distinction. However, G.S. 14-3(b) and 14-394 do not so discriminate; instead, they apply equally to everyone. The fact that the State may elect to prosecute either for the greater offense of the two statutes combined or the lesser offense of G.S. 14-394 alone is similar to the discretion the prosecutor has in choosing whether to proceed on a greater offense such as murder or the lesser included offense of manslaughter. *United States v. Batchelder*, 442 U.S. 114, 60 L.Ed. 2d 755, 99 S.Ct. 2198 (1979), held that the government could prosecute under either of two substantive criminal statutes that contained identical elements but different levels of punishment. No violation of equal protection or due process occurred since the statutes did not discriminate against any class of defendants. Although the present case does not involve two substantive statutes, we find the analysis of *Batchelder* applies here because G.S. 14-3(b) and 14-394 set up different punishment levels for the same criminal act without discriminating against any class of defendants. Furthermore, defendant has not shown a discriminatory pattern or intent by the prosecutor in his application of the statutes.

[2] Defendant contends that the trial court erred in instructing the jury that "transmitting" a threatening letter means "to send or in some way cause to be received that letter by the person meant to receive it." He had requested an instruction that, "[t]o find transmission you must find that the Defendant sent or transferred a letter to Pamela Navarra." Defendant's proposed instruction and his argument on appeal are based on *State v. Robbins*, 253 N.C. 47, 116 S.E. 2d 192 (1960). That case held, "There can be no transmission within the meaning of the statute without an intended recipient and a delivery of the prohibited writing or a communication of its contents to the intended recipient." *Id.* at 49, 116 S.E. 2d at 193. We hold that the trial court's instruction was proper because (1) it was in substance the same as the requested instruction, and (2) it was a correct statement of the law as set forth in *State v. Robbins. State v. Green*, 305 N.C. 463, 477, 290 S.E. 2d 625, 633 (1982).

[3] Defendant maintains the evidence was insufficient to show that he transmitted the letters as required by G.S. 14-394. He does not dispute that there was sufficient evidence for the jury to find that he wrote the letters. *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948), held there was sufficient evidence to support a conviction for writing and transmitting an unsigned threatening letter in violation of G.S. 14-394 where an expert testified that the letter was written on a typewriter later found in the defendant's home, and where defendant was seen in the area of the ransom money. The evidence in the present case is just as strong. The recipient of the letters was familiar enough with defendant's handwriting to identify him as the author of the threatening letters. Some of the letters appeared in the victim's classroom during or immediately following the time period when defendant attended class there. Some of the envelopes were folded, indicating they could have been mailed to an accomplice who then mailed them from the postmarked location while defendant was in another location. No more letters were mailed to the victim after defendant was arrested. This was sufficient evidence for the jury to find that defendant transmitted the letters as well as wrote them.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. EUGENE WATTS, JR.

No. 8419SC1202

(Filed 17 September 1985)

Burglary and Unlawful Breakings § 5.8— burglary of residence—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of first degree burglary for insufficient evidence where the victim was living in a dwelling house without paying rent to protect it and its contents for its owners; the evidence did not show that the owner did not consent to entry; and defendant entered through an unlocked door. A structure does not lose its status as a dwelling house because it is occupied by someone other than the owner; it is not necessary to show non-consent by the owner when the

premises are occupied by another; and the mere pushing or pulling open of an unlocked door, even in the slightest degree, constitutes a breaking.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered in CABARRUS County Superior Court 12 July 1984. Heard in the Court of Appeals 27 August 1985.

Defendant was charged in a proper indictment with first degree burglary. At trial, the State's evidence tended to show the following events and circumstances. On 12 December 1983, Timothy Williams was the sole occupant of a residence at 52 Bell Street in Concord. At about 7:00 p.m., Williams was cooking in the kitchen when he observed the door leading from the kitchen to a screened-in back porch "ease" open. Williams immediately went to the adjacent hallway, obtained a shotgun, and returned to the hall door which led to the porch. Through the glass portion of the hall door, Williams observed two black males; he immediately pursued the men. As the men fled, Williams shot one of them in the back. After going into the house for more shotgun shells, Williams returned to the yard but saw no one.

Later the same night, Officer Hatley of the Concord police found defendant at the emergency room of Cabarrus Memorial Hospital. Medical personnel removed shotgun pellets from defendant's buttocks and legs. The pellets were the same type fired by Williams. Defendant was arrested and gave a statement implicating Harold Bost.

Bost, a witness for the State, testified that he and Williams went to the house at 52 Bell Street on the night in question after defendant had told Bost they could break in the house and get some guns and stereo equipment. Bost and defendant went onto the porch, where defendant kicked "the door." When Williams came out with a gun, Bost and defendant ran away and Bost hid under a nearby house. About half an hour later defendant told Bost that defendant had been shot. Defendant went to the hospital against Bost's advice.

Defendant testified to the effect that he and Bost, who lived next door to 52 Bell Street, went to those premises, where Bost went on the porch while defendant remained in the yard. When Bost ran in defendant's direction saying a man had a gun, both ran away, and defendant was shot. Later, at defendant's house,

Bost told defendant's wife that defendant had nothing to do with the break-in.

From a sentence of imprisonment entered on the jury's verdict of guilty, defendant has appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General George W. Boylan for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Geoffrey C. Mangum for defendant appellant.

WELLS, Judge.

Defendant assigns error to the trial court's denial of his motion to dismiss for insufficiency of the evidence. The constituent elements of first degree burglary are the breaking and entering in the nighttime into a dwelling house or a room used as a sleeping apartment which is occupied at the time of the offense with the intent to commit a felony therein. *State v. Person*, 298 N.C. 765, 259 S.E. 2d 867 (1979). There was sufficient evidence in this case to allow the jury to find each of these elements.

Under this assignment, defendant first contends that the State failed to prove that the structure at 52 Bell Street was a dwelling house, relying principally upon *State v. Potts*, 75 N.C. 129 (1876), which held that a building occupied by a watchman for the sole purpose of keeping guard on property contained therein was not a dwelling. The case at bar is clearly distinguishable. The State's evidence showed that Timothy Williams was living in a dwelling house at 52 Bell Street. The facts that Williams was not paying rent and that he was living in the house to protect it and its contents for its owners do not negate the evidence which clearly showed that the structure was a dwelling house. A structure does not lose its status as a dwelling house because it is being occupied by someone other than the owner. *See State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976).

Defendant next contends that the State failed to prove lack of consent to entry, because the evidence failed to show that the owner of the structure did not consent to defendant's entry. Defendant concedes that Williams did not consent to defendant's entry. While consent to entry by the owner of a dwelling house constitutes a defense to burglary, *State v. Thompson*, 59 N.C.

App. 425, 297 S.E. 2d 177, *disc. rev. denied*, 307 N.C. 582, 299 S.E. 2d 650 (1983), in order to convict a person of burglary it is not necessary to show non-consent by the owner when the premises are occupied by another, but only non-consent by the occupant. *State v. Beaver, supra.*

Defendant next contends that the State's evidence did not prove a breaking or entering. It is well established that the mere pushing or pulling open of an unlocked door, even in the slightest degree, constitutes a breaking. *See State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). The evidence in this case shows clearly that defendant entered through an unlocked door onto the porch of the house. This was sufficient to show a breaking and an entering.

Under another assignment of error, defendant contends that the trial court erred in failing to submit to the jury the lesser included offense of felonious breaking and entering, because the evidence was in conflict on the issue of dwelling house status and the issue of whether defendant both broke and entered the house. We have resolved these issues against defendant, and this assignment is therefore overruled.

Defendant next contends that the trial court committed "plain error" in failing to submit the lesser included offense of attempted burglary.[1] Again, defendant relies on an asserted conflict in the evidence as to whether there was an entry. Having resolved this issue against defendant, we overrule this assignment of error.

No error.

Judges WHICHARD and PHILLIPS concur.

1. Defendant did not request an instruction as to this lesser included offense, nor object at trial to the trial court's failure to give such an instruction.

STATE OF NORTH CAROLINA v. RACHEL BRITT MASSEY AND VERA MAE LONG

No. 8513SC22

(Filed 17 September 1985)

Arson § 4.2; Insurance § 138— conspiracy to burn dwelling—false insurance claims —insufficient evidence

The State's circumstantial evidence was insufficient to support conviction of defendants for conspiracy to burn a mobile home, conspiracy to present a fraudulent insurance claim, and presenting a fraudulent insurance claim.

APPEAL by defendants from *Farmer, Judge.* Judgment entered 1 June 1984 in COLUMBUS County Superior Court. Heard in the Court of Appeals 13 August 1985.

Defendant Massey was convicted of conspiracy to burn a dwelling house, conspiracy to present a false and fraudulent claim for payment of insurance, and of presenting proof in support of a false and fraudulent claim for insurance.

Defendant Long was convicted of conspiracy to burn a dwelling house, conspiracy to present a false and fraudulent claim for insurance, and of presenting a false and fraudulent claim for insurance.

At trial, the State's evidence tended to show the following events and circumstances. Defendant Massey, who is defendant Long's daughter, lived in a Whiteville trailer park, next door to her mother, in a mobile home owned by defendant Long. On 30 September 1982, a neighbor observed Massey carrying clothing and household items from her dwelling to her mother's dwelling. In the early morning of 1 October 1982, Massey, in the company of Hartford T. Sellers, left her dwelling and went to her mother's dwelling. Just after leaving her dwelling, Massey threw a "gas" can into a neighbor's yard. Within a minute or two after Massey left her dwelling, it began burning. Massey remained in Long's dwelling until the fire was extinguished, Long being present in her dwelling during these events. There was evidence that the fire was intentionally set. On the morning of the fire, Massey called her brother and asked him to say to any inquirers that Massey and Sellers stayed in Fayetteville the night before the fire with Sellers' brother, which was not true. Long filed an in-

surance claim and was paid $6,800.00 for the loss of the mobile home and $250.00 for a washing machine. Of the total loss proceeds approximately $6,300.00 went directly to the mortgagee of the mobile home. The same neighbor who testified to seeing Massey leave her mobile home shortly before the fire testified that Massey later told her that Massey had received $4,000.00 for burning the trailer. Defendant Long told the insurance adjuster who handled the claim that she did not know how the fire started and that Massey had gone out of town the night before the fire. Massey told the adjuster she had gone to Fayetteville the night before the fire and had not returned home until about 6:45 a.m. the day of the fire. She did not discover the fire until about 11:00 a.m. She did not know how the fire started.

Defendant Massey did not testify. Defendant Long testified that she saw Massey at about 8:00 p.m. on the night before the fire, when Massey told her that Massey and Sellers were going to Fayetteville to spend the night. She did not see Massey again before about 11:00 a.m. the day of the fire, after the fire was extinguished. The day before the fire, Massey had brought clothing to Long's home to dry, but brought no household utensils. Long first learned of the fire when someone knocked at her door about 6:30 a.m. Long called the fire department. She did not know how the fire started.

From fines and sentences of imprisonment, defendants have appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney Gayl M. Manthei for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr. for defendant Massey.

Junius B. Lee, III and Fred C. Meekins, Jr. for defendant Long.

WELLS, Judge.

Each defendant has assigned error to the trial court's failure to grant their motion to dismiss for insufficiency of the evidence. We agree with defendants and reverse.

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or do a lawful act in an unlawful

way or by unlawful means. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982). In order for a defendant to be found guilty of a conspiracy, it must be established by competent evidence that the defendant entered into an unlawful confederation for the criminal purposes alleged. *Id.* While a conspiracy may be established from circumstantial evidence, there must be such evidence to prove the agreement directly or such a state of facts that an agreement may be legally inferred. *Id.* Conspiracies cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy. *Id.* If the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy. *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933).

Clearly, there is no direct evidence of a conspiracy in this case, all of the State's evidence being circumstantial. While it appears that a reasonable inference could be drawn from this evidence that defendant Massey burned the mobile home in which she was living, we cannot agree that the evidence supports a reasonable inference that either defendant conspired with each other or any other person to commit the crimes for which they stand convicted. There is no more than mere suspicion in this case, and suspicion, however strong, is simply not enough. *See State v. LeDuc, supra*, and cases cited and discussed therein. The fraudulent insurance claims charges are rooted in the conspiracy to burn charges; therefore, they must fall with the conspiracy.

For the reasons stated, the judgments against each defendant must be reversed and their sentences vacated.

Reversed and vacated.

Chief Judge HEDRICK and Judge WEBB concur.

TOM TOGS, INC. v. BEN ELIAS INDUSTRIES CORP.

No. 8510SC21

(Filed 17 September 1985)

Process § 14.2— out-of-state defendant—insufficient minimum contacts with North Carolina

There were insufficient minimum contacts between the out-of-state defendant and the State of North Carolina to satisfy constitutional requirements of due process where the record revealed only that defendant's agent visited a showroom in New York, viewed samples, and completed a purchase order for a quantity of the North Carolina plaintiff's merchandise based on those samples. There was no evidence of another contract between plaintiff and defendant, that defendant was ever a party to another contract entered into or to be performed in North Carolina, that defendant maintained an office or employed agents within North Carolina, that any of defendant's employees or agents ever set foot within North Carolina, that defendant has ever advertised or solicited business within North Carolina, or that defendant was licensed with the Secretary of State to conduct business in North Carolina. The fact that defendant intended to send its personal labels to plaintiff for use in the shirts was not in itself enough basis for defendant to anticipate a North Carolina lawsuit. G.S. 55-145.

APPEAL by defendant from *Lee, Judge.* Order entered 19 October 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 26 August 1985.

This is a civil action wherein plaintiff, a North Carolina corporation, seeks to recover $32,789.98 allegedly owed by defendant, a New Jersey corporation with its principal place of business in New York. Defendant filed a motion to dismiss for lack of jurisdiction. The motion was denied, and defendant appealed.

Johnson, Gamble, Hearn & Vinegar, by Richard J. Vinegar, for plaintiff, appellee.

Smith, Debnam, Hibbert & Pahl, by Bettie Kelley Sousa, for defendant, appellant.

HEDRICK, Chief Judge.

The underlying contract in this case involved the purchase of shirts by defendant distributor from plaintiff manufacturer. In November 1983, one of defendant's agents visited the New York showroom of Mr. Neal Schulman, an independent sales represent-

ative who represented several manufacturing companies, including plaintiff's, and discussed the purchase of a quantity of plaintiff's shirts. A purchase order on defendant's letterhead was completed and given to Mr. Schulman, who forwarded it to plaintiff's headquarters in North Carolina, since he had no authority to approve it himself. The purchase order indicated that defendant intended to send its personal labels to plaintiff for use in the shirts. Plaintiff accepted the purchase order, made the shirts in North Carolina, and shipped them to New York. Thereafter a dispute arose, and plaintiff sued to recover the purchase price less the amount it had recovered by resale.

The sole issue with which we are presented is whether the facts of this case reveal sufficient minimum contacts between defendant and the State of North Carolina to satisfy Constitutional requirements of due process.

Our Supreme Court has cited three essential requirements which must be met when making a due process determination:

> (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the Legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement.

Goldman v. Parkland, 277 N.C. 223, 229, 176 S.E. 2d 784, 788 (1970), citing *Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965). Here, the first requirement is not in dispute.

The third requirement is also satisfied since defendant readily admits the applicability of our long arm statute, G.S. 55-145. The essential determination in the present case is whether the defendant has engaged in some act by which he has purposefully availed himself of the privilege of conducting business in North Carolina, thus invoking the benefits and protection of the laws of this State. Our Supreme Court has recently elaborated on this requirement by stating that it is "crucial to due process analysis . . . 'that the defendant's conduct and connection with the forum

State are such that he should reasonably anticipate being haled into court there.'" *Miller v. Kite*, 313 N.C. 474, ---, 329 S.E. 2d 663, 665 (1985), *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed. 2d 490, 501 (1980). We believe the evidence does not support such a finding in this case.

The record reveals no evidence of another contract between plaintiff and defendant, nor is there any evidence that defendant was ever a party to another contract entered into or to be performed in North Carolina. There is nothing in the record to suggest that defendant maintained an office or employed agents within this State, or even that any of defendant's employees or agents ever set foot within North Carolina. The record does not disclose any evidence that defendant has ever advertised or solicited business within this State, nor was it shown that defendant corporation was licensed with the Secretary of State to conduct business in North Carolina. The record reveals instead only that defendant's agent visited a showroom in New York, viewed samples, and completed a purchase order for a quantity of merchandise based on those samples. The intended use of defendant's personal labels in the shirts, one of the points emphasized by plaintiff in its brief, is not in itself enough basis for defendant to anticipate a North Carolina lawsuit. We find plaintiff's other allegations of minimum contacts between defendant and North Carolina equally unpersuasive.

Accordingly, we hold that there are insufficient contacts between defendant and North Carolina to satisfy the Constitutional requirements of due process, and the order of the trial court denying defendant's motion to dismiss is reversed.

Reversed.

Judges ARNOLD and COZORT concur.

A. FLOYD HARRELL v. FIRST UNION NATIONAL BANK

No. 847SC738

(Filed 17 September 1985)

Evidence § 32.2— applicability of parol evidence rule

The parol evidence rule rendered incompetent plaintiff's testimony that, at the time he signed a letter providing that certain common stock could be used as collateral for future advances to plaintiff's son-in-law, he told defendant bank's loan officer that no future advances secured by the stock were to be made to the son-in-law without his prior approval.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 2 March 1984 in Superior Court, WILSON County. Heard in the Court of Appeals 7 March 1985.

This is an action for the wrongful sale of stock. The plaintiff's evidence showed that the defendant had made several loans to the plaintiff during a period of several years. The loans were secured by life insurance policies owned by the plaintiff. The plaintiff had also allowed his son-in-law to use the policies as collateral for loans. In March 1980, the plaintiff substituted common stock as collateral for his loans. At that time he signed a document entitled "Letter of Consent" which provided that the stock could be used as collateral for future advances to the plaintiff's son-in-law.

The court sustained an objection to part of the conversation between the plaintiff and the loan officer at the time the Letter of Consent was signed. The plaintiff then testified out of the presence of the jury that at the time he signed the Letter of Consent he told the loan officer that he did not want any future advances made to his son-in-law which were secured by the stock unless the plaintiff approved such advances. The loan officer replied, "That's right." On one occasion the plaintiff consented to an advance but several loans were subsequently made to the son-in-law without plaintiff's consent. The defendant sold the stock when the loans were not paid.

At the conclusion of the plaintiff's evidence the court granted the defendant's motion for a directed verdict. The plaintiff appealed.

Carr, Gibbons, Cozart and Jones, by L. H. Gibbons, for plaintiff appellant.

Connor, Bunn, Rogerson & Woodard, by James F. Rogerson, for defendant appellee.

WEBB, Judge.

This case brings to the Court a question as to whether testimony as to a conversation between the plaintiff and a loan officer of the defendant was properly held to be incompetent under the parol evidence rule. The parol evidence rule is not a rule of evidence but of substantive law. *See* E. Allan Farnsworth, *Contracts*, 447 *et seq.* It prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement. The testimony of the plaintiff to the effect that no future advances to his son-in-law would be made without his consent would vary the terms of the Letter of Consent and the court was correct in not letting it do so.

The appellant, relying on *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978), *Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E. 2d 517 (1959) and *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946) argues that the parol evidence rule does not prevent the consideration of this testimony. He says this is so because the testimony as to no future advances being made without his consent shows that the instrument was not to become effective until a certain condition was met. In each of the cases cited by the plaintiff there was evidence that the signer of an instrument made its effectiveness conditional upon the happening of some event. Those cases are distinguishable from this case in that the plaintiff in this case delivered the Letter of Consent to the bank and it became effective at that time. The plaintiff's testimony was that he told the loan officer at the time the Letter of Consent was delivered that he would not agree that the stock be used to secure any future loans without his consent. This testimony would have varied the terms of the contract which was in all other respects effective. The parol evidence rule prevents such a variance. The court properly refused to consider this testimony.

Affirmed.

Judge MARTIN concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the parol evidence rule does not apply to the evidence referred to. The evidence, as I view it, shows that the pledge of plaintiff's stock was to be effective only upon the plaintiff approving any loan the bank made to Ellis, and the writing and the stock were signed, delivered, and accepted on that condition.

STATE OF NORTH CAROLINA, PLAINTIFF v. NORRIS C. REID, III, DEFENDANT, IN THE MATTER OF A DOUGLAS C-54D-DC AIRCRAFT, SERIAL #10661, REG. #N-99212 ON PETITION OF JESSE GENE ROGERS

No. 842SC1240

(Filed 17 September 1985)

Judgments § 2.1— judgments signed out of session and out of county—no consent—null and void

A judgment signed out of session and out of county was null and void where the record affirmatively disclosed that the parties did not consent, even though the order stated that it was being signed out of session and out of county with the consent of the parties. There is no authority to support the contention that petitioner impliedly consented to the order being entered out of session and out of county by failing to object to the judge's announcement that he would take the case under advisement.

APPEAL by petitioner from *Bruce, Judge*. Order entered 14 September 1984 in Superior Court, MARTIN County. Heard in the Court of Appeals 28 August 1985.

This proceeding to recover possession of a Douglas C-54D-DC aircraft, was instituted by the petitioner, Jesse Gene Rogers, pursuant to the provisions of N.C. Gen. Stat. Sec. 15-11.1. The following facts are not in controversy. On 13 February 1983, law enforcement officers of the Beaufort County Sheriff's Department seized the aircraft in question which was loaded with approximately 15,000 pounds of marijuana. Several individuals were arrested and pled guilty to drug-related charges.

Pursuant to the provisions of N.C. Gen. Stat. Sec. 90-112(d)(2), the Sheriff of Beaufort County advertised the aircraft for public sale on 27 April 1984. On 26 April 1984, a petition for return of the aircraft was filed by Jesse Gene Rogers, the alleged owner. On 26 April 1984, an order was entered temporarily restraining the sale of the aircraft, and the proceeding came on for hearing before Superior Court Judge R. Michael Bruce in Martin County, by consent of the parties, at the 11 June 1984 session.

After the hearing the judge announced that he would take the case under advisement, and on 14 September 1984, he entered an order based on findings of fact and conclusions of law which dissolved the temporary restraining order, denied Mr. Rogers' petition, and reinstated the order of forfeiture. Petitioner appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas J. Ziko, for the State.

Gaskins, McMullan & Gaskins, P.A., by Herman E. Gaskins, Jr., for petitioner, appellant.

HEDRICK, Chief Judge.

Petitioner first contends that the order signed by Judge Bruce on 14 September 1984 is void because it was signed "out of session and out of county." The record discloses that the proceeding was heard in Martin County, Second Judicial District, during the session of Superior Court beginning 11 June 1984. The case was actually heard 15 June 1984. At the conclusion of the hearing, Judge Bruce stated, "I'm going to take this matter under advisement. We're going to be in recess—we're going to be adjourned." The order was signed by Judge Bruce with the following notation: "Entered this the 14 day of September, 1984, out of session and out of the county by consent of the parties."

The petitioner argues that the parties did not consent to the order being signed out of session and out of county. The State does not contend that the parties consented to the order's being signed out of session and out of county, but instead argues that the petitioner "waived his right to contest the validity" of the order by not objecting to the judge's failure to render a decision before adjourning court.

At the outset we take judicial notice of the fact that on 14 September 1984, R. Michael Bruce was the resident superior court judge of the Eighth Judicial District encompassing Wayne, Greene, and Lenoir counties, and that Martin County is in the Second Judicial District encompassing Martin, Beaufort, Tyrrell, Hyde, and Washington counties. We also take notice that Judge Bruce was assigned to a one week term of criminal superior court in Martin County on 11 June 1984, and that he was assigned to criminal superior court in Lenoir County the week of 10 September 1984.

The general rule governing this case is as follows:

> [J]udgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

State v. Humphrey, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923), *quoted in State v. Boone*, 310 N.C. 284, 287, 311 S.E. 2d 552, 555 (1984). When an order is entered out of term and out of county, and without consent of the parties, it is null and void and of no legal effect. *Id.*

While Judge Bruce stated in the order that it was being signed out of session and out of county with the consent of the parties, the record affirmatively discloses that the parties did not consent. The State cites no authority, and we have found none, to support its contention that petitioner impliedly consented to the order being entered out of session and out of county when he failed to object to the judge's announcement that he would take the case under advisement. We are not persuaded by this argument.

We hold the order entered 14 September 1984 outside of Martin County and the Second Judicial District three months after the session of Superior Court when the proceeding was scheduled and heard is void and of no effect, and the order is vacated,

and the cause is remanded to Superior Court, Martin County, for a new hearing on the petition filed 5 June 1984.

Vacated and remanded.

Judges ARNOLD and COZORT concur.

DARLENE STRICKLAND BROWN v. ALLSTATE INSURANCE COMPANY

No. 8521DC87

(Filed 17 September 1985)

Damages § 13.1— extent of injuries—damages to vehicle—exclusion of repair bill

In an action to recover the costs of chiropractic services rendered to plaintiff and her two minor children as a result of injuries sustained in an automobile collision, testimony by plaintiff of the extent and type of damage to her automobile was relevant as tending to prove the force of the impact and, therefore, the nature and extent of the injuries sustained by plaintiff and her children. Although a bill itemizing the costs of repairing plaintiff's automobile might have been corroborative of plaintiff's testimony, the trial court had the discretion under G.S. 8C-1, Rule 403 to exclude the repair bill as needlessly cumulative and potentially confusing or misleading to the jury.

APPEAL by plaintiff from *Keiger, Judge.* Judgment entered 4 September 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 29 August 1985.

Plaintiff seeks to recover the cost of chiropractic services rendered to her and her two minor children as a result of injuries sustained in an automobile collision. At the time of the collision defendant insured plaintiff and was obligated to pay plaintiff's medical expenses under the medical payments provision of its policy.

The parties stipulated that defendant paid all payable expenses except the chiropractic expenses. The issue submitted and the jury's answer were as follows:

> What amount, if any, are the reasonable expenses incurred by the plaintiff and/or her two children for necessary chiropractic services because of bodily injuries caused by the automobile accident . . . .

ANSWER: $0

Plaintiff appeals from a judgment entered on the verdict.

Randolph and Tamer, by Clyde C. Randolph, Jr., and David F. Tamer, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Richard T. Rice, for defendant appellee.

WHICHARD, Judge.

Plaintiff's sole contention is that the court erred in refusing to admit a bill itemizing the cost of repairing her automobile. She argues that the bill was "an important link in the chain of evidence tending to prove the considerable degree of severity in the force of impact." More specifically, she argues that evidence of the force of the impact was relevant and material to the issue of whether the chiropractic services were necessary. We find no prejudicial error.

To be admissible, evidence must be relevant, *i.e.*, it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. 8C-1, Rule 401. Relevant evidence may be excluded, however, if its probative value is outweighed by the danger that it will confuse or mislead the jury or by considerations of needless presentation of cumulative evidence. N.C. Gen. Stat. 8C-1, Rule 403; *see Noel Shows, Inc. v. United States*, 721 F. 2d 327, 329 (11th Cir. 1983); *Government of Virgin Islands v. Torres*, 476 F. 2d 486, 491 (3d Cir. 1973); *Wachovia Bank v. Rubish*, 306 N.C. 417, 434, 293 S.E. 2d 749, 760, *reh. denied*, 306 N.C. 753, 302 S.E. 2d 884 (1982) (pre-Rules case).

Here plaintiff testified to the extent and type of damage to her automobile as a result of the collision. This evidence was relevant as tending to prove the force of the impact and therefore, potentially, the nature and extent of the injuries sustained by plaintiff and her children. *See Davis v. Atlantic Coast Line Railroad Co.*, 145 N.C. 95, 97, 58 S.E. 798, 799 (1907). Plaintiff then sought to introduce the repair bill to corroborate her testimony. The bill contains nothing more than a list of the automobile's damaged parts and the cost of repairing or replacing them. While

perhaps corroborative of plaintiff's testimony, this evidence is cumulative and its probative value is weak. Moreover, the potential for confusion of issues by its admission is clear. The sole question was the amount, if any, that plaintiff was entitled to recover for chiropractic services. Admission of the repair bill might well have led the jury to conclude that it could also award damages for the repairs to plaintiff's automobile.

We thus hold that the court, in the exercise of its discretion under Rule 403, could properly exclude the proffered evidence as needlessly cumulative and potentially confusing or misleading. Assuming error, *arguendo*, we hold it nonprejudicial. "To have [the] judgment set aside, [plaintiff] must show not only that the court erred, but also that the error was material and prejudicial and that a different result likely would have ensued but for the error." *Nelson v. Patrick*, 73 N.C. App. 1, 13, 326 S.E. 2d 45, 53 (1985), citing *Glenn v. Raleigh*, 248 N.C. 378, 383, 103 S.E. 2d 482, 487 (1958). Plaintiff's testimony sufficiently described the damage to her automobile and adequately demonstrated the force and severity of the impact. We do not believe introduction of the cumulative and potentially confusing evidence of the repair bill would have prompted the jury to reach a different result.

No error.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ADAM ANTHONY WRIGHT

No. 8421SC1158

(Filed 17 September 1985)

1. Criminal Law § 60.5— breaking and entering and larceny—fingerprints—evidence sufficient

Defendant's motion to dismiss charges of felonious breaking and entering and felonious larceny was properly denied where the State relied upon fingerprints found at the scene of the crime even though the occupants of the residence had lived there for only five months, the items on which defendant's prints were found were previously located in another residence, and there was no showing that defendant had never lawfully been in the previous residence. When fingerprints are found inside residential premises where a crime has

been recently committed and there is evidence of non-access to such premises by the accused at any time other than the time of the offense, the State has carried its burden to establish *prima facie* that the fingerprints could only have been impressed at the time of the offense.

2. Criminal Law § 161.2— double jeopardy—no assignment of error—argument not considered

The issue of whether defendant's constitutional rights to be free from being twice put in jeopardy for the same offense were violated by his being convicted of both felonious breaking and entering and felonious larceny growing out of the same breaking and entering was not considered because it was not made the basis of an assignment of error. Rules of App. Procedure, Rule 10.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 16 August 1985 in FORSYTH County Superior Court. Heard in the Court of Appeals 22 August 1985.

Defendant was convicted of felonious breaking and entering and felonious larceny. At trial, the State's evidence tended to show the following circumstances and events. At about 4:00 p.m. on 14 March 1984, Shane McCain and his cousin James Lewis returned to their home at 3596 Shaw Road in Winston-Salem and discovered that the house had been broken into. They called police. James' mother, Lottie Lewis, arrived home about 5:15 p.m. and Patsy McCain, Shane's mother arrived about 5:30. The two women inspected the house, found evidence of a break-in and found various items of personal property missing, including jewelry. Officer Hutchens of the Winston-Salem Police Department inspected the house and determined that defendant's fingerprints appeared on two items he found in the house. None of the residents of the Shaw Road dwelling knew defendant, nor had they given him permission to enter the residence. Defendant lived approximately one-fourth to one-half mile from the Shaw Road residence. Upon arrest, defendant stated that he did not break in any house and was not on Shaw Road on 14 March 1984.

Defendant did not testify.

From judgment of imprisonment entered on the verdict, defendant has appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney Victor H. E. Morgan, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Geoffrey C. Mangum, for the defendant.

WELLS, Judge.

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree and find no error.

[1] The central thrust of defendant's argument is that the identity of defendant as the perpetrator of the crimes committed at the Shaw Road residence was based "on inference stacked upon inference." Defendant correctly argues that where the State relies exclusively upon fingerprints found at the scene of the crime to establish identity of the perpetrator, there must be substantial evidence that the fingerprints could have been impressed only at the time the offense was committed. *See State v. Bass*, 303 N.C. 267, 278 S.E. 2d 209 (1981) and cases cited and discussed therein. What is substantial evidence is a question of law. *Bass, supra.*

In *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973), our Supreme Court held that evidence that the occupant of the burglarized residence did not know defendant and had never seen him before, coupled with lack of evidence that defendant had ever been on the premises before, was substantial evidence that the accused's fingerprints found inside the residence could only have been impressed at the time of the offense.

In *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320 (1972), the Court held the following evidence to be sufficient: (1) defendant's fingerprints found in the burglarized premises; (2) the occupants did not know defendant and had never given him permission to enter their home; (3) defendant had never been in the burglarized home. A similar result was reached in *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). *Compare State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979), where the Court found fingerprint evidence to be insufficient because the evidence would permit an inference that defendant could have left his fingerprints at the scene on some other occasion than when the crime was committed.[1]

Defendant argues in this case, however, that evidence that the occupants of the Shaw Road residence had lived there for only five months, that items on which defendant's prints were found were previously located in another residence, and that

1. *Scott* contains a general review and comparison of fingerprint cases.

there was no showing that defendant had never lawfully been in the previous residence distinguishes this case so as to merit defendant's motion. We cannot agree. Our review of the cases persuades us that when fingerprints are found inside residential premises where a crime has been recently committed and there is evidence of non-access to such premises by the accused at any time other than the time of the offense, the State has carried its burden to establish *prima facie* that the fingerprints could only have been impressed at the time of the offense. This assignment is overruled.

[2] Defendant has attempted to present the question of whether defendant's constitutional rights to be free from being twice put in jeopardy for the same offense were violated by his being convicted of both felonious breaking and entering and felonious larceny growing out of the same breaking and entering. This question was not made the basis of an assignment of error and we therefore decline to consider it. *See* Rule 10 of the Rules of Appellate Procedure.

No error.

Judges WHICHARD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. MICHAEL S. BATES

No. 8412SC1183

(Filed 17 September 1985)

Criminal Law § 138— failure to aid victim—improper aggravating factor

The trial court erred in finding as an aggravating factor for voluntary manslaughter that "defendant left the victim dying in a field and did not seek to have help sent to him."

APPEAL by defendant from *Battle, Judge*. Judgment entered 28 June 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 August 1985.

Defendant was charged in a proper bill of indictment with the armed robbery and first degree murder of Roy Lee Warren, Jr. At trial, the State's evidence tended to show the following:

Around 11:00 p.m. on 6 January 1982 Mary Godwin found defendant, seriously injured, on her front porch. Deputies called to the scene searched nearby and found the body of Roy Warren lying on a lead pipe and near a car. A .22 caliber pistol was found in the area. Also found were various items of personal property belonging to both Warren and defendant. There was blood on both the ground and the car, most of it later identified as defendant's rather than Warren's. The pathologist testified that Warren had sustained two gunshot wounds (one just grazed his cheek), thirty-two knife wounds, and a number of blows by a blunt instrument.

Defendant testified at trial as follows: He and Warren had a dispute over the ownership of the gun, and as he was getting out of the car, Warren stabbed him in the back. The two men continued to fight, with defendant beating and stabbing Warren only in self-defense. He eventually was able to break free and crawl to Mrs. Godwin's house.

After a jury trial, defendant was found guilty of robbery with a firearm and first degree felony murder and was sentenced to life imprisonment. On appeal, the Supreme Court reversed both the murder conviction and the underlying robbery conviction. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983). On 27 June 1984 in Cumberland County Superior Court defendant pled guilty to voluntary manslaughter. At the sentencing hearing the trial judge found three aggravating factors, no factors in mitigation, ruled that the aggravating factors outweighed the mitigating factors, and sentenced defendant to fifteen years in prison, a term greater than the presumptive sentence. Defendant did not testify at this sentencing hearing. From the imposition of the fifteen year sentence, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General W. Dale Talbert, for the State.

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

HEDRICK, Chief Judge.

Defendant assigns error to the trial court's aggravation of his sentence by its non-statutory finding that "The defendant left the victim dying in a field and did not seek to have help sent to him." An aggravating factor can properly be found only if the defendant has exhibited some behavior which serves to "increase the offender's culpability." G.S. 15A-1340.3. It is error for an aggravating factor to be based on circumstances which are part of "the very essence" of a crime because "it can be presumed that the Legislature was guided by this unfortunate fact when it established presumptive sentences. . . ." *State v. Higson*, 310 N.C. 418, 424, 312 S.E. 2d 437, 441 (1984). The exceptional nature of a defendant "attempting to secure immediate medical attention for [his victim]" has been noted by the Supreme Court. *State v. Bondurant*, 309 N.C. 674, 694, 309 S.E. 2d 170, 183 (1983). We therefore conclude that the trial court erred in finding as an aggravating factor defendant's failure to aid his victim.

The Supreme Court has ruled that "in every case in which it is found that the judge erred in a finding or 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, 602, 300 S.E. 2d 689, 701 (1983). Since there must be a new sentencing hearing, we find it unnecessary to discuss defendant's remaining assignments of error.

Remanded for resentencing.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 SEPTEMBER 1985

AUTO. EQUIP. DIST., INC. v. PET. EQUIP. & SER., INC. No. 8526SC222	Mecklenburg (84CVS5905)	Dismissed
BOGGS v. N.C. DEPT. OF TRANSPORTATION No. 8510IC546	Industrial Commission (TA-8165)	Affirmed
BOWLES v. FORSYTH CO. DEPT. OF SOCIAL SERVICES No. 8521SC521	Forsyth (84CVS1832)	Affirmed in part; reversed and remanded in part
BROWN v. JACK SMITH TRANS. INS. No. 8510IC320	Industrial Commission (I-1663)	Dismissed
DAVID v. DAVID No. 855DC606	New Hanover (80CVD2262)	Vacated & Remanded
EDWARDS AND FOSTER FERTILIZER CO., INC. v. McGHEE No. 859DC541	Franklin (83CVD356)	Reversed & Remanded
GOOD v. GOOD No. 8525DC500	Caldwell (82CVD841)	Affirmed
GRIER v. GRIER No. 8526DC518	Mecklenburg (79CVD6634)	Affirmed
HUNTER v. CANNON MILLS COMPANY No. 8510IC378	Industrial Commission (I-2913)	Affirmed
IN RE FORECLOSURE OF MILLER No. 8421DC1354	Forsyth (84SP355)	Affirmed
IN RE HAMMONDS No. 8527DC387	Gaston (84J319) (350-84-0386)	Reversed
IN RE KOHRMAN No. 8510DC494	Wake (85SP128)	Affirmed
IN RE NORMAN No. 8512DC550	Cumberland (79J485)	Remanded for resentencing
IN RE PRUETT No. 8510DC496	Wake (85SP115)	Affirmed

IN RE ROSE No. 8523DC281	Yadkin (84J45)	Affirmed
JOHNSON v. WILKINS No. 8510SC508	Wake (84CVS3833)	No Error
LEGER v. LEGER No. 855DC159	Pender (80CVD42)	Reversed & Remanded
LEON v. McDUFFIE No. 8529DC421	Rutherford (77CVD286)	Dismissed
LLOYD v. N.C. DEPT. OF AGRI. No. 8510IC201	Industrial Commission (TA-7931)	Affirmed
MORRIS v. MORRIS No. 8511DC343	Johnston (84CVD1296)	Affirmed
ORR v. ORR No. 8518DC447	Guilford (83CVD5494)	Affirmed
POWELL v. BRITT No. 8522DC31	Davie (80CVD320)	Affirmed
REID v. DURHAM HERALD COMPANY No. 8414SC945	Durham (83CVS03024)	Affirmed
SMITH v. KIDD v. NORTHERN TELECOM, INC. No. 8510DC66	Wake (84CVD1051)	Vacated & Remanded
SMITH v. WINTERS No. 8512DC453	Cumberland (83CVD1342)	Reversed & Remanded
STALLINGS v. STALLINGS No. 8521DC444	Forsyth (84CVD5187)	Affirmed
STATE v. ATKINS No. 858SC439	Wayne (82CRS6685)	Affirmed
STATE v. BELL No. 854SC420	Onslow (84CRS13594) (84CRS13595)	No Error
STATE v. BLAKELY No. 8526SC395	Mecklenburg (84CRS41866)	No Error
STATE v. BRONSON No. 854SC480	Onslow (84CRS7813)	No Error
STATE v. CARLTON No. 8525SC374	Caldwell (84CRS3332)	No Error
STATE v. CARSON No. 8526SC377	Mecklenburg (84CR89598)	No Error

STATE v. CHANCE No. 8519SC565	Cabarrus (84CRS15644)	Affirmed
STATE v. CHASTEEN No. 8526SC275	Mecklenburg (84CRS7004)	No Error
STATE v. DAVIS No. 8512SC523	Cumberland (84CRS022631)	No Error
STATE v. DAVIS No. 855SC354	New Hanover (84CRS13058)	No Error
STATE v. DRAUGHN No. 857SC411	Edgecombe (84CRS8431) (84CRS8178)	No Error
STATE v. ELDER No. 8526SC280	Mecklenburg (83CRS68864) (83CRS68865)	No Error
STATE v. GRIFFIN No. 8523SC363	Wilkes (84CRS5126)	No Error
STATE v. HAIRR No. 854SC433	Sampson (84CRS1719) (84CRS1720) (84CRS1721)	No Error
STATE v. HALL No. 857SC385	Wilson (84CRS3484)	Affirmed
STATE v. HINSON No. 8519SC413	Randolph (83CRS13392)	Affirmed
STATE v. HOGGARD No. 858SC316	Wayne (84CRS3774)	No Error
STATE v. HOWELL No. 8517SC497	Rockingham (84CR5086) (84CR5087)	No Error
STATE v. HUFFMAN No. 8522SC325	Iredell (84CRS619)	Judgment Arrested
STATE v. JAMES No. 858SC341	Lenoir (83CRS7849)	No Error
STATE v. JOHNSON No. 8426SC1263	Mecklenburg (84CRS23511) (84CRS23512)	No Error
STATE v. JONES No. 859SC227	Granville (84CRS2310)	No Error
STATE v. LAVELLE No. 8520SC454	Union (84CRS2867) (84CRS2868)	New Trial (84CRS2867); No Error (84CRS2868)

STATE v. LEGRAND No. 8518SC375	Guilford (84CRS59632)	No Error
STATE v. LOWE No. 854SC475	Sampson (84CRS5865)	No Error
STATE v. LUCAS No. 8512SC287	Cumberland (84CRS14934)	No Error
STATE v. McCANN No. 8517SC392	Surry (84CRS9269)	No Error
STATE v. McNEAIR No. 8519SC424	Rowan (82CRS6833) (82CRS6834)	Remanded for resentencing
STATE v. MARTIN No. 8512SC335	Cumberland (81CRS53425)	No Error
STATE v. MITCHELL No. 856SC490	Hertford (84CRS4545) (84CRS4546)	No Error
STATE v. MORGAN No. 8525SC427	Catawba (75CRS14711) (75CRS15799)	No Error
STATE v. MORIN No. 8523SC279	Wilkes (84CRS1766) (84CRS1767) (84CRS1768) (84CRS1769) (84CRS1770)	No Error
STATE v. MORTON No. 8512SC310	Cumberland (84CRS10059)	No Error
STATE v. MURPHY No. 8523SC595	Wilkes (84CRS7019)	No Error
STATE v. O'QUINN No. 8412SC1120	Cumberland (83CRS40912)	No Error
STATE v. PARKER No. 851SC358	Pasquotank (84CRS1224)	No Error
STATE v. PEELE No. 858SC503	Wayne (84CRS11845)	No Error
STATE v. PEELER No. 8425SC1152	Caldwell (84CRS735)	No Error
STATE v. ROBERTS No. 8514SC298	Durham (84CRS8109)	No Error
STATE v. ROBERTS No. 855SC605	New Hanover (82CRS24050)	Affirmed

STATE v. ROBINSON No. 8413SC1290	Columbus (84CRS1756) (84CRS1757)	New Trial
STATE v. SANDERS No. 8515SC329	Chatham (84CRS4732)	Affirmed
STATE v. SAUNDERS No. 8419SC979	Randolph (83CRS7930)	No Error
STATE v. SIMMONS No. 855SC218	New Hanover (83CRS24796)	No Error
STATE v. SOLOMON No. 854SC645	Onslow (84CRS14154)	No Error
STATE v. SOUTHERLAND No. 8527SC359	Lincoln (84CRS4125)	No Error
STATE v. THIELE No. 8521SC517	Forsyth (84CRS47149)	No Error
STATE v. THOMPSON No. 855SC558	New Hanover (84CRS9704)	Judgment Arrested
STATE v. TRAYWICK No. 8520SC277	Union (84CRS5014) (84CRS6662)	No Error
STATE v. WATTS No. 8519SC516	Cabarrus (84CRS12621)	Remanded for resentencing
STATE v. WILLIAMS No. 8521SC505	Forsyth (84CRS53834)	No Error
STATE v. WRIGHT No. 8526SC428	Mecklenburg (84CRS4648) (84CRS4649) (84CRS4653)	No Error
STATESBORO HOMES, LTD. v. FERRELL No. 8510DC528	Wake (84CVD412)	Dismissed
THOMPSON v. WILKINS No. 858SC482	Wayne (83CVS1861)	Affirmed
YORK v. RED HILL HOSIERY v. CONTINENTAL INSURANCE COMPANY No. 8510IC224	Industrial Commission (I-3728)	Affirmed
ZICKGRAF ENTERPRISES, INC. v. ASTLING No. 8530DC205	Macon (84CVD181)	Affirmed

APPENDIX

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Appendix A of the North Carolina Rules of Appellate Procedure, 306 N.C. 759, is hereby amended to read as in the following pages.

Appendix F of the North Carolina Rules of Appellate Procedure, 306 N.C. 788, is hereby amended in the fifth paragraph thereof to delete the amount "$200.00" and replace it with the amount "$250.00" pertaining to the amount of appeal bond required in civil cases.

Adopted by the Court in Conference this 7th day of October, 1985. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

BILLINGS, J.
For the Court

APPENDIXES

APPENDIX A.

TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THESE RULES

Action	Time (Days)	From date of	Rule Ref.
Taking Appeal (civil)	10	entry of judgment (unless tolled)	3(c)
Taking Appeal (crim.)	10	entry of judgment (unless tolled)	4(a)(2)
Filing and serving proposed record on appeal	60	taking appeal	11(b)
Filing and serving objections or proposed alternative record on appeal	15	service of proposed record	11(c)

Action	Time (Days)	From date of	Rule Ref.
Requesting judicial settlement of record	10	last day within which an appellee served could file objections, etc.	11(c)
Judicial settlement of record	20	service on judge of request for settlement	11(c)
(Certification of Record	10	settlement of record on appeal but only if Notice of Appeal filed prior to 1 February 1985. NO CERTIFICATION IS RE-QUIRED FOR RECORDS ON APPEAL WHERE NOTICE IS FILED ON OR AFTER THAT DATE.)	
Filing Record on Appeal in appellate court	15	settlement of record on appeal (or 10 days from certification of record under old rules)	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	20	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	20	service of appellant's brief	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time. Practical time is 60-90 days)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THESE RULES

Action	Time (Days)	From date of	Rule Ref.
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(a)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a), 15(a)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))	20	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	20	service of appellant's brief	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time. Practical time is 60-90 days)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

* * * * *

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27(c) also explains the significance of the 150-day time period so often misunderstood. The trial tribunal may extend any times during the prepa-

ration of the record on appeal, so long as the record may be filed in the appellate court by the 150th day after the notice of appeal was filed. Any extensions of time which would cause the record to be so filed later than the 150th day after the notice of appeal was filed may only be granted by the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c))

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

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VENDOR AND PURCHASER
VENUE

WATERS AND WATERCOURSES
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ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

The trial court properly granted defendant's motion for summary judgment as to the issue of accord and satisfaction where it was uncontradicted that plaintiff negotiated defendant's check which was tendered as full payment of the disputed claim. *Sanyo Electric, Inc. v. Albright Distributing Co.*, 115.

A letter signed by the parties stating that such agreement and loans to the individual and corporate plaintiffs mentioned therein replaced "any and all loans or commitments now outstanding" constituted an accord and satisfaction of plaintiff corporations' claims against defendant bank for breach of loan commitments. *Fallston Finishing v. First Union Nat. Bank*, 347.

ADMINISTRATIVE LAW

§ 4. Procedure of Administrative Boards

There was no prejudicial error where the Board of Chiropractic Examiners issued a decision to suspend appellant's license 127 days after a hearing and the applicable regulation required that a decision be rendered within 90 days of the hearing. *Farlow v. Bd. of Chiropractic Examiners*, 202.

ADOPTION

§ 4. Validity of and Attack on Decrees

The three-month period for revocation of consent to adoption by the natural parent applied to a natural mother who signed a consent form which stated that she had six months to revoke consent. *In re Terry*, 529.

ADVERSE POSSESSION

§ 2. Hostile and Permissive Use in General

There was no triable issue of fact by application of the doctrines of adverse possession or color of title in a special proceeding to determine a disputed boundary. *Taylor v. Brittain*, 574.

AGRICULTURE

§ 9. Fertilizer; Liabilities

The trial court properly directed a verdict for plaintiff on defendants' counterclaims for breach of implied warranty of fertilizer and for breach of express warranty of fitness of the fertilizer for use on a corn crop. *Harvey and Son v. Jarman*, 191.

ANONYMOUS THREATS

§ 1. Generally

There was no error in the trial court's instruction on transmitting a threatening letter. *S. v. Glidden*, 653.

There was sufficient evidence to support a conviction for writing and transmitting an unsigned threatening letter. *Ibid.*

APPEAL AND ERROR

§ 6. Right to Appeal Generally

The trial court's entry of partial summary judgment for defendant was immediately appealable. *Olive v. Great American Ins. Co.*, 180.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

An interlocutory order granting summary judgment for one defendant affected a substantial right of plaintiffs and was thus immediately appealable. *Jenkins v. Maintenance, Inc.*, 110.

A substantial right of the plaintiffs was affected and plaintiffs' appeal was not premature where the trial judge directed a verdict against plaintiffs, denied plaintiffs' motion for a new trial and granted defendant's motion for a new trial on his counterclaim. *LaFalce v. Wolcott*, 565.

The Court of Appeals in its discretion entertained an appeal from a partial summary judgment in a special proceeding to determine a disputed boundary because the court's resolution of the question of the terminus of the common corner effectively resolved the case. *Taylor v. Brittain*, 574.

§ 24.1. Form of Exceptions and Assignments of Error

Appeal is dismissed for failure to comply with App. Rule 10(c) where appellant attempted to present several different questions of law in each assignment of error. *Wilkins v. Green*, 340.

An issue can be raised by filing one assignment of error that states the issue just once and which cites all exceptions on which it is based. *McManus v. McManus*, 588.

§ 40. Necessary Parts of Record Proper

Plaintiff's appeal was dismissed where the ruling of the trial court was never reduced to a written order, the record on appeal consisted of copies of various pleadings, documents, exhibits and the complete stenographic transcript of the hearing, and plaintiff referred in her brief to exceptions which did not appear in the transcript. *Sessoms v. Sessoms*, 338.

§ 49. Harmless Error in Exclusion of Evidence in General

There was no prejudicial error in an action arising from a tree limb falling across a power line in the exclusion of testimony from defendant's expert concerning the weakest part in an electrical distribution system. *Leary v. Nantahala Power and Light Co.*, 165.

§ 50.2. Instructions; What Constitutes Harmless Error

There was no prejudice from the trial judge's lapsus linguae in an action arising from a tree limb falling across a power line. *Leary v. Nantahala Power and Light Co.*, 165.

§ 67. Force and Effect of Decisions of Supreme Court

An appellate decision becomes binding authority upon filing, not upon publication in the advance sheets or reports or upon discovery by counsel or judge. *Hunnicutt v. Griffin*, 259.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

There is no legislative bar to arbitration of claims based on tortious conduct or unfair and deceptive trade practices and claims for punitive damages as long as

ARBITRATION AND AWARD — Continued

they arise out of or relate to a contract providing for arbitration or its breach. *Rodgers Builders v. McQueen*, 16.

§ 7. Conclusiveness of Award and Award as Bar to Action

The doctrine of res judicata applies to a judgment entered on an arbitration award. *Rodgers Builders v. McQueen*, 16.

A construction contractor's claims against the owner to recover compensatory and punitive damages for fraud, unfair trade practices and negligent misrepresentation were barred by res judicata due to a judgment entered on an arbitration award. *Ibid.*

ARSON

§ 4.2. Cases where Evidence Was Insufficient

The State's circumstantial evidence was insufficient to support conviction of defendants for conspiracy to burn a mobile home. *S. v. Massey*, 660.

ATTORNEYS AT LAW

§ 7.4. Fees Based on Provisions of Notes

The trial court erred in awarding attorney fees to plaintiff in an action on a promissory note where no notice of plaintiff's intention to collect attorney fees was ever mailed to defendants. *Harvey and Son v. Jarman*, 191.

AUTOMOBILES AND OTHER VEHICLES

§ 6.5. Liability for Fraud in Sale of Motor Vehicles

There was no error in the denial of defendant's motions for a directed verdict and for judgment n.o.v. in an action for knowingly giving a false odometer statement where the evidence was sufficient to permit the jury to find that defendant had or should have had some question as to the verity of the odometer mileage, yet all that defendant did to confirm the mileage was to drive the vehicle, examine the interior, and compare the mileage on the inspection sticker with the mileage on the odometer. *Levine v. Parks Chevrolet, Inc.*, 44.

The trial court did not err in an action for giving a false odometer statement by not submitting to the jury separate issues as to defendant's knowledge and intent to defraud. *Ibid.*

The trial court did not err in an action for giving a false odometer statement by instructing the jury that the price asked by defendant Wachovia took into consideration the actual mileage of the vehicle and by refusing defendant Parks Chevrolet's request for a similar instruction. *Ibid.*

The trial court did not err in an action for giving a false odometer statement by trebling damages and awarding attorney's fees where there was sufficient evidence of intent to defraud. *Ibid.*

§ 55.1. Sufficiency of Evidence of Negligence; Parking without Lights or Other Warning

The evidence was sufficient for the jury on the issue of defendant's negligence in parking his truck partly on the highway. *Wilkins v. Taylor*, 536.

§ 59.1. Sufficiency of Evidence of Negligence; Entering Highway

A directed verdict against plaintiffs in an automobile collision case was improper. *LaFalce v. Wolcott*, 565.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 72. Sudden Emergency

The Industrial Commission did not err by finding that a State employee was negligent in failing to down-gear his asphalt truck and run it against a retaining wall after its brakes failed. *Hulcher Brothers v. NC Dept. of Transportation*, 342.

§ 76.1. Contributory Negligence; Following too Closely or Hitting Momentarily Stopped or Slowly Moving Vehicles

Directed verdict against plaintiffs in an automobile collision case on the basis of contributory negligence was improper. *LaFalce v. Wolcott*, 565.

§ 76.2. Contributory Negligence; Hitting Parked Vehicle

The evidence failed to establish contributory negligence by plaintiff as a matter of law in striking defendant's truck which was parked partly on the highway. *Wilkins v. Taylor*, 536.

§ 78.1. Contributory Negligence; Passing Vehicle Traveling in Opposite Direction; Loss of Control

In an action to recover damages sustained by plaintiff when the garbage truck he was driving overturned after defendant allegedly drove across the center line when entering the highway from a driveway, the evidence presented questions for the jury as to whether plaintiff was contributorily negligent by failing to maintain a proper lookout and by pulling off the road and not applying his brakes to reduce his speed. *Alston v. Herrick*, 246.

§ 88.3. Contributory Negligence; Excessive Speed

The evidence presented a jury question as to whether plaintiff was contributorily negligent by driving his garbage truck at a speed greater than was reasonable under the circumstances. *Alston v. Herrick*, 246.

§ 91.3. Issues as to Willful and Wanton Conduct

Evidence of a driver's willful or wanton conduct was sufficient to go to the jury where the driver admitted awareness of intoxication, indifference to her duty to avoid driving while impaired, and obliviousness to the duty to stop at stoplights. *King v. Allred*, 427.

§ 94.7. Contributory Negligence; Knowledge that Driver Is Intoxicated

The trial court correctly instructed the jury on contributory negligence and properly refused to apply a totally subjective standard to determine contributory negligence in an action in which a passenger injured in a collision sought damages from the intoxicated driver. *King v. Allred*, 427.

§ 113.1. Sufficiency of Evidence of Homicide

The evidence was sufficient to support defendant's conviction on two charges of involuntary manslaughter arising from a collision between two vehicles. *S. v. Bailey*, 610.

§ 126.2. Driving Under the Influence; Blood and Breathalyzer Tests

Testimony that defendant had an alcohol concentration of .11 did not have to be excluded in a prosecution for driving while impaired because it was not expressed in terms of grams per milliliters of blood or liters of breath. *S. v. Jones*, 160.

The State sufficiently demonstrated that a vial of blood introduced into evidence was the same blood as that drawn from defendant in a hospital, although

AUTOMOBILES AND OTHER VEHICLES — Continued

the vial was labeled, "John Doe No. 2," was placed in the hospital's laboratory refrigerator to which other hospital personnel had access, and was later placed in a highway patrolman's home refrigerator where it was accessible to his family. *S. v. Bailey*, 610.

§ 126.3. Driving Under the Influence; Blood and Breathalyzer Tests; Qualification of Expert

The State's evidence established that a blood sample was drawn from defendant by a qualified person within the meaning of G.S. 20-139.1(c). *S. v. Bailey*, 610.

§ 130. Driving Under the Influence; Verdict and Punishment

Defendant lacked standing to assert that the sentencing scheme of the Safe Roads Act may deprive certain persons of their right to a jury trial by allowing the trial judge in the sentencing phase to find defendant guilty of aggravating factors which are separate criminal offenses. *S. v. Denning*, 156.

§ 134. Driving without Consent of Owner

The trial court in an automobile larceny case erred in failing to instruct the jury on the lesser included offense of unauthorized use. *S. v. Mason*, 154.

Unauthorized use of a motor vehicle is not a lesser included offense of common law robbery. *S. v. McCullough*, 516.

BANKS AND BANKING

§ 13. Loans

Plaintiffs' evidence was sufficient for submission of an issue to the jury as to whether defendant bank breached its commitment to lend the three plaintiff corporations money toward the purchase of a hosiery manufacturing company. *Fallston Finishing v. First Union Nat. Bank*, 347.

BASTARDS

§ 13. Legitimation

The trial court erred in an action to determine whether an allegedly illegitimate child had an interest in the proceeds of a condemnation settlement by applying G.S. 49-12 without a finding that the child's father and mother had married after the birth of the child. *Dept. of Transportation v. Fuller*, 138.

BILLS AND NOTES

§ 4. Consideration

A note given for the purchase of fertilizer was properly supported by a valid consideration where the amount of fertilizer purchased was delivered and applied although defendants claimed the fertilizer was defective. *Harvey and Son v. Jarman*, 191.

§ 20. Sufficiency of Evidence in Action on Note

Recovery on a promissory note was not precluded because it did not state an annual percentage rate. *Harvey and Son v. Jarman*, 191.

BILLS OF DISCOVERY

§ 6. Compelling Discovery

The trial court did not err in an action to recover damages from a fire by admitting into evidence photographs which had not been produced for inspection before trial pursuant to a discovery order. *Leary v. Nantahala Power and Light Co.*, 165.

BOUNDARIES

§ 3. Reversing Calls

The trial judge erred by granting summary judgment for respondents in an action to establish a boundary line where a mistake was made in the original survey of a subdivision and the trial court reversed the sequence of calls given in the original commissioner's report even though all the corners were known or could be determined. *Young v. Young*, 93.

§ 9. Rules of Construction; Questions of Law and Fact

The question of what are the boundaries presents a question of law for the court, while the question of where the boundaries are located on the ground is generally a question of fact for the jury. *Young v. Young*, 93.

§ 14. Court Surveys

G.S. 38-4 does not require the trial court to order a survey in boundary disputes. *Young v. Young*, 93.

The trial court erred in a boundary dispute by allowing a surveyor to testify as to where the boundary line ran. *Carson v. Reid*, 321.

§ 15.1. Sufficiency of Evidence

There was a triable issue of fact and summary judgment was improperly granted for respondent in a special proceeding to determine a disputed boundary. *Taylor v. Brittain*, 574.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.8. Sufficiency of Evidence of Breaking and Entering and Larceny of Residential Premises

The trial court did not err by denying defendant's motion to dismiss a charge of first degree burglary for insufficient evidence. *S. v. Watts*, 656.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 3.1. Cancellation for Duress

An issue as to whether an accord and satisfaction agreement allegedly obtained by economic duress was ratified by plaintiffs should have been submitted to the jury. *Fallston Finishing v. First Union Nat. Bank*, 347.

§ 10.2. Sufficiency of Evidence of Mental Incapacity

Plaintiffs' evidence was sufficient for submission to the jury of an issue as to the mental capacity of the individual plaintiff to enter an accord and satisfaction agreement for himself and as a representative of plaintiff corporations. *Fallston Finishing v. First Union Nat. Bank*, 347.

CHATTEL MORTGAGES

§ 1. Form and Requisites of Instruments Generally

The trial court erred by granting a directed verdict for defendant in an action to recover damages for wrongful conversion of personal property where plaintiff claimed that an agreement was a chattel mortgage and defendant that the transaction was an absolute sale with an option to repurchase. *Beard v. Newsome*, 476.

COMPROMISE AND SETTLEMENT

§ 1.1. Validity

A settlement agreement for illegal work performed by a general contractor while his license was expired was invalid as being contrary to public policy and could not be the basis of recovery by the contractor. *Sartin v. Carter and Carter v. Sartin*, 278.

CONSTITUTIONAL LAW

§ 1.1. Authority to Interpret Constitution

A challenge to the hospital certificate of need statute must be brought pursuant to the Declaratory Judgment Act. *Hospital Group of Western N. C. v. N. C. Dept. of Human Resources*, 265.

§ 7.1. Delegation of Powers; State Administrative Agencies

The statute which allows the Board of Chiropractic Examiners to suspend the license of a chiropractor for unethical conduct is not an unconstitutional delegation of power. *Farlow v. Bd. of Chiropractic Examiners*, 202.

§ 12.1. Regulation of Specific Professions

The regulation which requires that chiropractors not engage in dishonorable conduct is not unconstitutionally vague. *Farlow v. Bd. of Chiropractic Examiners*, 202.

§ 20. Equal Protection Generally

The statute which abolished parental immunity in motor vehicle cases does not violate the equal protection requirements of the North Carolina or United States Constitutions. *Allen v. Allen*, 504.

§ 23. Scope of Protection of Due Process

The statute which abolished parental immunity in motor vehicle cases does not violate substantive due process. *Allen v. Allen*, 504.

§ 25.1. Obligations of Contracts; Protection against Impairment

The bailment surcharge on distilled spirits does not unconstitutionally impair the security of bonds issued to construct a warehouse in that the surcharge is also the source of funding for the ALE Division. *N. C. Association of ABC Boards v. Hunt*, 290.

§ 28. Due Process and Equal Protection in Criminal Proceedings

Defendant's equal protection and due process rights were not violated where he was charged with writing and transmitting an unsigned threatening letter, a misdemeanor, and was acting in secrecy and malice, which raises the misdemeanor to a felony. *S. v. Glidden*, 653.

CONSTITUTIONAL LAW — Continued

§ 46. Removal or Withdrawal of Appointed Counsel

The trial court erred in a prosecution for second degree murder by discharging defendant's court-appointed counsel where defendant's family had hired private counsel to assist appointed counsel, appointed counsel was not in court on the day the trial was scheduled to begin because of a family illness, and defendant stated that he wanted to be represented by appointed counsel. *S. v. Nelson*, 371.

§ 49. Waiver of Right to Counsel

The trial court erred in requiring defendant to proceed to trial pro se in the absence of further inquiry into the reasons for defendant's lack of counsel and the inquiries required by G.S. 15A-1242 where defendant had discharged appointed counsel with the expectation of retaining private counsel. *S. v. Graham*, 470.

§ 79. Sentences within Maximum Fixed by Statutes

The imposition of a 30-year sentence for a habitual felon was within constitutional limits and did not constitute cruel and unusual punishment. *S. v. Aldridge*, 638.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors

A general contractor was not entitled to recover any further amounts for work performed in constructing a residence for defendants where he was fully paid for work performed while his license was in effect. *Sartin v. Carter and Carter v. Sartin*, 278.

A settlement agreement for illegal work performed by a general contractor while his license was expired was invalid as being contrary to public policy and could not be the basis of recovery by the contractor. *Ibid.*

§ 27.1. Sufficiency of Evidence of Existence of Contract

The evidence presented jury questions as to whether an alleged $10,000 loan was actually a gift or whether there was an agreement to repay this amount and, if so, what constituted a reasonable time for repayment. *Calhoun v. Calhoun*, 305.

§ 28.2. Instructions as to Damages

Defendant was not prejudiced by an instruction placing the burden on plaintiff to show both a breach of contract and negligence on the part of defendant to sustain damages for loss of use of an automobile. *Haas v. Kelso*, 77.

§ 29.3. Measure of Damages; Special Damages

Damages for loss of use of an automobile were recoverable in this action for breach of contract to repair the automobile. *Haas v. Kelso*, 77.

§ 34. Actions for Interference; Sufficiency of Evidence

Summary judgment was properly entered for defendant on plaintiff's claim that defendant tortiously interfered with plaintiff's freedom of contract by influencing the hiring process for a school music teacher position to plaintiff's detriment. *Campbell v. Board of Education of Catawba Co.*, 495.

COSTS

§ 3. Taxing of Costs in Discretion of Court

In an action arising from a tree limb falling across power lines, the trial court had jurisdiction to review the clerk's order approving and taxing costs. *Leary v. Nantahala Power and Light Co.*, 165.

COURTS

§ 2.1. Requirements for Jurisdiction

The trial court had jurisdiction of an action by a domestic corporation against an out-of-state salesman. *Ciba-Geigy Corp. v. Barnett*, 605.

§ 21.8. Conflict of Laws between States; Contractual Provisions Specifying Applicable Law

The parties impliedly intended North Carolina law to apply to a separation agreement executed in Maryland, and the separation agreement was invalid and did not bar the wife's claim for equitable distribution where it was not acknowledged by the wife before a certifying officer as required by G.S. 52-10.1. *Morton v. Morton*, 295.

CRIMINAL LAW

§ 5. Mental Capacity in General; Insanity

The trial court erred in a second degree murder prosecution by refusing to allow defendant to introduce evidence of insanity even though he failed to file a timely notice to rely on the defense. *S. v. Nelson*, 371.

§ 34.1. Evidence of Defendant's Guilt of other Offenses Inadmissible to Show Defendant's Character and Disposition to Commit Offense

The trial court in a prosecution for conspiracy to traffic in cocaine erred in allowing a witness to testify that he had previously purchased drugs from friends who told him that the drugs came from defendant. *S. v. Norman*, 623.

§ 40. Evidence at Former Proceeding; Requirement that Witness Be Unavailable

A detective was not incompetent to give his recollection of the preliminary hearing testimony of a witness who was unavailable for the trial because the detective served as an investigating officer in the case. *S. v. West*, 459.

§ 42.6. Chain of Custody of Items Connected with Crime

The State sufficiently demonstrated that a vial of blood introduced into evidence was the same blood as that drawn from defendant in a hospital, although the vial was labeled "John Doe No. 2," was placed in the hospital's laboratory refrigerator to which other hospital personnel had access, and was later placed in a highway patrolman's home refrigerator where it was accessible to his family. *S. v. Bailey*, 610.

§ 44. Bloodhounds

Evidence of tracking by a dog is admissible even though the dog is not a bloodhound as long as the final three foundation requirements set forth in *State v. McLeod*, 196 N.C. 542, are satisfied. *S. v. Green*, 642.

The State made a sufficient showing of acuteness of scent and training, experience and proven ability in tracking by a Doberman and a Rottweiler for the admission of testimony of tracking by such dogs. *Ibid.*

§ 55. Blood Tests Generally

The State's evidence established that a blood sample was drawn from defendant by a qualified person within the meaning of G.S. 20-139.1(c). *S. v. Bailey*, 610.

§ 60. Evidence in Regard to Fingerprints Generally

Fingerprint evidence was admissible to corroborate the prosecuting witness's identification of defendant as the perpetrator of the crime charged. *S. v. Mason*, 154.

CRIMINAL LAW — Continued

§ 60.5. Competency and Sufficiency of Fingerprint Evidence

Defendant's motion to dismiss charges of felonious breaking and entering and felonious larceny was properly denied where the State carried its burden of establishing that defendant's fingerprints could only have been impressed at the time of the crime. *S. v. Wright*, 673.

§ 89.3. Corroboration of Witnesses; Prior Consistent Statements

The trial court erred in permitting a police officer to state his opinion that a witness's pretrial statements were consistent with his trial testimony. *S. v. Norman*, 623.

§ 91. Speedy Trial

The trial court did not err in dismissing a charge against defendant without prejudice, rather than with prejudice, for the State's failure to prosecute him within the time limit specified in the Speedy Trial Act. *S. v. Parker*, 508.

§ 92. Consolidation of Counts

The trial court did not err by joining charges of felonious larceny and felonious possession of stolen property arising from the theft of automobiles from the parking lot of the Charlotte YMCA. *S. v. Neal*, 518.

§ 113.1. Instructions; Summary of Evidence

The trial court's description of undisputed evidence as a contention of the State was merely inadvertent. *S. v. Haddick*, 524.

§ 138. Severity of Sentence and Determination Thereof

Defendant failed to carry his burden of proof as to prior convictions; however, the court erred by considering as prior convictions cases in which prayer for judgment was continued. *S. v. Benfield*, 453.

The trial court did not err by failing to find as a mitigating factor that defendant was under provocation; an extenuating relationship between defendant and his wife could not justify or mitigate shooting randomly into a house and hitting an innocent bystander. *Ibid.*

The trial court did not err by failing to find as a mitigating factor that defendant suffered from a mental or physical condition which reduced his culpability in that he had been shot where he initiated the shootout. *Ibid.*

The trial court did not err by imposing sentences to be served consecutively rather than concurrently. *Ibid.*

Consecutive sentences for breaking and entering, discharging a firearm into an occupied dwelling, and multiple counts of assault were not so grossly disproportionate to the crimes committed that they violated the Eighth Amendment. *Ibid.*

The trial court in a second degree murder prosecution improperly found as an aggravating factor that the offense was especially cruel where the evidence was that the unsuspecting victim was shot one time in the back. *S. v. Nelson*, 371.

The trial court erred in finding as an aggravating factor for voluntary manslaughter that "defendant left the victim dying in a field and did not seek to have help sent to him." *S. v. Bates*, 676.

The trial judge did not err in resentencing defendant for possession of stolen goods by marking as an aggravating factor that the offense involved an attempted taking of property of great monetary value where the original form had listed one aggravating factor for attempted or actual taking of property of great monetary value. *S. v. Aldridge*, 638.

CRIMINAL LAW — Continued

§ 152. Appeals in Forma Pauperis

The trial court did not abuse its discretion by failing to afford defendant an opportunity to be represented on appeal in forma pauperis with regard to all appealable issues in all of the cases rather than in only the one case in which the sentence exceeded the presumptive. *S. v. Benfield*, 453.

§ 161.2. Necessity for Assignments of Error

The issue of whether defendant was subjected to double jeopardy by being convicted of felonious breaking and entering and felonious larceny growing out of the same breaking and entering was not considered because it was not made the basis of an assignment of error. *S. v. Wright*, 673.

§ 162. Objections and Assignments of Error to Evidence

In a prosecution for taking indecent liberties with a child, there was no prejudicial error in sustaining the State's objections to defendant's questions concerning the effect on the prosecutrix of the divorce of her parents. *S. v. Slone*, 628.

§ 181.2. Post-conviction Hearing; Evidence

Where defendant filed a motion for appropriate relief seeking a new trial based on newly-discovered evidence, the trial court did not abuse its discretion by finding that an accomplice who changed his testimony to exonerate defendant was not a credible witness. *S. v. Hoots*, 616.

Where defendant sought a new trial for armed robbery based on newly-discovered evidence, the court did not err by excluding the testimony of a witness that a third party had declared that he had committed the robbery. *Ibid.*

DAMAGES

§ 6. Special Damages

Damages for loss of use of an automobile were recoverable in this action for breach of contract to repair the automobile. *Haas v. Kelso*, 77.

§ 11.1. Circumstances where Punitive Damages Appropriate

The trial court properly entered summary judgment for defendant insurer on plaintiffs' claims for tortious breach of a fire insurance contract and punitive damages based upon defendant's refusal to settle plaintiffs' insurance claim. *Olive v. Great American Ins. Co.*, 180.

The evidence was sufficient to support an award of punitive damages against defendants for trespass. *Suggs v. Carroll*, 420.

§ 13.1. Competency and Relevancy of Evidence; Nature and Extent of Personal Injuries

Testimony by plaintiff of the extent and type of damage to her automobile was relevant as tending to prove the force of the impact and, therefore, the nature and extent of the injuries sustained by plaintiff and her children, but a repair bill for the automobile was properly excluded. *Brown v. Allstate Insurance Co.*, 671.

The trial court did not err in an automobile collision case by admitting testimony on cross-examination of plaintiff's past emotional problems, past institutionalization, and post-accident allegedly excessive drinking. *LaFalce v. Wolcott*, 565.

§ 17.7. Punitive Damages

The evidence was insufficient to permit the jury reasonably to infer that defendant's actions were motivated by malice, wickedness or a reckless indifference

DAMAGES — Continued

to the rights of plaintiff in an action for personal injuries resulting from plaintiff's combine touching defendant's power line. *Phelps v. Duke Power Co.*, 222.

DEDICATION

§ 4. Withdrawal and Revocation of Dedication

Plaintiff was not entitled to summary judgment as a matter of law enjoining defendant from using a street through plaintiff's subdivision to defendant's property where there was no evidence of a valid withdrawal of dedication and it was unclear whether the street dedication had ever been accepted or rejected by an appropriate authority. *Cavin v. Ostwalt*, 309.

DEEDS

§ 12.2. Estates Created by Instruments Generally; Defeasible Fees

The trial court erred by concluding that a possibility of reverter was never conveyed to plaintiff's predecessor in title. *Anderson v. Jackson Co. Bd. of Education*, 440.

The rule that a clause inserted other than in the granting or habendum clause which is repugnant to the unqualified fee granted in those clauses is mere surplusage does not apply where the language creating a fee simple determinable and possibility of reverter is contained within the habendum clause. *Ibid.*

§ 22. Covenant of Seisin

Evidence that property conveyed did not contain the acreage stated at the conclusion of the metes and bounds description in a warranty deed did not establish a breach of the covenant of seisin; nor did the fact that a portion of the property conveyed was within the rights of way of two public roads adjoining the property establish a breach of the covenant of seisin. *McKnight v. Cagle*, 59.

§ 24. Covenants against Encumbrances

A right of way or easement for a public highway may constitute an encumbrance sufficient to amount to a breach of the covenant against encumbrances where the purchaser has no actual or constructive knowledge of the encumbrance. *McKnight v. Cagle*, 59.

DIVORCE AND ALIMONY

§ 16.8. Alimony without Divorce; Finding; Ability to Pay

The trial court's findings were insufficient to support its determination that the wife was not a dependent spouse. *Talent v. Talent*, 545.

§ 18.14. Alimony; Possession of Property

The trial court erred by denying defendant's offer to buy a house at the fair market value set by the court where the court's equitable distribution judgment had ordered that the house be sold by a licensed real estate agent and the proceeds divided. *Appelbe v. Appelbe*, 391.

§ 19.5. Modification of Decree; Effect of Separation Agreements

The trial court erred in treating a separation agreement as a court order, subject to modification of its alimony provisions, under the terms of a 1981 consent judgment. *Frykberg v. Frykberg*, 401.

DIVORCE AND ALIMONY – Continued

A provision in a separation agreement prohibiting a modification of the amount of alimony was not void as against public policy. *Ibid.*

§ 24.5. Modification of Child Support Order

A provision in a separation agreement not incorporated into a court order for automatic increases in child support based on the Consumer Price Index is not void as against public policy. *Frykberg v. Frykberg*, 401.

§ 24.9. Child Support; Findings

The evidence and findings were insufficient to support the trial court's order reducing the amount of the father's child support payment after custody of one child was transferred from the mother to the father. *Norton v. Norton*, 213.

§ 25.9. Modification of Child Custody Order; Where Evidence of Changed Circumstances Is Sufficient

Where plaintiff had lost custody of her child to the father because of alcohol abuse, the mother's substantial progress in rehabilitation from alcoholism constituted a sufficient change in circumstances to support the court's return of custody of the child to the mother. *Perdue v. Perdue*, 600.

§ 27. Child Custody and Support; Attorney's Fees

The evidence and findings were insufficient to support the trial court's award of attorney fees to the mother for a child custody and support modification hearing and two subsequent child support modification hearings. *Norton v. Norton*, 213.

The mother was not entitled to an award of attorney fees for two child support modification hearings under the terms of a consent judgment providing that the father would indemnify the mother for subsequent attorney fees only if he failed to perform his financial and other obligations to the mother and, as a result thereof, the mother incurred any expenses to collect the same. *Ibid.*

There was no error prejudicial to defendant in an equitable distribution judgment from findings as to the value of services rendered by plaintiff's counsel where the judgments appealed from made no provision for attorney fees. *Appelbe v. Appelbe*, 391.

§ 30. Equitable Distribution

The trial court erred in an action for divorce and equitable distribution by concluding that plaintiff had no interest in defendant's equity in the marital home and lot. *Cable v. Cable*, 134.

The trial court had authority to equitably distribute the husband's "disposable" military pension in a divorce action filed after 1 August 1983. *Morton v. Morton*, 295.

There was no error in an equitable distribution judgment which distributed to plaintiff more than half of the marital property where the court's conclusion was supported by findings of fact and evidence. *Appelbe v. Appelbe*, 391.

The trial court erred in an equitable distribution judgment by ordering defendant to pay prejudgment interest from the time the parties separated on a portion of the funds he was ordered to deliver to plaintiff. *Ibid.*

The trial court's findings that plaintiff wife was not coerced into signing a separation agreement and was not under any other disability supported the court's determination that the agreement was duly executed and a bar to plaintiff's petition for equitable distribution. *Knight v. Knight*, 395.

DIVORCE AND ALIMONY — Continued

The trial court did not err in an equitable distribution action by finding that cash, stock, and a Dodge van were marital property and that deck furniture was separate property. *McManus v. McManus*, 688.

The trial court in an equitable distribution action properly determined the value of defendant's interest in a closely-held corporation. *Ibid.*

The date of the parties' separation rather than the date the divorce action was filed should be used in identifying and valuing marital property. *Talent v. Talent*, 545.

The trial court correctly determined that $68,000 in savings accounts and certificates of deposit owned by the parties on the date of their separation was marital property even though the wife withdrew such amount and had possession of only a portion thereof at the time of the hearing. *Ibid.*

The trial court erred in treating certain jewelry given to the wife by the husband during the marriage as marital property. *Ibid.*

The equity in a mobile home and lot purchased by the husband after the parties separated with money from repayment of a loan originally made from marital funds constituted marital property. *Ibid.*

When both permanent alimony and equitable distribution are requested, the equitable distribution should be decided first. *Ibid.*

DURESS

§ 1. Generally

Plaintiffs' evidence was sufficient for submission of an issue as to whether an accord and satisfaction of plaintiffs' claims against defendant bank for breach of a loan commitment was procured by economic duress. *Fallston Finishing v. First Union Nat. Bank*, 347.

An issue as to whether an accord and satisfaction agreement allegedly obtained by economic duress was ratified by plaintiffs should have been submitted to the jury. *Ibid.*

EASEMENTS

§ 3. Easements Appurtenant

The trial court correctly entered summary judgment for plaintiffs and correctly enjoined defendants from using or interfering with the use of any part of a driveway which was an appurtenant easement. *Frost v. Robinson*, 399.

EJECTMENT

§ 3. Termination and Expiration of Term

A summary ejectment action was remanded for further findings as to the nature of the tenancy where the trial court made no findings of fact on the nature of the tenancy or the expiration date of the lease term. *Cla-Mar Management v. Harris*, 300.

§ 4. Notice to Vacate Premises

A district court's findings in a summary ejectment action supported its conclusion that defendant received sufficient notice to vacate her lot where the findings indicated that defendant had forty-two days' notice to vacate. *Cla-Mar Management v. Harris*, 300.

ELECTRICITY

§ 5.1. Liability for Injury; Height of Uninsulated Wires

The trial court erred by directing a verdict for defendant in an action for personal injuries suffered when plaintiff's combine came into contact with defendant's power line and the court had erroneously excluded evidence of the National Electrical Safety Code and defendant's own safety standards. *Phelps v. Duke Power Co.*, 222.

§ 7.1. Sufficiency of Evidence of Defendant's Negligence

In an action for personal injuries suffered after plaintiff's combine came into contact with defendant's power line, the question of whether plaintiff's injuries were foreseeable should be left for the jury. *Phelps v. Duke Power Co.*, 222.

§ 8. Liability for Injury; Contributory Negligence

Plaintiff was not contributorily negligent as a matter of law in an action arising from injuries suffered after his combine came into contact with defendant's power lines. *Phelps v. Duke Power Co.*, 222.

EVIDENCE

§ 13. Privileged Communications; between Attorney and Client

The trial court erred in an action by an injured passenger against an intoxicated driver by allowing the passenger's attorney to question the driver concerning substantive statements the driver made to her former attorney. *King v. Allred*, 427.

§ 27. Tape Recordings

A witness was qualified to testify as to the contents of a tape recording, although part of the tape was made in his absence, where he had earlier heard the tape during a competency hearing. *Suggs v. Carroll*, 420.

§ 29.3. Hospital Records

The minutes, proceedings, and materials held by the executive committee of the medical staff of a hospital were not discoverable in an action in which plaintiffs alleged that the hospital knew prior to plaintiff's injury that two doctors were incompetent. *Shelton v. Morehead Memorial Hospital*, 253.

In an action in which plaintiffs alleged that defendant hospital knew prior to plaintiff's injury that two doctors were incompetent, the trial court properly quashed a subpoena served on the Chief Executive Officer of the hospital where the CEO had attended meetings of the Executive Committee of the Medical Staff. *Ibid.*

§ 32.2. Application of the Parol Evidence Rule

The parol evidence rule rendered incompetent plaintiff's testimony that, at the time he signed a letter providing that certain stock could be used as collateral for future advances to his son-in-law, he told defendant bank's loan officer that no future advances secured by the stock were to be made to the son-in-law without his prior approval. *Harrell v. First Union Nat. Bank*, 666.

§ 32.7. Parol Evidence Affecting Writings; Ambiguities

A lease agreement was ambiguous as to whether a certain wall is included in the demised premises and whether the lessee has the right to make alterations to the wall, and the court erred in refusing to admit the original lease agreement containing certain language crossed out and plaintiff's parol testimony concerning negotiations of the parties. *Asheville Mall v. F. W. Woolworth Co.*, 130.

EVIDENCE — Continued

§ 45. Evidence as to Value

The trial court did not err in an action arising from defendant insurance agent's alleged failure to provide collision insurance on an automobile by excluding testimony about the value of the car from an employee of the bank which financed the car where the witness could not testify from personal knowledge and plaintiff failed to present any foundation from which he could have offered an opinion of the automobile's value. *Cockman v. White*, 387.

§ 47.1. Expert Testimony; Necessity for Statement of Facts as Basis for Opinion

The trial court in an action arising from the burning of a cabin after a tree limb fell on a power line did not err by permitting plaintiffs' expert on the cause of fires to eliminate accidental fire, arson, or household electrical current inside the cabin as causes of the fire based on hearsay that no one had been in the cabin. *Leary v. Nantahala Power and Light Co.*, 165.

§ 55. Expert Testimony as to Electricity

There was no prejudicial error in excluding the testimony from defendants' expert on design of electrical service systems to residential customers concerning the effects upon various components of electrical systems of being struck by lightning or falling tree limbs where the record did not indicate that the witness possessed any special training, experience, or knowledge and substantially the same evidence was admitted through testimony of defendants' electrical engineering expert. *Leary v. Nantahala Power and Light Co.*, 165.

§ 56. Expert Testimony as to Value

The trial court did not err in an action arising from the burning of a cabin by allowing plaintiffs' expert to give his opinion of the value of antiques in the cabin even though he had never seen the antiques. *Leary v. Nantahala Power and Light Co.*, 165.

GAS

§ 1. Regulation

The Utilities Commission had authority to take payments received by a gas company in lieu of what it would have received under a service contract into account in setting a reasonable rate for the gas company. *State ex rel. Utilities Comm. v. N. C. Natural Gas*, 330.

GIFTS

§ 1. Gifts Inter Vivos Generally

The evidence presented jury questions as to whether an alleged $10,000 loan was actually a gift or whether there was an agreement to repay this amount and, if so, what constituted a reasonable time for repayment. *Calhoun v. Calhoun*, 305.

HOMICIDE

§ 19. Evidence Competent on Question of Self-Defense

A defendant convicted of second degree murder was not prejudiced by the court's refusal to permit defense counsel to cross-examine State's witnesses concerning deceased's statements to them about how many fights he had been in on the night of his death. *S. v. Snider*, 532.

HOMICIDE — Continued

§ 19.1. Evidence Competent on Self-Defense; Evidence of Character or Reputation

The trial court erred in a prosecution in which defendant relied on self-defense by allowing the district attorney in his closing argument to bring to the jury's attention the fact that there was no evidence that the deceased had a criminal record. *S. v. Burgess*, 534.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The evidence was insufficient to support a finding that defendant suffocated a child so as to support her conviction of second degree murder. *S. v. West*, 459.

HOSPITALS

§ 2.1. Control and Regulation; Selection of Site

The constitutionality of the certificate of need statute was not properly before the court where the hearing officer and the director of the Division of Facility Services had appropriately declined to decide the issue because they lacked authority to rule on constitutionality. *Hospital Group of Western N. C. v. N. C. Dept. of Human Resources*, 265.

Respondent's findings of fact regarding the review criteria set forth in the certificate of need statute were supported by competent, material and substantial evidence under the whole record test. *Ibid.*

§ 3.3. Liability for Negligence of Physicians

Summary judgment was properly granted for defendant hospital in a medical malpractice action where neither the attending physician nor the resident was an agent of the hospital. *Smock v. Brantley*, 73.

§ 6. Regulation of Physicians and Other Medical Personnel

In an action in which plaintiffs alleged that the hospital knew prior to plaintiff's injury that two doctors were incompetent, the trial court erred in its conclusion that the minutes and records of the Board of Trustees were barred from discovery by G.S. 131E-95. *Shelton v. Morehead Memorial Hospital*, 253.

G.S. 131-126.11A (now G.S. 131E-85) does not grant a medical practitioner the right to have his application for staff privileges considered by a hospital if the hospital's governing board has made a reasonable decision to deny further staff privilege requests. *Claycomb v. HCA-Raleigh Community Hosp.*, 382.

Plaintiff podiatrist had the burden of proving that defendant hospital's denial of staff privileges to additional podiatrists because the services of one podiatrist were adequate to meet the podiatric needs of the community was arbitrary, capricious or discriminatory. *Ibid.*

HUSBAND AND WIFE

§ 3.1. Agency of One Spouse for the Other; Evidence in Particular Cases

A note executed by defendants for the purchase of fertilizer was binding on the wife where the evidence showed that the husband was acting as his wife's agent in purchasing farm supplies. *Harvey and Son v. Jarman*, 191.

§ 10. Requisites and Validity of Separation Agreements; Compliance with Statutory Formalities

The parties impliedly intended North Carolina law to apply to a separation agreement executed in Maryland, and the separation agreement was invalid and

HUSBAND AND WIFE — Continued

did not bar the wife's claim for equitable distribution where it was not acknowledged by the wife before a certifying officer as required by G.S. 52-10.1. *Morton v. Morton*, 295.

§ 10.1. Requisites and Validity of Separation Agreements; Void and Voidable Agreements

A provision in a separation agreement prohibiting a modification of the amount of alimony was not void as against public policy. *Frykberg v. Frykberg*, 401.

§ 11. Binding and Conclusive Effect of Separation Agreement

The trial court's findings that plaintiff wife was not coerced into signing a separation agreement and was not under any other disability supported the court's determination that the agreement was duly executed and a bar to plaintiff's petition for equitable distribution. *Knight v. Knight*, 395.

§ 12.1. Revocation and Rescission of Separation Agreement

In determining the validity of a separation agreement, the trial court is not required to make an independent determination as to whether the agreement is fair to the wife. *Knight v. Knight*, 395.

INDEMNITY

§ 2. Construction and Operation Generally

Indemnification and exculpatory clauses in a lease between plaintiff and a mall owner did not exonerate the corporate mall manager and its employee, as agents of the owner, from liability for damages caused by their negligence. *Candid Camera Video v. Mathews*, 634.

INFANTS

§ 18. Delinquency Hearing; Sufficiency of Evidence

The evidence was insufficient to support an adjudication of delinquency on the ground of an attempt to carnally know a minor female by force and against her will. *In re Howett*, 142.

§ 20. Delinquency Hearing; Judgments and Orders

The trial court erred in adjudicating respondent a delinquent without affirmatively stating that the allegation of the juvenile petition had been proved beyond a reasonable doubt. *In re Johnson*, 159.

INSURANCE

§ 2.2. Liability of Agent to Insured for Failure to Procure Insurance

The trial court properly granted defendant's motion for a directed verdict in an action arising from defendant insurance agent's alleged failure to provide collision insurance coverage on an automobile where plaintiff produced no competent evidence of market value before a collision and no evidence of the cost of repairs. *Cockman v. White*, 387.

§ 8. Waiver

A provision that accidental death benefits would be payable only if death occurred within 90 days of the accident was a matter of forfeiture rather than of coverage and a genuine issue of fact existed as to whether the insurer waived the 90-day clause. *Brendle v. Shenandoah Life Ins. Co.*, 271.

INSURANCE — Continued

§ 16. Life Insurance; Payment and Avoidance of Policies for Nonpayment under Group Policies

Summary judgment for defendant insurer as to accidental death benefits was not proper where a group life insurance policy did not lapse when payment of premiums ceased but was continued so long as proof of total disability was renewed each year and the policy and a letter from the insurer were silent as to whether the extension included the accidental death clause. *Brendle v. Shenandoah Life Ins. Co.*, 271.

§ 18. Life Insurance; Avoidance of Policy for Misrepresentations or Fraud

The incontestability clause in a life insurance policy was applicable only to the initial application and policy, and once the contestable period had expired while the policy was in effect, a subsequent application for reinstatement of the policy did not trigger a second two-year contestable period; furthermore, a requirement of "evidence of insurability" was a condition precedent to reinstatement rather than a defense to payment, and the alleged falsity of the insured's statements in his application for reinstatement was not a valid defense to an action to recover under the policy. *Chavis v. Southern Life Ins. Co.*, 481.

§ 51. Accident Insurance; Limitation as to Time

A provision that accidental death benefits would be payable only if death occurred within 90 days of the accident was not void for reasons of public policy. *Brendle v. Shenandoah Life Ins. Co.*, 271.

§ 69. Automobile Insurance; Uninsured Motorist Coverage

The minor plaintiff was a resident of her father's household so as to come within the uninsured motorist coverage of an automobile insurance policy issued to the father even though the parents were living separately and the mother had custody of the minor plaintiff under a separation agreement where the father in effect had joint custody. *Davis v. Maryland Casualty Co.*, 102.

§ 85. Automobile Liability Insurance; "Use of Other Automobiles" Clause; "Non-owned Automobile" Clause

Summary judgment was properly entered for defendant in an action seeking a declaration that defendant's policy covered injuries received in an automobile accident where defendant had issued a policy covering owned automobiles and temporary substitute automobiles. *Indiana Lumbermens Mut. Ins. Co. v. Unigard Indemnity Co.*, 88.

§ 113. Fire Insurance Generally

The trial court properly entered summary judgment for defendant insurer on plaintiffs' claims for tortious breach of a fire insurance contract and punitive damages based upon defendant's refusal to settle plaintiffs' insurance claim. *Olive v. Great American Ins. Co.*, 180.

§ 138. Fire Insurance; Criminal Liability for Presenting False Claim

The State's circumstantial evidence was insufficient to support conviction of defendants for conspiracy to present a fraudulent insurance claim and presenting a fraudulent insurance claim. *S. v. Massey*, 660.

§ 145. Property Damage Insurance; Subrogation

In an action arising from a house fire in which plaintiff's insurers were joined as party plaintiffs, the trial court did not commit prejudicial error by prohibiting

INSURANCE — Continued

the mention of the insurance company during voir dire, excluding any reference to the insurance company by name, preventing defendant from commenting during closing argument on the insurance company's failure to produce the defective woodstove, or allowing on redirect examination the terms of plaintiffs' settlement and the basic theory of subrogation. *Howard v. Smoky Mountain Enterprises, Inc.*, 123.

INTOXICATING LIQUOR

§ 1. Validity and Construction of Control Statutes in General

The bailment surcharge on distilled spirits is not a tax and is therefore not an unconstitutionally enacted or inequitable tax. *N. C. Association of ABC Boards v. Hunt*, 290.

JUDGMENTS

§ 2.1. Consent to Judgment Rendered Out of Term and Out of County

A judgment signed out of session and out of county was null and void where the record affirmatively disclosed that the parties did not consent. *S. v. Reid*, 668.

§ 35.1. Res Judicata in General

The doctrine of res judicata applies to a judgment entered on an arbitration award. *Rodgers Builders v. McQueen*, 16.

§ 37.5. Preclusion of Judgments in Proceedings Involving Real Property Rights

A construction contractor's claims against the owner to recover compensatory and punitive damages for fraud, unfair trade practices and negligent misrepresentation were barred by res judicata due to a judgment entered on an arbitration award. *Rodgers Builders v. McQueen*, 16.

§ 55. Right to Interest

The trial court erred in an action arising from the burning of a cabin by awarding prejudgment interest on a portion of the damage award not covered by liability insurance due to a deductible. *Leary v. Nantahala Power and Light Co.*, 165.

The trial court erred in an equitable distribution judgment by ordering defendant to pay prejudgment interest. *Appelbe v. Appelbe*, 391.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

There was no error in the denial of defendant's motion to dismiss the charge of second degree kidnapping for the purpose of attempting second degree rape where defendant physically forced a taxicab driver to drive to a secluded area, commanded her to pull down her pants, and threatened her repeatedly. *S. v. Whitaker*, 52.

§ 1.3. Instructions

There was no error in a prosecution for second degree kidnapping and attempted second degree rape in not charging the jury on false imprisonment. *S. v. Whitaker*, 52.

§ 1.4. Indictment

There was no error in an indictment charging defendant with kidnapping with the underlying felony of attempted second degree rape. *S. v. Whitaker*, 52.

LANDLORD AND TENANT

§ 2. Requisites and Validity of Lease

A landlord could require payment of a security deposit in excess of one and a half month's rent where the security deposit was to be submitted in connection with a new lease which also raised the rent. *Cla-Mar Management v. Harris*, 300.

§ 6. Construction and Operation of Lease Generally

Indemnification and exculpatory clauses in a lease between plaintiff and a mall owner did not exonerate the corporate mall manager and its employee, as agents of the owner, from liability for damages caused by their negligence. *Candid Camera Video v. Mathews*, 634.

§ 6.1. Premises Demised

A lease agreement was ambiguous as to whether a certain wall is included in the demised premises and whether the lessee has the right to make alterations to the wall, and the court erred in refusing to admit the original lease agreement containing certain language crossed out and plaintiff's parol testimony concerning negotiations of the parties. *Asheville Mall v. F. W. Woolworth Co.*, 130.

§ 19. Rent and Actions Therefor

A rent increase was not invalid in that it had not been approved by HUD where the increase was scheduled to take effect on 1 July and the federally-insured mortgage was paid and satisfied on 28 June. *Cla-Mar Management v. Harris*, 300.

§ 20. Injury to Premises by Lessee

Plaintiff landlord's allegations that a tenant intentionally burned the leased premises stated a claim against the tenant for waste. *Threatt v. Hiers*, 521.

LARCENY

§ 8. Instructions Generally

The trial court in an automobile larceny case erred in failing to instruct the jury on the lesser included offense of unauthorized use. *S. v. Mason*, 154.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from which Statute Begins to Run in General

The trial court erred by ruling that the three year statute of limitations began to run when the parties separated in an action for conversion of former marital property. *White v. White*, 127.

MASTER AND SERVANT

§ 64.1. Workers' Compensation; Suicide

The Industrial Commission did not err in finding that plaintiff's suicide attempt was caused by mental depression resulting from a prior compensable back injury and that plaintiff was thus entitled to compensation for injuries received as a result of the suicide attempt. *Elmore v. Broughton Hospital*, 582.

§ 69. Workers' Compensation; Amount of Recovery Generally

A volunteer fireman who worked at two part-time jobs before becoming permanently disabled was entitled to compensation based on the wages earned only in

the job in which he principally earned his livelihood rather than on his combined average earnings from both jobs. *Derebery v. Pitt County Fire Marshall*, 67.

The Industrial Commission erred in requiring an employer to provide an injured employee confined to a wheelchair with wheelchair accessible housing. *Ibid.*

A Form 21 compensation agreement was binding on the parties, and a hearing commissioner erred in finding that plaintiff's average weekly wage was an amount greater than that stated in the compensation agreement. *Roberts v. Carolina Tables*, 148.

§ 74. Workers' Compensation; Disfigurement

The Industrial Commission erred by awarding plaintiff compensation for serious disfigurement affecting her future earning capacity where hot water had spilled onto her chest in the course of her employment and she had two scars on top of her breast. *Anderson v. Shoney's of Morganton*, 158.

§ 77.1. Workers' Compensation; Grounds for Modification of Award; Change of Conditions

There was no error in finding a change of condition from partial disability to permanent disability and modifying the award of compensation accordingly. *Hubbard v. Burlington Industries*, 313.

§ 95.1. Workers' Compensation; Appeal of Award; Procedure to Perfect Appeal

An appeal to the full Industrial Commission from the opinion and award of a Deputy Commissioner was timely where the application to review the award was mailed to the full Commission within fifteen days of the time defendants received notice of the award. *Hubbard v. Burlington Industries*, 313.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Claimants were discharged for misconduct connected with their work and were thus not entitled to unemployment compensation where they had participated in a sale of their employer's surplus property without specific approval or authorization by the employer. *In re Vanhorn v. Bassett Furniture Ind.*, 377.

MORTGAGES AND DEEDS OF TRUST

§ 15.1. Transfer of Property Mortgaged; Relation of Parties Resulting

Where the holder of a second mortgage foreclosed and purchased the mortgagor's interest and there was no agreement of record for the second mortgagee to assume the principal debt, the second mortgagee took the land subject to the first mortgage and had no personal liability for the debt. *Branch Banking and Trust Co. v. Kenyon Investment Corp.*, 1.

§ 15.2. Transfer of Property Mortgaged; Personal Liability for Mortgage Debt

A second mortgage assumed personal liability on the mortgage debt and the debt was not discharged when the principal obligor was discharged in bankruptcy. *Branch Banking and Trust Co. v. Kenyon Investment Corp.*, 1.

§ 24. Foreclosure by Action

The successor in title to a first mortgagee was entitled to a court order for foreclosure of the first deed of trust where the second mortgagee had assumed the indebtedness with the mortgagor being liable for any deficiency remaining after foreclosure, the mortgagor had been released by the first mortgagee in a bankruptcy settlement, and the second mortgagee had agreed in its bankruptcy settlement

MORTGAGES AND DEEDS OF TRUST — Continued

to assume a liability the mortgagor may have had on the first mortgage. *Branch Banking and Trust Co. v. Kenyon Investment Corp.*, 1.

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase Money Mortgages and Deeds of Trust

A seller who is a holder of a subordinate purchase money deed of trust and whose security has been eroded by a foreclosure of a senior deed of trust cannot bring an in personam action for the debt because of the anti-deficiency statute. *Sink v. Egerton*, 526.

MUNICIPAL CORPORATIONS

§ 2.2. Annexation; Compliance with Statutory Requirements in General

Petitioners did not meet their burden of showing error in the Town's calculations concerning the number of lots of five acres or less. *Lowe v. Town of Mebane*, 239.

The Town used an acceptable method of consolidating tracts and calculating whether sixty percent of the lots in an area to be annexed were used for urban purposes. *Ibid.*

The Town did not err in calculating urban density for annexation purposes by classifying a forty-unit apartment complex as commercial. *Ibid.*

§ 2.3. Annexation; Compliance with Statutory Requirements other than Use and Size of Tracts

The Town's annexation plan conformed with statutory requirements in the use of natural topographic lines as boundaries. *Lowe v. Town of Mebane*, 239.

§ 2.5. Effect of Annexation

The trial court correctly found that petitioners in an action challenging an annexation ordinance had failed to carry their burden of proof on the issue of material injury. *Lowe v. Town of Mebane*, 239.

§ 23. Franchises for Public Utilities and Services

Revenues received by defendant from HBO satellite service were not subject to a franchise tax under an ordinance which taxed compensation received for use of an improved television reception service because HBO does not originate from a television station and cannot be received except through a cable system. *City of Lexington v. Summit Communications, Inc.*, 333.

§ 30.6. Zoning; Special Permits and Variances

The evidence supported a town council's denial of a special use permit for a planned apartment development on the ground that the development was not located and designed so as to maintain or promote the public health, safety and general welfare. *In re Application of Goforth Properties*, 231.

The board of aldermen, sitting as a board of adjustment, did not have legal authority to grant petitioners' requested zoning variance to allow duplexes on their lots. *Sherrill v. Town of Wrightsville Beach*, 646.

§ 31.2. Judicial Review of Zoning Ordinances; Scope and Extent of Judicial Review

The issue of whether a zoning ordinance was unconstitutional was not properly before the Court of Appeals. *Sherrill v. Town of Wrightsville Beach*, 646.

NARCOTICS

§ 4. Sufficiency of Evidence

An analysis of the contents of three of fourteen packets obtained from defendant was sufficient to permit the jury to find that all fourteen packets contained heroin and that defendant was thus guilty of trafficking by selling and delivering in excess of 4 grams of a mixture containing heroin. *S. v. Anderson*, 434.

The evidence was sufficient to support defendant's conviction of conspiracy to traffic in 400 grams or more of cocaine. *S. v. Norman*, 623.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The evidence was sufficient to support jury findings that defendant possessed and conspired to possess heroin. *S. v. Anderson*, 434.

§ 5. Verdict

A verdict finding defendant guilty of trafficking "by selling or delivering in excess of 4 grams of a mixture containing heroin" was ambiguous and fatally defective. *S. v. Anderson*, 434.

NEGLIGENCE

§ 2. Negligence Arising from Performance of a Contract

Plaintiffs' evidence was sufficient for the jury on the issue of whether defendants negligently represented that land they developed and sold to plaintiffs, which had previously been used for a sanitary landfill, was suitable for plaintiffs' restaurant building. *Stanford v. Owens*, 284.

§ 22. Pleadings in Negligence Actions

The trial court did not err by denying defendant's Rule 12(b)(6) motion to dismiss where plaintiffs clearly alleged a claim for relief based upon defendant's storage of a chemical in defective and leaking containers. *Lyon v. Continental Trading Co.*, 499.

§ 29.1. Particular Cases where Evidence of Negligence Is Sufficient

The trial court did not err by denying defendant's motion to dismiss where the court made findings of fact supported by the evidence which clearly disclosed that defendant was negligent in the storage of a chemical. *Lyon v. Continental Trading Co.*, 499.

§ 45. Elements and Definitions of Culpable Negligence

The trial court did not err in an action to recover damages caused by the negligent storage of chemicals by allowing an expert to testify as to the value of plaintiffs' fiber damaged by the chemicals. *Lyons v. Continental Trading Co.*, 499.

§ 47. Negligence in Condition of Buildings Generally

The trial court did not err in an action arising from injuries suffered outside the front doorway of defendants' building by refusing to allow defendants to argue that the issuance of a building permit by the City gave rise to an inference of the safety of the building. *Pasour v. Pierce*, 364.

§ 48. Negligence in Condition of Buildings; Condition and Maintenance of Entryway

In an action arising from an injury suffered at a step-off outside the entranceway to defendants' building, plaintiff's expert witness was qualified to testify concerning caution and safety conditions. *Pasour v. Pierce*, 364.

NEGLIGENCE — Continued

§ 58. Nonsuit for Contributory Negligence of Invitee

In an action arising from plaintiff's fall at a step-off in the entranceway of defendants' building, the trial court properly refused defendants' motions for a directed verdict and judgment n.o.v. based on plaintiff's contributory negligence. *Pasour v. Pierce*, 364.

§ 58.1. Instructions in Actions by Invitees

In an action arising from plaintiff's fall in an entranceway to defendants' building, the trial court did not err in its instructions by refusing to include plaintiff's knowledge as a factor to consider for contributory negligence. *Pasour v. Pierce*, 364.

NUISANCE

§ 4. Pollution of Streams

The N. C. Clean Water Act does not preempt the common law actions of nuisance and trespass to land for the discharge of industrial pollutants into a stream in violation of an applicable NPDES permit. *Biddix v. Henredon Furniture Industries*, 30.

Plaintiff's allegations stated a claim under the statute imposing a strict liability for damages to property or persons from the discharge of oil or other hazardous substances into any waters although the complaint did not identify the statute as a basis for the action. *Ibid.*

PARENT AND CHILD

§ 1. Termination of Relationship

The trial court did not abuse its discretion by declining to terminate parental rights where the factual findings were insufficient to support a conclusion that grounds existed for terminating the mother's parental rights and the court declined to terminate the father's parental rights. *In re Tyson*, 411.

§ 1.1. Presumption of Legitimacy

The findings and conclusions did not support the judgment that Cynthia Steward, as the illegitimate daughter of Johnny Fuller, was the owner of a one-third undivided interest in property which had been owned by Johnny Fuller and which was the subject of a condemnation action by the Department of Transportation where the undisputed evidence showed that Cynthia Steward's mother was married to Ernest Steward when Cynthia was born. *Dept. of Transportation v. Fuller*, 138.

§ 1.5. Procedure for Termination of Parental Rights

Service of process by publication on respondent father in a proceeding to terminate parental rights was void where petitioner failed to use due diligence in attempting to locate the father. *In re Clark*, 83.

§ 1.6. Termination of Parental Rights; Competency and Sufficiency of Evidence

There were sufficient grounds to terminate a father's parental rights, but the court's findings were inadequate to support its conclusion that grounds existed for termination of the mother's rights. *In re Tyson*, 411.

The evidence was more than sufficient to meet the clear, cogent, and convincing standard required for termination of parental rights. *In re Ennix*, 512.

PARENT AND CHILD — Continued

§ 2. Liability of Child for Injury to Parent

The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendant on the basis of child immunity where plaintiff was injured while a passenger in a car being driven by defendant, her son. *Allen v. Allen*, 504.

§ 2.1. Liability of Parent for Injury of Child

The complete abolishment of the doctrine of parent-child immunity for public policy reasons is not a proper function of the Court of Appeals. *Allen v. Allen*, 504.

A riding lawnmower is not a "motor vehicle" within the meaning of the statute creating an exception to the doctrine of parent-child immunity for tort actions arising out of the operation of motor vehicles, and such doctrine barred the manufacturer's third-party action against the minor plaintiff's father for contribution based on his negligent operation of the lawnmower. *Lee v. Mowett Sales Co.*, 556.

§ 2.3. Child Neglect

The trial court did not err by terminating respondent's parental rights where a prior adjudication of neglect was not the only evidence relied on by the court. *In re Black*, 106.

§ 7.3. Enforcement of Parental Duty to Support Child

The trial court erred by awarding plaintiff an arrearage in child support and prospective child support without the required specific findings as to the relative estates, earnings, conditions, and accustomed standard of living of the parents and the child. *Buff v. Carter*, 145.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 6. Revocation of Licenses Generally

The Board of Chiropractic Examiners did not err by suspending appellant's license for dishonorable conduct even though the governing statute now refers to unethical conduct because the unethical conduct which the Board is authorized to penalize includes dishonorable conduct in which appellant engaged. *Farlow v. Bd. of Chiropractic Examiners*, 202.

§ 6.1. Proceedings for Revocation of Licenses

A chiropractor was not deprived of his right to an impartial decision maker in a hearing which resulted in the suspension of his license where two of the Board members resided in the county where his office was located and one member had said that he was going to get appellant's license. *Farlow v. Bd. of Chiropractic Examiners*, 202.

§ 6.2. Proceedings for License Revocation; Evidence

There was evidence to support the Board of Chiropractic Examiners' findings that appellant engaged in unprofessional conduct by inflating insurance claims. *Farlow v. Bd. of Chiropractic Examiners*, 202.

The evidence and the facts found supported the conclusion of the Board of Chiropractic Examiners that there was no medical justification for appellant's treatment of three patients even though appellant was the only medical expert who testified because the fact finders were experts who could form opinions based on the evidence. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS — Continued

§ 20.2. Instructions in Malpractice Actions

The trial court's instructions on honest error and guaranteed results in a medical malpractice action were erroneous. *Hunnicutt v. Griffin*, 259.

PROCESS

§ 14.2. Service of Process on Foreign Corporation; Minimum Contacts Test

There were insufficient minimum contacts between the out-of-state defendant and the State of North Carolina to satisfy constitutional requirements of due process. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 663.

§ 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence of Contacts with N.C.

North Carolina could properly assert personal jurisdiction over an out-of-state defendant in an action by a domestic corporation to recover refund credits and replacement goods shipped by the corporation to an out-of-state salesman based on falsified customer complaints and refund requests. *Ciba-Geigy Corp. v. Barnett*, 605.

RAPE AND ALLIED OFFENSES

§ 4.3. Evidence of Unchastity of Prosecutrix

In a prosecution in which defendant was accused of committing a second degree sexual offense against a paralegal in a law office, the trial court properly excluded evidence that the prosecutrix had on a prior occasion had sex with the attorney on a sofa in the law office. *S. v. Parker*, 465.

§ 5. Sufficiency of Evidence

The evidence was sufficient to support a conviction of second degree sexual offense. *S. v. Parker*, 465.

§ 18.2. Assault with Intent to Commit Rape; Sufficiency of Evidence

Although defendant only verbally expressed that he wanted to perform cunnilingus on his victim in a vulgar play on words, his statement indicated that he surely intended to use her to gratify his passion in spite of her resistance and did not foreclose all other inferences. *S. v. Whitaker*, 52.

§ 19. Taking Indecent Liberties with Child

The State's evidence was sufficient to warrant the inference that defendant willfully took indecent liberties with a child. *S. v. Slone*, 628.

The trial court did not err in a prosecution for taking indecent liberties with a child by allowing the prosecutrix to testify about whether defendant had on prior occasions played hide-and-go-seek with children in the neighborhood and whether defendant had ever hidden with her before. *Ibid.*

There was no prejudice in a prosecution for taking indecent liberties with a child in permitting the prosecutrix's mother and another witness to testify that the prosecutrix's story shocked them. *Ibid.*

The court did not err in a prosecution for taking indecent liberties with a child by admitting into evidence testimony of the prosecutrix's mother that a prior incident in which defendant allegedly cursed the prosecutrix had nothing to do with the subject charge. *Ibid.*

RAPE AND ALLIED OFFENSES — Continued

The trial court did not err in a prosecution for taking indecent liberties with a child by allowing the prosecutrix's brother to testify about the incident even though he had no personal knowledge of the events in question. *Ibid.*

RECEIVING STOLEN GOODS

§ 5.2. Insufficiency of Evidence

The evidence was insufficient to support an inference that defendant acted with a dishonest purpose in driving a stolen automobile so as to support his conviction of felonious possession of stolen property. *S. v. Parker*, 508.

REFORMATION OF INSTRUMENTS

§ 1. Generally; Mistake of Law

A 1982 deed of correction was without legal effect. *Taylor v. Brittain*, 574.

REGISTRATION

§ 5.1. Parties Protected by Registration; Purchasers for Valuable Consideration

Although plaintiffs' forecast of evidence showed that the female plaintiff signed the male plaintiff's name to a deed to the individual defendants without his consent, summary judgment was properly entered for the corporate defendant which bought the property from the individual defendants where its forecast of evidence showed it was a bona fide purchaser of the property without notice of the defect in the deed. *Jenkins v. Maintenance, Inc.*, 110.

ROBBERY

§ 5.4. Instructions on Lesser Included Offenses

The trial court did not err in a prosecution for attempted armed robbery and assault with a deadly weapon by refusing to instruct the jury on attempted common law robbery. *S. v. Haddick*, 524.

Unauthorized use of a motor vehicle is not a lesser included offense of common law robbery. *S. v. McCullough*, 516.

RULES OF CIVIL PROCEDURE

§ 15. Amended Pleadings

When plaintiff amended his complaint as a matter of right without leave of court, defendants had thirty days from the date of the amendment in which to file answer even though the amendment was minor and did not itself require a response by defendants. *Hyder v. Dergance*, 317.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

The trial court did not err in permitting plaintiff to amend his complaint at the beginning of trial to allege additional damages incurred prior to trial. *Haas v. Kelso*, 77.

§ 24. Intervention

The trial court did not err in denying an insurance company's motion to intervene where summary judgment was properly granted for defendants. *Colon v. Bailey*, 491.

RULES OF CIVIL PROCEDURE — Continued

§ 37. Consequences of Failure to Make Discovery

The trial court had authority to dismiss a dram shop action against a tavern owner for plaintiff's failure to answer interrogatories. *Hayes v. Browne*, 98.

The trial court did not abuse its discretion in an action to recover damages from a fire by admitting into evidence photographs and sections of an electrical service mast not produced as required by a discovery order. *Leary v. Nantahala Power and Light Co.*, 165.

§ 41. Dismissal of Actions Generally

A Rule 41(b) dismissal with prejudice for failure to comply with "any order of court" cannot be premised on a party's failure to comply with an erroneous order. *In re Will of Parker*, 594.

§ 41.1. Voluntary Dismissal; Dismissal without Prejudice

The voluntary dismissal without prejudice of plaintiffs' claim for negligent misrepresentation did not give plaintiffs the right to institute an action for fraud within one year of the dismissal. *Stanford v. Owens*, 284.

§ 50. Directed Verdicts

A trial judge has the authority to direct a verdict for a party even though such party has not made a motion for a directed verdict. *Harvey and Son v. Jarman*, 191.

§ 59. New Trials

The trial court did not abuse its discretion in denying defendant's motion for a new trial on the ground of an excessive verdict in an action for breach of contract to repair an automobile. *Haas v. Kelso*, 77.

The trial judge properly awarded plaintiffs a new trial in a medical malpractice action under Rule 59 when the authority upon which he based his charge had been overruled by the N. C. Supreme Court the day before the charge was given, although plaintiffs' counsel failed to object to the charge. *Hunnicutt v. Griffin*, 259.

In an action arising from the burning of a cabin, the trial court erred by reducing damages to the amount the insurance company had sought where there was evidence supporting the verdict and plaintiffs objected to a reduction in the verdict. *Leary v. Nantahala Power and Light Co.*, 165.

§ 60. Relief from Judgment or Order

The trial court did not abuse its discretion by finding that defendant's failure to respond to a complaint was excusable neglect. *Thomas M. McInnis & Assoc. v. Hall*, 486.

§ 60.2. Grounds for Relief from Judgment or Order

Defendant's assertion in his Rule 60(b)(1) motion that he is not indebted to plaintiff was an insufficient pleading of a meritorious defense to permit the trial court to set aside a summary judgment for the indebtedness on the ground of excusable neglect. *Chaparral Supply v. Bell*, 119.

The trial court did not abuse its discretion in denying defendant's Rule 60(b)(1) motion. *Thomas M. McInnis & Assoc. v. Hall*, 486.

SCHOOLS

§ 13.1. Election and Re-election of Teachers

A music teacher hired as a "temporary teacher" for a term which ended on a specified date was not a probationary teacher, and a board of education's failure to employ her for a permanent position did not violate G.S. 115C-325(m)(2). *Campbell v. Board of Education of Catawba Co.*, 495.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 2. Recovery of Amount Paid to Recipient

Defendant's ex-wife and her children had no legal or equitable right to recover proceeds of dependent spouse payment checks issued by the Social Security Administration to defendant in the mistaken belief that defendant and his ex-wife were still lawfully married to each other. *McCombs v. Kirkland*, 336.

TAXATION

§ 1. Meaning of "Tax" within Purview of Constitutional Restrictions

The bailment surcharge on distilled spirits is not a tax and is therefore not an unconstitutionally enacted or inequitable tax. *N. C. Association of ABC Boards v. Hunt*, 290.

§ 15. Sales, Use and Transfer Taxes

Payments received by plaintiff for maintaining leased machines and equipment were derived from a lease or rental of tangible personal property and were taxable where the maintenance payments were made because the leases required them. *Sperry Corp. v. Lynch*, 327.

§ 25.7. Ad Valorem Taxes; Valuation; Factors Determining Market Value Generally

The Property Tax Commission erred in allowing the true value schedule and the use value schedule used in appraising real property in Bertie County for ad valorem taxation to be the same. *In re Appeal of Parker*, 447.

TORTS

§ 7.1. Release from Liability; Interpretation and Construction

An agreement in which the parties divided insurance proceeds for the contents of a restaurant destroyed by fire and released each other from all claims arising out of defendants' lease of plaintiffs' property barred plaintiffs' suit against defendants for breach of the lease and negligent maintenance of equipment as a matter of law. *Colon v. Bailey*, 491.

TRESPASS

§ 7. Sufficiency of Evidence

The evidence was sufficient to support a verdict that defendants wrongfully trespassed on plaintiff's property but was insufficient to support the jury's finding that plaintiff suffered an actual injury and its award of $1,200 in compensatory damages to plaintiff. *Suggs v. Carroll*, 420.

§ 8. Damages in General

The evidence was sufficient to support an award of punitive damages against defendants for trespass. *Suggs v. Carroll*, 420.

TRIAL

§ 3.2. Particular Grounds for Continuance

The trial court did not err in denying defendants' motion for a continuance because of the unavailability of one defendant at the beginning of trial. *Suggs v. Carroll*, 420.

§ 11. Argument and Conduct of Counsel

The trial court did not err by permitting plaintiffs' counsel to read from a Supreme Court decision during jury argument. *Leary v. Nantahala Power and Light Co.*, 165.

§ 13.1. Discretion of Trial Court to Allow Jury to Visit Exhibits

The trial court did not abuse its discretion in permitting a jury view of a repaired garbage truck. *Alston v. Herrick*, 246.

§ 18.1. Competency and Admissibility of Evidence

The trial court did not err in an action for damages from a tree limb falling on a power line by sustaining its own objection to defendant's attempt to ask a metallurgist about the temperatures he would expect to find in a house fire. *Leary v. Nantahala Power and Light Co.*, 165.

§ 31. Directed Verdict

A trial judge has the authority to direct a verdict for a party even though such party has not made a motion for a directed verdict. *Harvey and Son v. Jarman*, 191.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The trial court correctly granted defendant's motion for a directed verdict on an unfair trade practice claim in an action arising from defendant insurance agent's alleged failure to provide collision insurance on plaintiff's automobile. *Cockman v. White*, 387.

Plaintiff's allegations that a tenant intentionally burned a building leased from plaintiff was insufficient to state a claim against the tenant for unfair trade practices. *Threatt v. Hiers*, 521.

UTILITIES COMMISSION

§ 5. Jurisdiction and Authority of Commission in General

The Commission did not have jurisdiction to order VEPCO to comply with a Corridor Commission's regulations requiring underground electric facilities and to absorb the costs of placing the facilities underground. *State ex rel. Utilities Comm. v. Roanoke Voyages Corridor*, 324.

§ 24. Rate Making in General; Just and Reasonable Return

The Utilities Commission had authority to take payments received by a gas company in lieu of what it would have received under a service contract into account in setting a reasonable rate for the gas company. *State ex rel. Utilities Comm. v. N. C. Natural Gas*, 330.

VENDOR AND PURCHASER

§ 1.3. Construction of Options

An issue as to whether the parties to an option contract intended plaintiff's purchase of other property to be a condition precedent to the exercise of its option to purchase defendant's property constituted an issue of fact for the jury. *Harris-Teeter Supermarkets v. Hampton*, 649.

§ 2.1. Duration of Options

A genuine issue of material fact was presented as to when an option to purchase expired. *Harris-Teeter Supermarkets v. Hampton*, 649.

VENUE

§ 7. Motions to Remove as Matter of Right

The trial court erred by granting defendant's motion to change venue from Randolph to Guilford County where plaintiff's complaint was filed on 11 August 1982, defendant filed her answer on 31 August 1982, and defendant's motion to change venue was not filed until 11 April 1984. *Cheek v. Higgins*, 151.

WATERS AND WATERCOURSES

§ 3.2. Pollution

The N. C. Clean Water Act does not preempt the common law actions of nuisance and trespass to land for the discharge of industrial pollutants into a stream in violation of an applicable NPDES permit. *Biddix v. Henredon Furniture Industries*, 30.

Plaintiff's allegations stated a claim under the statute imposing a strict liability for damages to property or persons from the discharge of oil or other hazardous substances into any waters although the complaint did not identify the statute as a basis for the action. *Ibid.*

WILLS

§ 14. Bond of Caveator

The propounder, not the caveator, functions as a plaintiff in a caveat proceeding, and the trial court thus had no discretion to require the caveator to post a prosecution bond pursuant to G.S. 31-34 in addition to the $200 bond required by G.S. 31-33. *In re Will of Parker*, 594.

§ 28.4. Intention of Testator; Determining Intent from Language of Will and Circumstances Surrounding Execution

The trial court correctly ruled that the proceeds of a treasury note purchased by an attorney-in-fact be distributed according to a cash devise. *Wachovia Bank and Trust Co. v. Ketchum*, 539.

WITNESSES

§ 6.3. Evidence Competent to Impeach or Discredit Witness; Conviction of Crime

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COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina