NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 78

3 DECEMBER 1985

---

21 JANUARY 1986

RALEIGH
1987

CITE THIS VOLUME
78 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

R. A. HEDRICK

Judges

GERALD ARNOLD
HUGH A. WELLS
CHARLES L. BECTON
CLIFTON E. JOHNSON
EUGENE H. PHILLIPS
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN
SARAH PARKER
JACK COZORT
ROBERT F. ORR
K. EDWARD GREENE

Retired Judges

HUGH B. CAMPBELL
FRANK M. PARKER
EDWARD B. CLARK
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL

Clerk

FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN	Williamston
3	DAVID E. REID, JR.	Greenville
	HERBERT O. PHILLIPS III	Morehead City
4	HENRY L. STEVENS III	Kenansville
	JAMES R. STRICKLAND	Jacksonville
5	BRADFORD TILLERY	Wilmington
	NAPOLEON B. BAREFOOT	Wilmington
6	RICHARD B. ALLSBROOK	Roanoke Rapids
7	FRANKLIN R. BROWN	Tarboro
	CHARLES B. WINBERRY, JR.	Rocky Mount
8	JAMES D. LLEWELLYN	Kinston
	PAUL MICHAEL WRIGHT	Goldsboro

Second Division

9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.	Henderson
10	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	DONALD W. STEPHENS[1]	Raleigh
11	WILEY F. BOWEN	Dunn
12	DARIUS B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	J. MILTON READ, JR.	Durham
15A	J. B. ALLEN, JR.[2]	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16	B. CRAIG ELLIS	Laurinburg

Third Division

17A	MELZER A. MORGAN, JR.	Wentworth
17B	JAMES M. LONG	Pilot Mountain
18	W. DOUGLAS ALBRIGHT	Greensboro
	EDWARD K. WASHINGTON	High Point
	THOMAS W. ROSS	Greensboro
	JOSEPH JOHN	Greensboro
19A	THOMAS W. SEAY, JR.	Spencer
	JAMES C. DAVIS	Concord
19B	RUSSELL G. WALKER, JR.	Asheboro
20	F. FETZER MILLS	Wadesboro
	WILLIAM H. HELMS	Wingate

DISTRICT	JUDGES	ADDRESS
21	WILLIAM Z. WOOD	Winston-Salem
	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
22	ROBERT A. COLLIER, JR.	Statesville
	PRESTON CORNELIUS	Mooresville
23	JULIUS A. ROUSSEAU, JR.	North Wilkesboro
	Fourth Division	
24	CHARLES C. LAMM, JR.	Boone
25	FORREST A. FERRELL	Hickory
	CLAUDE S. SITTON	Morganton
26	FRANK W. SNEPP, JR.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
	W. TERRY SHERRILL[3]	Charlotte
27A	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
27B	JOHN MULL GARDNER[4]	Shelby
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	JAMES U. DOWNS	Franklin
	JANET MARLENE HYATT[5]	Waynesville

SPECIAL JUDGES

JAMES ARTHUR BEATY, JR.	Winston-Salem
JOHN B. LEWIS, JR.	Farmville
FRED J. WILLIAMS	Durham
LAMAR GUDGER	Asheville
I. BEVERLY LAKE, JR.	Raleigh
DONALD L. SMITH[6]	Raleigh
MARVIN K. GRAY[7]	Charlotte

EMERGENCY JUDGES

HENRY A. MCKINNON, JR.	Lumberton
SAMUEL E. BRITT	Lumberton
HAL H. WALKER	Asheboro
JAMES H. POU BAILEY	Raleigh
JOHN R. FRIDAY[8]	Lincolnton
D. MARSH MCLELLAND[9]	Graham

1. Elected and took office 12-1-86 to replace Donald L. Smith.
2. Elected and took office 1-1-87 to replace D. Marsh McLelland.
3. Elected and took office 1-1-87 to replace Marvin K. Gray.
4. Elected and took office 1-2-87 to replace John R. Friday.
5. Elected and took office 1-1-87 to replace Joseph A. Pachnowski.
6. Appointed and took office 12-1-86 to replace Donald W. Stephens who became a Resident Judge on 12-1-86.
7. Appointed and took office 1-1-87 to replace Janet Marlene Hyatt who became a Resident Judge on 1-1-87.
8. Appointed 1-1-87.
9. Appointed 3-10-87.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES W. HARDISON	Williamston
	SAMUEL C. GRIMES	Washington
3	E. BURT AYCOCK, JR. (Chief)	Greenville
	JAMES E. RAGAN III	Oriental
	JAMES E. MARTIN	Bethel
	H. HORTON ROUNTREE	Greenville
	WILLIE LEE LUMPKIN III	Morehead City
	JAMES RANDAL HUNTER	New Bern
4	KENNETH W. TURNER (Chief)	Rose Hill
	STEPHEN M. WILLIAMSON	Kenansville
	JAMES NELLO MARTIN	Clinton
	WILLIAM M. CAMERON, JR.	Jacksonville
	WAYNE G. KIMBLE, JR.	Jacksonville
5	GILBERT H. BURNETT (Chief)	Wilmington
	CHARLES E. RICE	Wrightsville Beach
	JACQUELINE MORRIS-GOODSON	Wilmington
	ELTON G. TUCKER	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE M. BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	ALBERT S. THOMAS, JR.	Wilson
	QUINTON T. SUMNER	Rocky Mount
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
	RODNEY R. GOODMAN, JR.	Kinston
	JOSEPH E. SETZER, JR.	Goldsboro
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	BEN U. ALLEN	Henderson
	CHARLES W. WILKINSON	Oxford
	J. LARRY SENTER	Franklinton
10	GEORGE F. BASON (Chief)	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh

DISTRICT	JUDGES	ADDRESS
	RUSSELL G. SHERRILL III	Raleigh
	WILLIAM A. CREECH	Raleigh
	L. W. PAYNE	Raleigh
	JOYCE A. HAMILTON	Raleigh
	FRED M. MORELOCK[1]	Raleigh
	JERRY W. LEONARD[2]	Raleigh
11	ELTON C. PRIDGEN (Chief)	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
	EDWARD H. MCCORMICK	Lillington
	O. HENRY WILLIS[3]	Dunn
12	SOL G. CHERRY (Chief)	Fayetteville
	LACY S. HAIR	Fayetteville
	ANNA ELIZABETH KEEVER	Fayetteville
	WARREN L. PATE	Raeford
	PATRICIA ANN TIMMONS-GOODSON	Fayetteville
	JOHN HAIR[4]	Fayetteville
13	WILLIAM C. GORE, JR. (Chief)	Whiteville
	LEE GREER, JR.	Whiteville
	JERRY A. JOLLY	Tabor City
	D. JACK HOOKS, JR.	Whiteville
	DAVID G. WALL[5]	Elizabethtown
14	DAVID Q. LABARRE (Chief)	Durham
	ORLANDO HUDSON	Durham
	RICHARD CHANEY	Durham
	KENNETH TITUS	Durham
	CAROLYN D. JOHNSON[6]	Durham
15A	WILLIAM S. HARRIS, JR. (Chief)[7]	Graham
	JAMES KENT WASHBURN	Burlington
	SPENCER B. ENNIS[8]	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	PATRICIA HUNT	Chapel Hill
	LOWERY M. BETTS	Pittsboro
16	JOHN S. GARDNER (Chief)	Lumberton
	CHARLES G. MCLEAN	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
	ADELAIDE G. BEHAN	Lumberton
17A	PETER M. MCHUGH (Chief)	Reidsville
	ROBERT R. BLACKWELL	Reidsville
	PHILIP W. ALLEN[9]	Yanceyville
17B	JERRY CASH MARTIN (Chief)[10]	Mount Airy
	CLARENCE W. CARTER[11]	King
18	PAUL THOMAS WILLIAMS (Chief)[12]	Greensboro
	WILLIAM L. DAISY	Greensboro

DISTRICT	JUDGES	ADDRESS
	EDMUND LOWE	High Point
	ROBERT E. BENCINI	High Point
	SHERRY FOWLER ALLOWAY	Greensboro
	J. BRUCE MORTON	Greensboro
	LAWRENCE C. MCSWAIN	Greensboro
	WILLIAM A. VADEM[13]	Greensboro
19A	FRANK M. MONTGOMERY (Chief)	Salisbury
	ADAM C. GRANT, JR.	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
	ROBERT M. DAVIS, SR.[14]	Salisbury
19B	WILLIAM M. NEELY (Chief)[15]	Asheboro
	RICHARD M. TOOMES[16]	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
	MICHAEL EARLE BEALE	Southern Pines
	TANYA WALLACE[17]	Misenheimer
21	ABNER ALEXANDER (Chief)	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
	ROLAND HARRIS HAYES	Winston-Salem
	WILLIAM B. REINGOLD	Winston-Salem
	LORETTA BIGGS[18]	Clemmons
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	ROBERT W. JOHNSON	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE THOMAS FULLER	Lexington
	KIMBERLY T. HARBINSON[19]	Taylorsville
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	EDGAR GREGORY	Wilkesboro
	MICHAEL E. HELMS	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland
	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN	Boone
25	L. OLIVER NOBLE, JR. (Chief)[20]	Hickory
	DANIEL R. GREEN, JR.	Hickory
	TIMOTHY S. KINCAID	Hickory
	RONALD E. BOGLE[21]	Hickory
	STEWART L. CLOER[22]	Hickory
	JONATHAN L. JONES[23]	Hickory
26	JAMES E. LANNING (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte

DISTRICT	JUDGES	ADDRESS
	WILLIAM G. JONES	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
	T. PATRICK MATUS II	Charlotte
	RESA L. HARRIS	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	MARILYN R. BISSELL	Charlotte
	RICHARD ALEXANDER ELKINS	Charlotte
	SHIRLEY L. FULTON[24]	Charlotte
27A	LAWRENCE B. LANGSON (Chief)[25]	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
	TIMOTHY L. PATTI	Gastonia
	HARLEY B. GASTON, JR.[26]	Belmont
	CATHERINE C. STEVENS[27]	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	JOHN KEATON FONVIELLE[28]	Shelby

---

1. Appointed and took office 11-10-86 to replace Narley Lee Cashwell who resigned 8-31-86.
2. Elected and took office 12-1-86.
3. Appointed and took office 1-22-87 to replace K. Edward Greene who was elected to the North Carolina Court of Appeals.
4. Appointed and took office 7-1-86 to replace Charles Lee Guy who retired April 1986.
5. Appointed and took office 1-12-87 to replace Lee Greer, Jr., deceased.
6. Elected and took office 12-1-86.
7. Appointed and took office 1-1-87 as Chief Judge.
8. Appointed and took office 2-11-87 to replace J. B. Allen, Jr.
9. Elected and took office 12-1-86.
10. Appointed and took office as Chief Judge 12-1-86 to replace Foy Clark who retired.
11. Elected and took office 12-1-86.
12. Appointed and took office as Chief Judge 12-5-86 to replace Thomas G. Foster, Jr.
13. Appointed and took office 1-19-87.
14. Appointed and took office 12-1-86 to replace James H. Dooley, Jr.
15. Appointed and took office as Chief Judge 12-1-86 to replace L. T. Hammonds, Jr.
16. Elected and took office 12-1-86.
17. Appointed and took office 1-23-87 to replace W. Reece Saunders, Jr.

DISTRICT	JUDGES	ADDRESS
28	EARL JUSTICE FOWLER, JR. (Chief)	Arden
	PETER L. RODA	Asheville
	ROBERT HARRELL	Asheville
	GARY STEPHEN CASH	Fletcher
29	ROBERT T. GASH (Chief)	Brevard
	ZORO J. GUICE, JR.	Hendersonville
	THOMAS N. HIX	Hendersonville
	LOTO J. GREENLEE	Marion
30	JOHN J. SNOW, JR. (Chief)[29]	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT[30]	Bryson City

18. Appointed and took office 2-13-87 to replace Lynn Burleson.
19. Elected and took office 12-1-86.
20. Appointed and took office as Chief Judge 12-1-86.
21. Elected and took office 12-1-86 to replace Samuel McD. Tate.
22. Elected and took office 12-1-86 to replace Livingston Vernon.
23. Elected and took office 12-1-86.
24. Appointed and took office 1-23-87 to replace W. Terry Sherrill who went on the Superior Court bench.
25. Appointed and took office as Chief Judge 1-16-87 to replace J. Ralph Phillips, deceased.
26. Elected and took office 12-1-86.
27. Appointed and took office 2-9-87.
28. Appointed and took office 1-9-87.
29. Appointed and took office 12-6-86 as Chief Judge.
30. Appointed and took office 12-2-86.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General

JOHN D. SIMMONS III

Deputy Attorney General for Training and Standards

PHILLIP J. LYONS

Deputy Attorney General for Policy and Planning

ALAN D. BRIGGS

Chief Deputy Attorney General

ANDREW A. VANORE, JR.

Senior Deputy Attorneys General

JEAN A. BENOY
H. AL COLE, JR.
JAMES J. COMAN
WILLIAM W. MELVIN
WILLIAM F. O'CONNELL
EUGENE A. SMITH

Special Deputy Attorneys General

ISAAC T. AVERY III
GEORGE W. BOYLAN
CHRISTOPHER P. BREWER
JOAN H. BYERS
EDMOND W. CALDWELL, JR.
LUCIEN CAPONE III
J. MICHAEL CARPENTER
T. BUIE COSTEN
ANN REED DUNN
WILLIAM N. FARRELL, JR.
FRED R. GAMIN
JANE P. GRAY
JAMES C. GULICK
GUY A. HAMLIN
RALF F. HASKELL
CHARLES M. HENSEY
I. B. HUDSON, JR.
RICHARD N. LEAGUE
DANIEL F. MCLAWHORN
CHARLES J. MURRAY
STEPHEN H. NIMOCKS
DANIEL C. OAKLEY
JAMES B. RICHMOND
JACOB L. SAFRON
JO ANNE SANFORD
JAMES PEELER SMITH
EDWIN M. SPEAS, JR.
REGINALD L. WATKINS
ROBERT G. WEBB

Assistant Attorneys General

ARCHIE W. ANDERS
DAVID R. BLACKWELL
WILLIAM F. BRILEY
STEVEN F. BRYANT
ELISHA H. BUNTING, JR.
ROBERT E. CANSLER
RICHARD H. CARLTON
EVELYN M. COMAN
JOHN R. CORNE
FRANCIS W. CRAWLEY
THOMAS H. DAVIS, JR.
DEBRA K. GILCHRIST
ROY A. GILES, JR.
MICHAEL D. GORDON
RICHARD L. GRIFFIN
NORMA S. HARRELL
WILLIAM P. HART
WILSON HAYMAN
LEMUEL W. HINTON
ALAN S. HIRSCH
CHARLES H. HOBGOOD
DORIS A. HOLTON
J. ALLEN JERNIGAN
DOUGLAS A. JOHNSTON
KATHRYN L. JONES
FLOYD M. LEWIS
KAREN LONG
CATHERINE C. MCLAMB
BARRY S. MCNEILL
JOHN F. MADDREY
JAMES E. MAGNER, JR.
ANGELINE M. MALETTO
GAYL M. MANTHEI
THOMAS G. MEACHAM, JR.
THOMAS R. MILLER
DAVID R. MINGES
MICHAEL R. MORGAN
VICTOR H. E. MORGAN, JR.
MARILYN R. MUDGE
G. PATRICK MURPHY
DENNIS P. MYERS
J. MARK PAYNE
SUEANNA P. PEELER
NEWTON G. PRITCHETT, JR.
WILLIAM B. RAY
BARBARA P. RILEY
HENRY T. ROSSER
ALFRED N. SALLEY
ELLEN B. SCOUTEN
TIARE B. SMILEY
T. BYRON SMITH
WALTER M. SMITH
W. DALE TALBERT
PHILIP A. TELFER
JANE R. THOMPSON
AUGUSTA B. TURNER
R. BRYANT WALL
JAMES M. WALLACE, JR.
JOHN H. WATTERS
KAYE R. WEBB
THOMAS B. WOOD
DEBBIE K. WRIGHT
SARA C. YOUNG
THOMAS J. ZIKO
THOMAS D. ZWEIGART

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. Williams	Elizabeth City
2	Mitchell D. Norton	Williamston
3A	Thomas D. Haigwood	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	William H. Andrews	Jacksonville
5	Jerry Lee Spivey	Wilmington
6	David Beard	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	Donald Jacobs	Goldsboro
9	David Waters	Oxford
10	Colon Willoughby	Raleigh
11	John W. Twisdale	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Michael F. Easley	Whiteville
14	Ronald L. Stephens	Durham
15A	Steve A. Balog	Graham
15B	Carl R. Fox	Carrboro
16	Joe Freeman Britt	Lumberton
17A	Thurman B. Hampton	Wentworth
17B	H. Dean Bowman	Dobson
18	Horace M. Kimel, Jr.	Greensboro
19A	James E. Roberts	Kannapolis
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	William Warren Sparrow	Winston-Salem
22	H. W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	James T. Rusher	Boone
25	Robert E. Thomas	Newton
26	Peter S. Gilchrist III	Charlotte
27A	Calvin B. Hamrick	Gastonia
27B	William Carlos Young	Shelby
28	Robert W. Fisher	Asheville
29	Alan C. Leonard	Rutherfordton
30	Roy H. Patton, Jr.	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3	ROBERT L. SHOFFNER, JR.	Greenville
12	MARY ANN TALLY	Fayetteville
15B	J. KIRK OSBORN	Chapel Hill
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

NORTH CAROLINA NATIONAL BANK, INTERVENING PLAINTIFF v. ROBERT E. ROBINSON AND JOANN ROBINSON, PLAINTIFFS v. BARCLAYS AMERICAN CREDIT, INC. D/B/A BARCLAYS AMERICAN FINANCIAL, DEFENDANT

No. 8514DC187

(Filed 3 December 1985)

1. **Automobiles and Other Vehicles § 5; Uniform Commercial Code § 1— ownership of vehicle—purchaser versus inventory finance company—applicability of UCC**

The Uniform Commercial Code rather than the Motor Vehicle Act controls in determining whether the purchaser of an automobile or a finance company which has an inventory security agreement with the dealer owns the automobile and who will bear the loss caused by the dealer's failure to pay the finance company money received from the purchaser.

2. **Automobiles and Other Vehicles § 5.4; Uniform Commercial Code § 17— title certificate not reassigned—automobile purchaser as buyer in ordinary course of business**

An automobile purchaser may be a "buyer in the ordinary course of business" as that term is used in N.C.G.S. § 25-2-403 and § 25-9-307 even though the certificate of title has not yet been reassigned. N.C.G.S. § 25-1-201 (9).

3. **Automobiles and Other Vehicles § 5.4; Uniform Commercial Code § 17— automobile in dealer inventory—rights of purchaser superior to inventory finance company**

Where a used automobile was held in inventory and displayed for sale by a dealer with no warning that defendant finance company had a security interest in it under an inventory security agreement, defendant finance company had possession of the title certificate which was in the dealer's name, the purchasers received a bill of sale and a twenty-day temporary marker receipt, and

the dealer failed to pay defendant finance company for the vehicle sold, the purchasers took free of any security interest defendant finance company may have had, N.C.G.S. § 25-9-307(1), and also took whatever title defendant finance company had, N.C.G.S. § 25-2-403. Therefore, the purchasers were entitled to recover possession of the automobile from defendant finance company, and the purchaser's lender was entitled to have its purchase money security interest noted on the certificate of title.

Chief Judge HEDRICK concurring in the result in part and dissenting in part.

APPEAL by plaintiffs and intervening plaintiff from *LaBarre, Judge*. Judgment entered 1 August 1984 in District Court, DURHAM County. Heard in the Court of Appeals 25 September 1985.

Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for intervening plaintiff appellant.

Jimmy D. Sharpe for plaintiff appellants.

Pulley, Watson, King & Hofler, P.A., by R. Hayes Hofler, III, for defendant appellee.

BECTON, Judge.

I

This is a civil action for wrongful conversion of a used automobile and damages for the reasonable rental value of the automobile for the time it was held by defendant, Barclays American Credit, Inc. (Barclays). The plaintiffs, Mr. and Mrs. Robinson, borrowed $4,500 from North Carolina National Bank (NCNB) to buy the automobile from Colclough Auto Sales. NCNB, the intervening plaintiff, seeks a joint and several judgment against the Robinsons and Barclays for $4,500. The Robinsons moved for partial summary judgment on the issue of the ownership of the automobile. Barclays responded with a motion for summary judgment on all issues against NCNB and the Robinsons. From the entry of summary judgment for Barclays, NCNB and the Robinsons appeal. The evidence presented to the trial court tends to show the following.

Barclays and Colclough had a dealer inventory security agreement, in effect since 1 April 1970, under which Barclays would finance used auto purchases by Colclough, and Colclough would execute collateral promissory notes giving Barclays securi-

ty interests in the vehicles. Under this agreement, Colclough could sell a used car at retail in the ordinary course of business provided Colclough would then pay Barclays for the vehicle sold. On 28 February 1983, Barclays loaned Colclough the purchase price of a 1979 Pontiac, and, pursuant to the dealer inventory plan, Colclough executed a collateral promissory note to Barclays and was permitted to display the vehicle on its lot for sale. Barclays retained the title certificate which was in the name of Colclough.

On 2 June 1983, Mr. Robinson negotiated the purchase of the 1979 Pontiac from Colclough. Robinson agreed to pay $1,000 in cash and to obtain a $4,500 loan from NCNB. Neither NCNB nor the Robinsons asked Colclough to produce the certificate of title, but a branch manager from NCNB called Colclough, explained that NCNB was issuing a check to Mr. Robinson and Colclough, and asked that the title show a lien in favor of NCNB. It was not the usual practice at NCNB to inquire about the status of the title in this situation.

Mr. Robinson gave Colclough the $4,500 check and received a bill of sale and a twenty-day temporary marker receipt. Colclough did not transfer the $4,500 to Barclays and did not notify Barclays of the sale of the Pontiac. Barclays' district manager, Mr. Reese, noticed that the Pontiac was gone from Colclough's lot, and he told Mr. Colclough that he had "one day to . . . put the car back on the lot or we would want to be paid." Colclough called Mrs. Robinson and apparently said the car must be returned to Colclough "for the State man to come in and read the odometer." Mr. Robinson, although "completely puzzled" by the request, returned the car. He drove it several times from mid-June to mid-July, but each time parked it at Colclough's lot having been told that the inspector had not yet come.

Upon returning the car from a trip on 19 July 1983, Robinson was met by Reese who asked if Robinson had a title certificate or bill of sale. Robinson said he owned the car, but he could not produce a title or bill of sale. Reese said Barclays had title to the Pontiac and he was taking possession of the car. Robinson did not object and voluntarily surrendered his set of keys to Reese. Reese drove the car to Barclays' office lot, where apparently it remains.

On 16 September 1983, Barclays filed a certificate of repossession with the Department of Motor Vehicles, stating that Barclays had repossessed the car from Colclough on 15 August 1983. A certificate of title was issued for the Pontiac on 19 September 1983 in the name of Barclays.

Plaintiffs could not regain possession of the car and, therefore, discontinued payments to NCNB. Apparently, Mr. Colclough "absconded with the purchase price [$4,500] . . . and subsequently was involuntarily bankrupted."

The Robinsons sued Barclays for wrongful conversion of their car to Barclays' use, and they moved for partial summary judgment on the issue of the ownership of the car. It is clear that this is the ultimate issue in this case. In more stark terms, the question is, who will bear the loss caused by Colclough's failure to pay Barclays? Although we agree with the trial court that there are no material issues of fact for a jury, we disagree with the legal conclusion that Barclays is entitled to the Pontiac. Therefore, we reverse.

II

The first step in our analysis is to examine the law under the Uniform Commercial Code (UCC) and the Motor Vehicle Act (MVA). This is essential because an examination of these statutes reveals that Barclays will bear the loss in this case if the UCC applies, and the Robinsons will bear the loss if the MVA applies. We begin by examining the MVA.

A.

When a dealer transfers a vehicle registered under Chapter 20 of the Motor Vehicle Act, it must execute a reassignment and warranty of title on the reverse of the certificate of title "and title to such vehicle shall not pass or vest until such reassignment is executed and the motor vehicle delivered to the transferee." N.C. Gen. Stat. Sec. 20-75 (1983). The dealer must also deliver the duly assigned certificate of title to the transferee or lienholder at the time the vehicle is delivered. *Id.*; *cf. id.* Sec. 20-72(b) (using nearly identical language for transfers of automobile ownership by transferors who are not dealers or insurance companies). Barclays relies on this statute and two 1970 Supreme Court decisions for the proposition that title to a motor vehicle does not pass un-

til (1) the certificate of title has been assigned by the vendor; (2) the certificate has been delivered to the vendee or his agent; and (3) an application has been made for a new certificate of title. *See International Service Insurance Co. v. Iowa National Insurance Co.*, 276 N.C. 243, 251, 172 S.E. 2d 55, 60 (1970); *Nationwide Mutual Insurance Co. v. Hayes*, 276 N.C. 620, 627, 174 S.E. 2d 511, 517 (1970). However, the cases cited by Barclays held only that these three requirements applied from 1 July 1961 through 1 July 1963. In 1963, the General Assembly amended G.S. Secs. 20-72(b) and 20-75 to require the transferor to note in writing on the back of the certificate of title an assignment of title to the transferee. *See* 1963 N.C. Sess. Laws, ch. 552, Secs. 4, 5. There is no longer a requirement under the MVA that a purchaser apply for a new certificate of title before title may pass or vest. *See Hayes*, 276 N.C. at 640, 174 S.E. 2d at 524.

Having discussed the proper analysis of title transfers under G.S. Secs. 20-72(b) and 20-75, we agree with Barclays that the Robinsons did not receive title through the operation of the MVA. They did take delivery of the vehicle, but the certificate of title was not reassigned to them or to NCNB by Colclough. Thus, under the MVA, Barclays would have been within its rights in repossessing the Pontiac, title to which was still in its debtor, Colclough. We now turn to an analysis under the applicable sections of the UCC.

B.

Barclays' interest in the Pontiac was no more than a security interest at the time of the repossession. *See* N.C. Gen. Stat. Secs. 25-1-201(37) (Cum. Supp. 1985), -2-401(1) (1965); *American Clipper Corp. v. Howerton*, 311 N.C. 151, 166, 316 S.E. 2d 186, 194-95 (1984). Title was in Colclough, and Barclays simply held the certificate of title as security. Barclays did not note its lien on the reverse side of the certificate of title. Nevertheless, Barclays argues that it had a valid lien on the vehicle, apparently arguing that possession of the title certificate to secure a debt is sufficient under the decision in *Wachovia Bank and Trust Co. v. Wayne Finance Co.*, 262 N.C. 711, 138 S.E. 2d 481 (1964). *Wachovia Bank and Trust Co.* is inapplicable because it involved a mortgagee who had retained possession of the vehicle itself, not the certificate of title. In the case at bar, the vehicle was displayed for sale on Colclough's lot.

We also reject the implication in Barclays' argument that the relevant time for determining the rights of the parties is after Barclays took possession of the automobile. This action is for wrongful conversion; we must determine whether the repossession was wrongful in the first place. Thus, we are interested in the rights of the parties at the time of the repossession.

Barclays had a perfected security interest in the Pontiac until its financing statement lapsed in 1975. This is so because the car was held in inventory by a used car business, and thus falls within the provisions of N.C. Gen. Stat. Sec. 20-58.8(b)(3) (1983) and N.C. Gen. Stat. Sec. 25-9-302(3)(b) (Cum. Supp. 1985), and Barclays failed to file a continuation statement as required by N.C. Gen. Stat. Sec. 25-9-403(2) (Cum. Supp. 1985). Our decision is in accord with *Bank of Alamance v. Isley*, 74 N.C. App. 489, 492, 328 S.E. 2d 867, 869 (1985), in which Judge Martin, writing for this Court, noted that Article 9 does not apply to security interests in motor vehicles unless "held as inventory and the security is created by the inventory seller. G.S. 25-9-302(3)(b)." In *Bank of Alamance*, the security interest was created by the purchaser of the car which "was sold in contemplation of regular use on the highway." *Id.* In the case *sub judice*, the car was held for sale in inventory and the inventory seller, Colclough, created the security interest.

Even if Barclays' security interest remained perfected after 1975, the Robinsons would be protected purchasers under the UCC. The Robinsons took free of Barclays' security interest under N.C. Gen. Stat. Sec. 25-9-307(1) (Cum. Supp. 1985): "A buyer in ordinary course of business (subsection (9) of G.S. 25-1-201) . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." A buyer in ordinary course of business is one "who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. . . ." G.S. Sec. 25-1-201(9) (Cum. Supp. 1985). As the Official Comment to G.S. Sec. 25-9-307(1) points out, a buyer takes free even if he or she knows of the security interest, as long as the buyer does not know the sale is in violation of some terms of the security agreement.[1] Of-

1. Neither NCNB nor the Robinsons argue that the Pontiac was a "consumer good." Under N.C. Gen. Stat. § 25-9-109(1) (Cum. Supp. 1985), a consumer good is an

ficial Comment 2 notes further that "[i]f the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this section." Thus, the UCC as adopted in this State protects purchasers in the ordinary course of business from the claims of predecessors in interest who place items into the stream of commerce without warning that they subsequently will claim ownership. This applies in the case at bar because the car was held in inventory and displayed for sale with no warning that Barclays had an interest in it. *Accord Bank of Alamance*, 74 N.C. App. at 493, 328 S.E. 2d at 870 (G.S. Sec. 25-9-307(1) does not apply when the perfection of a security interest in a motor vehicle is governed by Chapter 20.); *Cunningham v. Camelot Motors, Inc.*, 351 A. 2d 402 (N.J. Super. 1975). Barclays' rights are in the proceeds of the sale by Colclough. *See* G.S. Sec. 25-9-306.

A second UCC provision is applicable in this case. Under N.C. Gen. Stat. Sec. 25-2-403 (1965), Barclays "entrusted" the Pontiac to Colclough:

> (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
>
> (3) "Entrusting" includes any delivery and any acquiescence in retention of possession *regardless of any condition expressed between the parties* to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(Emphasis added.) The General Assembly added a North Carolina Comment relating to Subsection (2):

---

item "used or bought for use primarily for personal, family or household purposes." As Official Comment 2 notes, goods can be "inventory in the hands of a dealer and consumer goods in the hands of a householder." If the car is a consumer good, the outcome in this case is the same because the Robinsons had no knowledge of Barclays' security interest and the security interest was not properly filed. The result is required by G.S. § 25-9-307(2) which provides:

> In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.

> Prior North Carolina law provided that the fact that an owner has entrusted someone with mere possession and control of personal property would not, without more, estop the owner from asserting his title against one who had bought from such possessor (in the absence of some estoppel factor). The UCC, however, protects any purchaser who has bought in the ordinary course of business any item entrusted to a "merchant" who deals in goods of the kind entrusted, whether the merchant had any apparent authority to sell or *whether or not there was any indicium of title.*

(Emphasis added.) In *American Clipper Corp.*, the Supreme Court held, "three essential elements must be present to make this statute operative: (1) an entrustment of goods to (2) a merchant dealing in goods of that kind, followed by a sale by that merchant to (3) a buyer in the ordinary course of business." 311 N.C. at 165, 316 S.E. 2d at 194 (citation omitted).

To the extent Barclays had any ownership interest in the Pontiac, by entrusting the car to Colclough who sold it in the ordinary course of business to the Robinsons, Barclays passed to Colclough the power to transfer that interest to the Robinsons. As the Supreme Court noted in *American Clipper Corp.*, quoting from 3 Anderson, *Uniform Commercial Code*, Sec. 2-403:59, at 600-01 (1971), "[t]he sale by the entrustee makes a definitive transfer of the entruster's title." 311 N.C. at 166, 316 S.E. 2d at 194. The Court then stated:

> Once, therefore, a sale has been made by the entrustee to a buyer in ordinary course of business, *title passes from the entruster to the buyer.* The entruster no longer has title. The buyer then has the power to transfer to another the interest he received in the goods.

Id. (emphasis added).

The Robinsons took free of any security interest Barclays may have had. G.S. Sec. 25-9-307(1). They also took whatever title Barclays had. G.S. Sec. 25-2-403. Barclays could have protected its interest by noting its security interest on the reverse side of the title and taking steps to assure that potential customers of Colclough would know of Barclays' superior claim. Such a customer then would not be a buyer in the ordinary course of business be-

cause he would have "knowledge that the sale to him is in violation of the ownership rights or security interest of a third party." G.S. Sec. 25-1-201(9).

In sum, under the UCC, the Robinsons would prevail in this action as the rightful owners of the Pontiac at the time of Barclays' repossession.

III

[1] The final step in our analysis is to determine whether the MVA or the UCC applies in this case. In *Nationwide Mutual Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970), the Supreme Court applied the title provisions of the MVA over the UCC. But in that case, the rights of the parties were directly dependent upon when legal title to a vehicle had passed, and neither party had been privy to the actual sale of the vehicle. Two automobile insurance companies were involved; one would have been liable under a "nonowner" policy, the other under an "owner" policy. The Court decided that the MVA applied partly because it comprised "public regulations" and the UCC is "a private law." *Id.* at 639, 174 S.E. 2d at 523. The Supreme Court consistently limited its holding, that the MVA title provisions applied instead of the UCC, to cases involving "tort law and liability insurance coverage." *Id.* at 640, 174 S.E. 2d at 524. The Court also said that the sales act, Article 2 of the UCC, may be applicable to public regulations when a court can define "a clear and concise definitional basis for so doing." *Id.* at 640, 174 S.E. 2d at 523. In *American Clipper Corp.*, the Supreme Court explained its earlier decision and held that, "*Hayes* left open the question whether the MVA, as opposed to the UCC, would control in all circumstances." 311 N.C. at 162, 316 S.E. 2d at 192.

In *American Clipper Corp.*, the Supreme Court reviewed its earlier decisions that involved both UCC and MVA title provisions and noted that the Supreme Court had looked to the prevailing general laws of sales, bailment and entrustment to determine which party had title. *Id.* (discussing *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953) and *King Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E. 2d 329 (1968)). The Court also quoted at length from *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976) to the effect that the UCC, not traditional concepts of title, should control problems that pri-

marily involve security interest disputes. In *American Clipper Corp.*, the dispute involved conflicting security interests among a manufacturer, a dealer, a consumer, and the dealer's finance company. Although the Court of Appeals held that the MVA applied and title to the car could not "pass or vest" until the MVA regulations were satisfied, the Supreme Court reversed and held,

> the provisions of the UCC and not the MVA properly resolve the contest here. As the Court tacitly recognized in both *Hawkins* and *King Homes, Inc.*, the title transfer provisions of the MVA were not designed to resolve the kind of question here presented. The UCC, which generally has supplanted the principles [of sales, bailment and entrustment] relied on in *Hawkins* and *King Homes, Inc.*, was so designed and should have been, but was not, employed by Clipper in this case. For similar holdings from other jurisdictions, see *Wood Chevrolet Company, Inc. v. Bank of the Southeast*, 352 So. 2d [1350] ([Ala.] 1977); *Cunningham v. Camelot Motors, Inc.*, 138 N.J. Super. 489, 351 A. 2d 402 (1975); *Bank of Beulah v. Chase*, 231 N.W. 2d 738 (N.D. 1975).

311 N.C. at 163, 316 S.E. 2d at 192-93.

We conclude that, in this case, the dispute primarily involves a security interest in, and the entrustment of, an automobile. Although the cause of action is the tort of wrongful conversion, the rights of the parties revolve around their relationships as commercial actors. This is not an automobile accident case; rather it involves a business transaction in which the policies underlying the private UCC law are fully implicated.

[2] Therefore, notwithstanding the title transfer provisions of the MVA, we conclude that an automobile purchaser may be a "buyer in the ordinary course of business" as that term is used in G.S. Secs. 25-2-403 and -9-307 even though the certificate of title has not yet been reassigned.[2] Moreover, we believe the MVA pro-

2. We recognize that language in *Hayes*, 276 N.C. at 639-40, 174 S.E. 2d at 524, suggests that the UCC was not intended to repeal the provisions of G.S. § 20-72 in the MVA. This is true as far as it goes, but it does not help to resolve specific conflicts. We believe that the case at bar involves a specific instance when the UCC was meant to override the MVA. Indeed, the UCC provides that entrustment may be completed, and title may pass, despite even the larceny of an entrustee. G.S.

visions quoted above which refer to the UCC demonstrate the legislature's intent to have the UCC control issues of security interests and priorities in cases such as the one at bar. The UCC should control over the MVA when automobiles are used as collateral and are held in inventory for sale. *Accord Ramsey National Bank & Trust Co. v. Suburban Sales & Service, Inc.*, 231 N.W 2d 732, 741-42 (N.D. 1975).

[3] In light of the foregoing, we hold that the Robinsons had the superior right to possession of the Pontiac. They gave value for the car and received a twenty-day temporary marker in June 1983. The car was no longer part of the dealer's inventory when Barclays' agent came to repossess it on 19 July 1983. Thus, the repossession was not from the dealer, but from the Robinsons, and even though it was accomplished without a breach of peace, it was wrongful. Of course, Barclays has rights against its dealer, Colclough.

For the reasons set forth above, the entry of summary judgment in favor of defendant is reversed, and the trial court is directed to enter partial summary judgment in favor of the Robinsons on the issue of the ownership of the automobile. Barclays converted the Pontiac to its own use and had no authority to have the title reassigned to it by the Department of Motor Vehicles. The Robinsons are entitled to possession of the vehicle, and, because the Robinsons' purchase money debt to NCNB is not disputed, NCNB is entitled to have its purchase money security interest noted on the certificate of title. The trial court must still resolve the issue of damages, including, but not limited to, depreciation, rental costs and incidental damages, as a result of the conversion. Finally, the Robinsons and NCNB have abandoned their claim for unfair and deceptive trade practices because it was resolved against them by the trial court and they did not raise and argue it on appeal.

Reversed and remanded.

---

§ 25-2-403(3). Thus, if Colclough had stolen one of Barclays' automobiles, it could have passed title to the Robinsons. In the case at bar, the automobile was in Colclough's name and Colclough only destroyed Barclays' security interest.

Chief Judge HEDRICK dissents.

Judge PARKER concurs.

Chief Judge HEDRICK concurring in the result in part and dissenting in part.

While I would not have treated NCNB's appeal as cavalierly as have my colleagues, I concur in affirming summary judgment for defendant as to any claims alleged by NCNB against defendant. I also question the authority and propriety of this Court's ordering that NCNB's purchase money security interest be noted on the certificate of title when there has been no trial court disposition of NCNB's claims against the Robinsons.

I vote to affirm summary judgment for defendant with respect to the Robinsons' claims.

The Motor Vehicles Act, in pertinent part, provides that when the transferee of a vehicle is a dealer that:

> To assign or transfer title or interest in such vehicle, the dealer . . . shall execute in the presence of a person authorized to administer oaths a reassignment and warranty of title on the reverse of the certificate of title . . . and title to such vehicle shall not pass or vest until such reassignment is executed and the motor vehicle delivered to the transferee.

G.S. 20-75. Under this Act, no title passes to the purchaser of the motor vehicle until the vendor executes an assignment and warranty of title on the reverse of the certificate of title, there is actual or constructive delivery of the motor vehicle, and the duly assigned certificate of title is delivered to the transferee. *See, Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970). In enacting the Motor Vehicles Act, the legislature used the word "title" as a synonym for "ownership." *Id.*

In *Hayes*, the Supreme Court held that the provisions of the UCC do not override the motor vehicle statutes relating to the transfer of ownership of a motor vehicle for the purposes of tort law and liability insurance coverage. The Court reasoned that the Motor Vehicles Act contains specific, definite and comprehensive terms concerning the transfer of ownership of an automobile, while the UCC only refers to the passing of title of property de-

scribed as "goods," and that the more specific statute must control.

Plaintiffs and intervening plaintiff distinguish *Hayes* on its facts and contend that even if the Robinsons were not owners for the purposes of the Motor Vehicles Act, they were buyers in ordinary course of business and as such were protected from repossession by Barclays by G.S. 25-9-307(1). This section provides that "[a] buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." "Buyer in ordinary course of business" is defined as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. . . ." G.S. 25-1-201(9). The word "buyer" is not further defined for the purposes of Article 9 of Chapter 25.

As discussed by the Supreme Court in *Hayes*, the Motor Vehicles Act is concerned only with automobiles, and although the word "automobile" falls within the general term of "goods" as defined in the UCC, automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. I hold, therefore, that a purchaser of a motor vehicle is a "buyer" for the purposes of G.S. 25-9-307(1) when he has become an "owner" under the provisions of the Motor Vehicles Act when the old certificate of title has been assigned by the vendor, the motor vehicle has been delivered, and the assigned certificate of title has been delivered to the vendee.

In holding that the UCC, rather than the Motor Vehicles Act, controls in this case, the majority relies upon the recent Supreme Court decision in *American Clipper Corp. v. Howerton*, 311 N.C. 151, 316 S.E. 2d 186 (1984). In that case, the manufacturer of a recreational vehicle retained the manufacturer's certificate of origin after shipping the vehicle to a dealer in an attempt to secure itself against loss by default of the dealer, in violation of G.S. 20-52.1, a provision of the Motor Vehicles Act. The Court held since the statute *required* that the manufacturer supply the transferee with a certificate of origin, the manufacturer could not protect itself from default by retaining the certificate and decided

the priorities of the parties under the provisions of the UCC. In the present case, however, Barclays did not violate a statute by retaining the certificate of title to the vehicle. Thus, the *American Clipper* decision is not controlling in this case.

Additionally, I note that the Robinsons should have had knowledge that the sale of the automobile was in violation of the rights of another party when Colclough failed to assign the certificate of title to them. Obviously, Colclough could not deliver paper title because it was held by defendant Barclays.

It is uncontroverted in this case that the Robinsons never acquired an assigned certificate of title to the Pontiac as required by G.S. 20-75. In my opinion, therefore, the Robinsons were not the "owners" of the vehicle at the time of repossession and thus did not have an interest paramount to that of Barclays under the provisions of the UCC. Therefore, they do not have a claim for conversion against Barclays. Colclough Auto Sales was the "owner" of the automobile, and Mr. Reese validly repossessed it on Colclough's lot pursuant to the security agreement signed on April 1, 1970.

Assuming, however, that the Robinsons were the owners of the automobile and were entitled to the possession thereof, as the majority declares, I cannot agree that there are no genuine issues of material fact with respect to plaintiff's claim for conversion so as to require the trial court to enter summary judgment for plaintiffs on the issue of defendant's liability to plaintiffs for wrongfully converting the automobile. Conversion is defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Spinks v. Taylor and Richardson v. Taylor Co.*, 303 N.C. 256, 264, 278 S.E. 2d 501, 506 (1981). To establish a claim for conversion, plaintiff must prove both ownership in himself and the wrongful possession or conversion of the property by defendant. *Gadson v. Toney*, 69 N.C. App. 244, 316 S.E. 2d 320 (1984). Summary judgment is inappropriate where the evidence raises a genuine issue as to whether defendant's possession of plaintiff's property is authorized or wrongful. *Id.* Where defendant has rightfully come into possession of the goods and then refused to surrender them, demand and refusal are necessary to the ex-

istence of a claim for conversion. *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).

With respect to the manner in which Barclays got possession of the vehicle Mr. Robinson testified in his deposition as follows:

> Another day I went and got my car, again, and drove to Raleigh, and come back and parked it in the lot and that's the time David come in. He said (pointing to David Reese, manager of Barclays-American), "Mr. Robinson is this your car?" He said "Well you can't get title to it, I have title to it." I said, "Here, I know you want the keys." He said, "I was fixin to ask you for them."

In a second deposition, Mr. Robinson further testified:

> I went back to see Mr. Reese a number of times, several times, but I do not know the exact number. He said he was waiting on Colclough to do something. To pay the money that they owed to Barclays. He has been very nice and I have nothing against that man. Mr. Colclough owed Barclays some money on that car and that's why they were holding the car.

With respect to how Barclays obtained possession of the automobile, Mr. Reese testified in his deposition as follows:

> I went over there and walked up to the car and the gentlemen was getting out of it and I identified myself. I told him I was David Reese with Barclays American Financial across the street and I would like to know what he was doing driving that car. He said that he owned the car. I said what do you mean you own the car? He said that this car belongs to me. I said I want to advise you that Barclays American has the title to the car, that we have a lien on it, that the dealer owes us money on it and that we have an interest in this automobile. I asked him whether he had a bill of sale or could identify any ownership and he said that he could not. He did state that he thought there were some papers in the car at one time, but that they were missing. I told him that I thought he was going to have to talk with Mr. or Mrs. Colclough to verify what was going on and see if they could do anything about it. I said in the meantime, I'm going to take the car over to my office and I'm going to lock it up. He did

not resist me at all. I took out the set of keys and he said, well, here I've got another set of keys to the car. He says, you want these, too? I asked him how he had a set of keys to it and he said he had owned the car previously and had a set that he had never turned in when he traded it back in. And so he just gave me the keys and I told him that he needed to get in touch with the Colcloughs to see if they could work out an agreement.

In the present case, all the evidentiary matter discloses that Barclays came into possession of the automobile rightfully. Mr. Robinson voluntarily surrendered the vehicle to Mr. Reese. The record before us is devoid of any evidence that Barclays wrongfully obtained possession of the automobile or exercised unauthorized control over it. In fact, all of the evidentiary matter contained in this record affirmatively discloses that Barclays' possession of the vehicle was authorized by plaintiffs themselves. In my opinion, summary judgment for plaintiffs on the issue of defendant's liability for wrongful conversion of the automobile would be improper, and on this record summary judgment for defendant on the issue of defendant's liability for wrongful conversion was proper.

IN THE MATTER OF THE PROTEST OF CLYDE MASON, JR., EX REL. THE PROPOSED LEASE OF JOSEPH A. HUBER

No. 8510SC122

(Filed 3 December 1985)

1. Waters and Watercourses § 7 — shellfish cultivation lease — no natural shellfish beds — insufficient evidence

The trial court did not err in reversing a decision of the Marine Fisheries Commission to grant a shellfish cultivation lease in Core Sound on the issue of whether there was sufficient evidence to determine that the area did not contain a natural shellfish bed where N.C.G.S. 113-202 (1983) provides that no lease may be granted which embraces a known or suspected natural shellfish bed; the Commission's regulations define a natural shellfish bed as an area of public bottom where ten bushels or more of shellfish per acre are to be found growing; an investigation in 1982 revealed that the bottom of the proposed lease area was sand and mud, there was no significant rooted vegetation, the area was totally exposed to wind, and the clam density was less than ten bushels per acre; a second investigation one year later only surveyed the area outside the proposed lease because Huber, the proposed lessee, had planted

two and one-half million clam seeds and had placed protective mats and stakes over the leased area; the Commission found that this proposed lease overlapped another proposed lease which had been denied as containing a natural shellfish bed, that clams are mobile and migrate, that conditions in the two areas differ significantly, and that Huber had carefully avoided natural shellfish beds; and the Commission concluded that the proposed lease area did not contain a natural shellfish bed. The Commission may not adopt an objective ten bushels per acre standard and apply a subjective standard that considers an area's substrate, vegetation, and wind exposure; thus, because Huber's mats prevented a proper investigation, the Commission had insufficient evidence in the record to conclude that the area did not contain a natural shellfish bed. 15 NCAC 3c.0302(a)(2) (1983).

2. Waters and Watercourses § 7— shellfish cultivation lease—no interference with riparian rights

The trial court erred in its reasoning when reversing a Marine Fisheries Commission decision to issue a shellfish cultivation lease by concluding that the lease constituted a taking of Mason's riparian rights without compensation. The lease as issued contained conditions designed to guard the public's and Mason's right of navigation and recreation in the riparian area, conditions which protected Mason's access to deep water, and a setoff which recognized Mason's right to make reasonable use of the water as it flowed past the shore. However, the result reached by the court was affirmed on other grounds. G.S. 113-202(d).

APPEAL by respondent from *Bailey, Judge.* Judgment entered 9 August 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 18 September 1985.

Wheatly, Wheatly, Nobles & Weeks, P.A., by Stevenson L. Weeks, for petitioner appellee Clyde Mason, Jr.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Daniel F. McLawhorn, for respondent appellant Marine Fisheries Commission.

BECTON, Judge.

This case began with the application of Joseph A. Huber to the Marine Fisheries Commission (Commission) to lease public bottom land in Core Sound for clam culture. Clyde Mason, Jr., protested the proposed lease. On 14 April 1984, after an administrative hearing and a final agency hearing, the Commission ordered that the lease be issued to Huber with certain conditions. Following is a more detailed recitation of the facts and procedural history in this case.

I

On 9 July 1982, Huber submitted an application for a lease for shellfish cultivation in a 1.8 acre area of the public bottom of Core Sound, Carteret County, North Carolina. Two years earlier, Charles Edwards' application for a shellfish cultivation lease for approximately 1.18 acres in the same area of Core Sound had been denied based on the findings and conclusions of a shellfish biologist of the Division of Marine Fisheries (Division). The biologist investigated the Edwards site in October 1980 and concluded that it had "good potential for natural clam production and is acceptable to the public," that clams present at the site were "in sufficient quantities to be valuable to the public," and that the site contained a natural shellfish bed.

Huber's lease application included a map of the proposed area to be used for clam culture. The map showed that the area would begin at the highwater mark of Core Sound and extend outward in such a way as to overlap Mason's area of riparian access across the Sound. The water depth in this area varies from zero at the shore side of the lease area to a depth of one and one-half to four and one-half feet at the waterward side. It is not disputed that Mason owned the riparian rights involved herein, that Core Sound is navigable, or that Mason's riparian area is overlapped by the proposed lease area.

On 11 October 1982, the Chairman of the Commission notified Huber that his application would be deferred until a legislative moratorium on shellfish leases expired on 30 June 1983. The General Assembly enacted Chapter 621 of the 1983 Session Laws, to be effective 1 July 1983, establishing additional minimum criteria for shellfish leases, authorizing the Commission to modify lease applications and impose conditions, and retaining the requirement that no lease area contain a natural shellfish bed.

On 2 August 1983, after the moratorium on leases expired, the Division attempted to conduct another investigation of the lease area. The original investigation was approximately one year old, and clam populations are mobile. Huber had been in possession of the area, however, and he had planted two and one-half million clam seeds in the area and had placed plastic mats with stakes and weights over the area to protect the clams from predators. There were at least sixty stakes projecting out of the water.

The inspector for the Division, along with Huber, "did a random survey inside and outside the proposed lease with the standard clam rakes, [and] there appeared to be little or no change in the clam densities outside the proposed lease."

On 22 September 1983, the Commission approved Huber's proposed lease (which had been amended on 15 September 1983). On 7 October 1983, Mason requested an administrative hearing. An administrative hearing was held, and the hearing officer issued a proposed order on 14 March 1984. The Commission then held a final hearing. It reviewed the entire record, including the findings and conclusions of the administrative hearing officer, and it issued a final order on 14 April 1984 granting to Huber a lease subject to several specific conditions.

Mason petitioned the superior court to review the Commission's decision under N.C. Gen. Stat. Sec. 150A-43 (1983) (recodified at G.S. Sec. 150B-43 (1985)). In the petition, Mason included a recitation of the facts in the case, some of which varied from the findings of the Commission. The trial court issued its own findings of fact and conclusions of law and held that (1) the Commission violated the United States and North Carolina Constitutions by issuing the lease to Huber because it constituted a taking of the vested riparian rights of Mason for a private purpose without compensation; and (2) the Commission exceeded its authority under N.C. Gen. Stat. Sec. 113-202 (1983). The trial court reversed the Commission's order and denied the issuance of the lease.

The Commission appeals, asserting that the trial court erred by (1) failing to accept the Commission's findings of fact when they were supported by the record; (2) failing to base its judicial review on the "whole record"; (3) improperly and erroneously concluding that riparian access areas must extend to the nearest federally maintained channel; and (4) erroneously concluding that Mason's riparian rights were taken and that he was entitled to compensation. We disagree with the Commission on its first two assignments of error, and we hold that the trial court properly reversed the Commission's order. But we agree with the Commission on its last two assignments of error, and we modify the reasoning of the trial court to the extent it relies on the conclusion that Mason's riparian rights were taken.

II

[1] Petitioner contends that the trial court erred in substituting its own findings of fact for the Commission's when the Commission based its findings on competent, material and substantial evidence. We agree that such a practice is prohibited. *See In re Appeal of AMP, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). Nevertheless, we conclude that the trial court did not commit this error.

In order to issue a lease for the cultivation of shellfish in underlying fishing coastal waters, the Commission must comply with the requirements of N.C. Gen. Stat. Sec. 113-202 (1983) (some subsections were revised in 1985, but the revisions became effective on 1 July 1985 and do not apply in this case). The lease involved in this case was issued in 1984 and is within the purview of this statute. *See* G.S. Sec. 113-202(p). G.S. Sec. 113-202 provides in part:

> (a) To increase the use of suitable areas underlying coastal fishing waters for the production of shellfish, the Marine Fisheries Commission may grant shellfish cultivation leases to persons who reside in North Carolina under the terms of this section when it determines the public interest will benefit from issuance of the lease. Suitable areas for the production of shellfish shall meet the following minimum standards:
>
> (1) The area leased must be suitable for the cultivation and harvesting of shellfish in commercial quantities.
>
> (2) The area leased must not contain a natural shellfish bed.
>
> (3) Cultivation of shellfish in the leased area will be compatible with lawful utilization by the public of other marine and estuarine resources. Other public uses which may be considered include, but are not limited to, navigation, fishing and recreation.
>
> (4) Cultivation of shellfish in the leased area will not impinge upon the rights of riparian owners.
>
> * * *
>
> (b) The Marine Fisheries Commission may delete any part of an area proposed for lease or may condition a lease to

> protect the public interest with respect to the factors enumerated in subsection (a) of this section.

If it is determined by the Secretary "that granting the lease would benefit the shellfish culture of North Carolina,"

> the Secretary, in the case of initial applications, must order an investigation of the bottom proposed to be leased . . . to determine whether the area proposed to be leased is consistent with the standards in subsection (a) and any other applicable standards under this Article and the regulations of the Marine Fisheries Commission.

G.S. Sec. 113-202(d). Apparently, the legislature is concerned that private, commercial shellfish cultivation might infringe upon natural shellfish beds, which are open to the public. The same statute provides that "no lease may be granted which embraces a known or suspected natural shellfish bed." G.S. Sec. 113-202(g) (relating to procedures upon receipt of a protest to a proposed lease) (quoted language eliminated by 1985 amendments); *see also* G.S. Sec. 113-202(e) (it is desirable to keep a leasehold "a sufficient distance from any known natural shellfish bed" to prevent disputes between a leaseholder and public clammers).

In the case at bar, the Department conducted two investigations. The first was on 30 August 1982, and it revealed that the bottom proposed to be leased to Huber was composed of sand and mud for the first third of the area, beginning with the shore side, and coarse sand over the remaining two-thirds. There was no significant rooted vegetation, and the area was totally exposed to wind. The investigator also conducted a random survey of the bottom land, using "a rake for forty-five minutes and tongs for ten minutes," to determine clam density. The investigator reported finding less than ten bushels of clams per acre and concluded that the area would be "of little benefit to the public clammer and is seldom utilized for public clam harvest."

The second investigation took place approximately one year later, on 2 August 1983. Huber had planted two and one-half million clams and had placed mats and stakes to protect the clams from predators. Huber had notified the Commission of his intention to take possession of the proposed lease area pending the termination of the moratorium and the ultimate decision of the

Commission on his lease proposal. It is unclear whether the Commission approved this plan, although it is clear that it allowed its implementation. Thus, when the Division investigator went to reinspect the site of the lease, the proposed lease area was covered with the protective mats. The investigator conducted a random survey, using the technique described above, but he could only survey the area surrounding the proposed area.

In its Findings of Fact, the Commission detailed the results of the two investigations and found several other facts. Among these were, (1) the proposed Huber lease overlapped the proposed Edwards lease, which previously had been denied as containing a natural shellfish bed; (2) the conditions within the two areas differed significantly; (3) Huber had carefully avoided areas that were natural shellfish beds; and (4) clams are mobile—that is, they migrate. From the results of the two investigations, and satisfied with Huber's careful planning, the Commission concluded that the proposed Huber lease area did not contain a natural shellfish bed. The trial court reviewed the Commission's Findings, Conclusions and Order and held that, as a matter of law, the Commission failed to conduct a proper investigation as required by statute and, therefore, had insufficient evidence to conclude that there was no natural shellfish bed in the Huber proposed lease area. We agree.

The statute requires an investigation to determine whether a natural shellfish bed exists within the bounds of the area proposed to be leased. The statute defines a "natural shellfish bed" as "an area of public bottom where oysters, clams, scallops, mussels or other shellfish are found to be growing in sufficient quantities to be valuable to the public." N.C. Gen. Stat. Sec. 113-201.1(1) (1983). The Commission's regulations further define natural shellfish bed as "an area of public bottom where 10 bushels or more of shellfish per acre are found to be growing." 15 NCAC 3c.0302(a)(2) (1983). This appears to be the standard under which the investigators of the Huber site operated. The statute specifically requires that the Commission's regulations, as well as the statutory requirements, be followed in conducting the investigation and in making the determination of acceptability of a proposed site under G.S. Sec. 113-202(a). Thus, before a lease may be approved, there must be a finding under the Commission's reg-

ulatory standards that the site contains less than ten bushels of shellfish per acre.

The difficulty in applying these requirements is a result of the fact that neither the statutes nor the regulations specify a time period within which the investigation must be conducted. In the case at bar, the only survey of the bottom area inside the Huber site boundaries was conducted in August 1982 because the August 1983 investigation was hampered by Huber's mats and stakes. The trial court found that an investigation and survey for shellfish is of little value when it is conducted one year before the determination of whether a natural shellfish bed is present at the site. The court's conclusion was based on what the Commission in this case found as fact: "Clam populations are mobile and may be present in one location one year and gone the next."

One must keep in mind that a natural shellfish bed was found in Edwards' proposed site, which is adjacent to the Huber site, in December 1980. In fact, Huber at all times asserted that in planning his lease area he had to carefully avoid the nearby areas where clams naturally cultivate. The Huber site may have become a natural shellfish bed, despite the adverse physical realities of the area, if the clams from the nearby natural bed migrated through the Huber area. In any event, the Commission did not adopt a "physical characteristics" standard for determining the presence of natural shellfish beds. It chose an objective "ten bushels per acre" standard. The investigator in August 1983 used the "ten bushels per acre" standard when he attempted to conduct the necessary survey.

Although this is a close case, we conclude that without the results of a proper and timely survey, the Commission's regulations and the minimum requirements of G.S. Sec. 113-202 cannot be satisfied. The Commission may not adopt in its regulations one standard (an objective "ten bushels per acre" standard) and then apply another (a subjective standard that considers an area's substrate, vegetation and wind exposure). Were we to hold otherwise, lease applicants would be encouraged to possess marginal areas before investigations could be conducted, and the Commission would be permitted to condone this activity by granting leases without complying with the letter or spirit of the statute and its affiliated regulations.

Respondent contends that the trial court erred in substituting its own findings of fact for the Commission's by finding that mats and stakes prevented a proper investigation and that there was insufficient evidence for the Commission to conclude that no natural shellfish bed existed on the lease site. Respondent argues, "The planted beds obviously could not and did not include a natural shellfish bed since it had mats obstructing access to the area." The logic of this argument escapes us. The purpose of the investigations is to be sure there are no natural shellfish beds at the sites where artificial beds will be placed so that only nonproductive public bottom areas will be converted to productive commercial areas. To allow the unauthorized planting of artificial beds before investigations, and then conclude that there must be no natural beds at the mat-obstructed sites, would defeat the purpose of the statute. We simply would not know if the artificial beds were planted on top of natural beds. Clearly, the planting must await the determination of the absence of a natural bed; otherwise, the determination is a foregone conclusion. Thus, because Huber's protective mats prevented a proper investigation, the Commission had insufficient evidence in the record, taken as a whole, to conclude that the area did not contain a natural shellfish bed. *Cf. In re Broad and Gales Creek Community Association*, 300 N.C. 267, 266 S.E. 2d 645 (1980). The Commission erred in circumventing this requirement. The trial court did not err in reversing the Commission on this issue. *See* N.C. Gen. Stat. Sec. 150A-51 (1983) (revised and recodified at G.S. Sec. 150B-51 (1985)).

III

[2] The trial court did not rely solely on the Commission's failure to conduct a proper investigation of the proposed lease area in reversing the agency decision. The court also concluded that the granting of the proposed lease constituted a taking of Mason's riparian rights for a private purpose without compensation, in violation of the United States and North Carolina Constitutions. For the reasons set forth below, we reverse the trial court on this issue and modify the bases for the court's reversal of the Commission to include only the ground discussed and affirmed in Part II, *supra.*

Riparian rights are vested property rights that cannot be taken for private purposes or taken for public purposes without

compensating the owner, and they arise out of ownership of land bounded or traversed by navigable water. *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 536, 44 S.E. 39, 45 (1903). In *Shepard's Point Land Co.*, the Supreme Court stated with approval:

> Lewis on Eminent Domain, sec. 83, says: "The following rights may be enumerated as appurtenant to property upon public waters:
>
> "1. The right to be and remain a riparian proprietor and to enjoy the natural advantage thereby conferred upon the land by its adjacency to the water.
>
> "2. The right of access to the water, including a right of way to and from the navigable parts.
>
> "3. The right to build a pier or wharf out to the navigable water, subject to any regulations by the State.
>
> "4. The right to accretions or alluvium.
>
> "5. To make reasonable use of the water as it flows past or laves the shore."

Id. at 538, 44 S.E. at 46. The State may regulate, protect and promote the shellfish industry and protect the public rights in navigable waters. *Capune v. Robbins*, 273 N.C. 581, 160 S.E. 2d 881 (1968); *Bond v. Wool*, 107 N.C. 139, 12 S.E. 281 (1890); *Oglesby v. McCoy*, 41 N.C. App. 735, 255 S.E. 2d 773, *disc. rev. denied*, 298 N.C. 299, 259 S.E. 2d 301 (1979). The legislature vested the authority to promote the shellfish industry in the Marine Fisheries Commission, but it also mandated that the Commission may not lease a bottom area if the lease would impinge upon riparian rights. G.S. Sec. 113-202(a)(4).

The trial court in the case at bar concluded that Mason's riparian rights were seriously encumbered in that the lease would interfere with Mason's rights to "navigation, recreation, access to the navigable portions of Core Sound, potential future accretions and all other rights of usage to which petitioner is entitled . . . by virtue of his riparian ownership." We believe the Commission properly and conscientiously considered the potential conflicts between the proposed lease and Mason's riparian rights, and the

trial court erroneously concluded that the lease, as issued, would impinge upon Mason's riparian rights.

As an initial matter, we note that the trial court consistently used the proposed lease area, rather than the area defined by the lease as issued, in evaluating the extent of the conflict with the riparian rights. The proper area to consider is the area covered by the lease as issued, with the conditions imposed by the Commission. These conditions are explicitly authorized by the legislature:

> In the event the Secretary finds the application inconsistent with the applicable standards, the Secretary shall recommend that the application be denied *or that a conditional lease be issued* which is consistent with the applicable standards.

G.S. Sec. 113-202(d) (emphasis added). And, if a protest is filed, "[t]he Marine Fisheries Commission may impose special conditions on leases so that leases may be issued which would otherwise be denied." *Id.* Sec. 113-202(h) (quoted language eliminated by 1985 amendments). The Commission used this authority to impose the following conditions:

1. All stakes must be a minimum of nineteen feet apart;
2. All stakes should be at a height clearly visible to boaters;
3. The matting must be maintained so as not to pose a threat to navigation;
4. The lease area must be set back at least 100 feet from the Protestant's shoreline as shown in Protestant's Exhibit 21; and
5. That portion of the lease area within the limits of the Protestant's areas of riparian rights shall be made subject to the lawful exercise of those rights including the right to build a pier for access to navigable waters within the lease. Upon six months notice that the Protestant or his successor in interest, has obtained the necessary permits for and intends to build a pier within the lease area, the leaseholder shall remove all equipment which interferes with the pier and reasonable access to the pier.

The first three conditions were designed to guard the public's right of navigation and recreation (including Mason's) as

required by G.S. Sec. 113-202(a)(3). The Commission recognized the problem:

> On the proposed lease site, the number of stakes, if unregulated as to proximity and height, could pose an impermissible obstruction to navigation in an area commonly plied by boats eighteen to twenty-three feet long, Finding of Fact 4(e). While the Commission requires lease boundary stakes no further than fifty yards apart, 15 NCAC 3C.0305(a)(3), it sets no minimum distance for stakes generally.

And it concluded that the conditions, combined with the protection already afforded the public under N.C. Gen. Stat. Sec. 76-40(a) (prohibiting deposit of various wastes in navigable water) and (c) (1981) (prohibiting abandonment of structures on floor of navigable waters), would render "such matting and stakes . . . compatible with other public uses of the area." The fourth condition, requiring a one hundred foot set-off, also protects the public's right and Mason's right to navigation and recreation in the riparian area. The set-off, based upon 15 NCAC 3c.0302(a)(3), recognizes Mason's right to make reasonable use of the water as it flows past the shore. *See O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937); *Shepard's Point Land Co.*

The final condition imposed by the Commission protected Mason's right to access to "deep" or "navigable" water. The Commission concluded that the lease as proposed "could interfere with [Mason's] riparian right to build a pier or other structure out to deep water." The Commission noted, however, that Mason's Exhibit 22 (the map) did not, as a matter of law, show Mason's area of riparian access because it extended the area of access to the federal channel. The Commission nevertheless found that the proposed lease area generally extends substantially waterward of Mason's property. The trial court specifically found:

> 7. The riparian area of petitioner's land is that area included within parallel lines drawn from the perpendicular to the water course as established by the NOAA Chart aforesaid to the termini of petitioner's land lines at the highwater mark as shown by protestant's Exhibit 22.

Exhibit 22 shows the riparian area extending all the way to the federally maintained channel.

As the Commission correctly noted, the riparian access zone does not necessarily extend this far. It only extends as far as necessary to provide access to the "navigable parts" of the waterway. *See Shepard's Point Land Co.*, 132 N.C. at 538, 44 S.E. at 46. Thus, the question becomes: What is navigable? In this State, "all water courses are regarded as navigable in law that are navigable in fact." *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901). "The navigability of a watercourse is therefore largely a question of fact for the jury, and its best test is the extent to which it has been so used by the public when unrestrained." *Id.* Thus, the Commission was correct in concluding that the right of access to "navigable" water in the case at bar depended upon "the context of the actual shoreline, the sound, and local usage." We further point out that the lateral boundaries of the zone of riparian access should be determined in accordance with the Coastal Area Management Act (CAMA) regulation 15 NCAC 7h.0208(b)(6)(F) (1983) (concerning the proper placement of piers that may interfere with adjacent property owner's riparian access area):

> The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then draw a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge.

Here we note that these imaginary lines drawn from the channel or deep water represent the lateral boundaries between access zones and do not represent the distance each zone extends away from the shore. Each access zone extends only as far as necessary to ensure access to navigable waters, as described above.

Even though the findings of the Commission indicate that the small craft customarily used in the proposed lease area are able to navigate up to the shore, there was no error in the Commission's conclusion that Mason is entitled to some access to deeper water through the area of the proposed lease. Otherwise, Mason would be boxed in. The Commission was well within its authority to condition the lease on the provision of this zone of access. *See* G.S. Sec. 113-202(d), (h). Mason argues that this condition—that Huber's lease be subject to Mason's right to build a pier through the lease area—is in conflict with CAMA regulation 15 NCAC

7h.0208(b)(6)(G) which provides that docks and piers shall not significantly interfere with shellfish franchises or leases. In the case at bar, however, the lease as issued expressly excluded from the lease area the area to be used for a pier. In other words, the lease areas with which the pier would interfere were removed from the lease to avoid any conflict.

IV

In summary, we do not believe that the lease issued by the Commission infringed upon Mason's riparian rights. Had a proper investigation been conducted, the lease as issued would have been proper. Thus, the result reached by the trial court is affirmed, but the reasoning is modified to the extent that it relies on the conclusion that Mason's riparian rights were impaired.

For the reasons set forth above, we affirm the result and modify the reasoning of the trial court.

Modified and affirmed.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. JOHN RICHARD GARY

No. 856SC326

(Filed 3 December 1985)

1. **Constitutional Law § 60; Grand Jury § 3.3— discrimination in selection of grand jury foreman—dismissal of indictments not required**

Evidence that every grand jury foreman in the county for the past thirty years has been white and that 47% of the county population is black did not require dismissal of the indictments against a black defendant on equal protection grounds since the role of the foreman of a North Carolina grand jury is essentially ministerial and not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictments.

2. **Conspiracy § 6; Narcotics § 4— conspiracy to sell and deliver cocaine—sufficiency of evidence**

The State's evidence presented a jury question as to the existence of a conspiracy to sell and deliver cocaine where it tended to show that an ac-

quaintance of an undercover agent took the agent to defendant's pool hall to get cocaine; the agent gave the acquaintance money and the acquaintance went into the pool hall and bought cocaine from defendant; and during the transaction, the agent sat in a car directly outside the pool hall and defendant sat at a pool hall window where he could see the acquaintance get out of and return to the car. The jury could logically infer from such evidence that defendant knew that the acquaintance was not buying the cocaine for his own use.

3. **Conspiracy § 5.1; Criminal Law § 79.1— statements by co-conspirator after conspiracy ended—inadmissible hearsay**

In a prosecution for conspiracy to sell and deliver cocaine, the trial court erred in admitting hearsay statements made by a co-conspirator a week after the conspiracy had ended that he could get "two or three pieces" of cocaine from defendant. N.C.G.S. 8C-1, Rule 801(d)(E).

4. **Criminal Law § 73.3— statement made by another—reason for subsequent conduct**

A statement made to an undercover agent by another that defendant's pool hall was the place to get cocaine was admissible to explain why the agent and the other person went to the pool hall in the first place.

5. **Conspiracy § 5.1; Criminal Law § 79— co-conspirator's statement after cocaine delivery—admissibility**

A co-conspirator's statement immediately following delivery of cocaine that it was good stuff because he had had some earlier in the day occurred close enough in time to the criminal acts to be admissible.

6. **Criminal Law § 79.1— evidence concerning trial of non-testifying codefendant—inadmissibility**

The State's evidence in a prosecution for narcotics offenses that a non-testifying codefendant had been charged and tried for narcotics offenses violated the rule barring evidence of convictions of non-testifying codefendants even though evidence of the result of the codefendant's trial was not introduced.

7. **Criminal Law § 50.1; Narcotics § 3.3— expert testimony—lab results—tests performed by another**

The opinion of an S.B.I. lab analyst that mass spectra of residues found in defendant's pool hall indicated the presence of cocaine was not inadmissible because the tests were performed by someone else. N.C.G.S. 8C-1, Rule 705.

APPEAL by defendant from *Freeman, Judge.* Judgments entered 19 October 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 16 October 1985.

Defendant was indicted on charges of conspiracy to sell and deliver cocaine, possession of cocaine with intent to sell and deliver and selling and delivering cocaine, and maintaining a business for use and sale of controlled substances. The State's evi-

dence tended to show that undercover agent Clarence Cox asked an acquaintance, Eddie Wilkins, where they could get some cocaine. Wilkins took Cox to defendant's pool hall. Cox gave Wilkins money, and Wilkins went in. Defendant was seated at a table near a plate glass window in the pool hall, a low one-story structure, about 15 feet from Cox. It was nighttime but a light was on inside the pool hall. Cox observed Wilkins talk with defendant; defendant motioned to another man in the room who gave Wilkins a package. Wilkins gave defendant the money. Wilkins came out and gave Cox the package which contained cocaine. At the end of the undercover operation four weeks later, a search of the pool hall resulted in the discovery of drug paraphernalia and numerous items containing drug residue.

Defendant relied on an alibi defense. The jury found him guilty as charged (the sale and delivery charge was voluntarily dismissed). From a judgment imposing sentences totalling twelve years, defendant appeals.

Attorney General Thornburg by Assistant Attorney General Richard L. Griffin for the State.

Glover & Petersen by James R. Glover for the defendant-appellant.

EAGLES, Judge.

I

[1] Defendant moved unsuccessfully before trial to dismiss the indictments against him, alleging violation of his constitutional right to equal protection. Defendant, a black, showed that every grand jury foreman in Halifax County for the past thirty years has been white. According to the 1980 census, 47% of Halifax' population is black. These facts are undisputed, and form the basis for defendant's first assignment of error.

Both sides rely principally on two recent decisions of the United States Supreme Court. *Rose v. Mitchell*, 443 U.S. 545, 61 L.Ed. 2d 739, 99 S.Ct. 2993 (1979); *Hobby v. United States*, --- U.S. ---, 82 L.Ed. 2d 260, 104 S.Ct. 3093 (1984). Although sharply divided on this issue the *Rose* court reaffirmed the long-established rule that a criminal conviction of a black person could not stand, without regard to any showing of actual legal preju-

dice, where the underlying indictment was handed down by a grand jury from which black people were excluded by reason of race. 443 U.S. at 551-57, 61 L.Ed. 2d at 746-50, 99 S.Ct. at 2997-3001. The court decided on the merits that the petitioners had failed to show a *prima facie* case of racial discrimination. Since it reached that result, the *Rose* court simply assumed that discrimination in the selection of a grand jury foreman would also require reversal. *Id.* at 551 n. 4, 61 L.Ed. 2d at 747, n. 4, 99 S.Ct. at 2998, n. 4. Standing alone, *Rose* might seem to require reversal here.

In *Hobby*, however, the issue here was more directly addressed. There defendant, a white male, challenged the selection of the grand jury foreman on due process grounds, alleging that systematic exclusion of blacks and women deprived him of fundamentally fair proceedings. The court rejected this argument, relying heavily on the difference between the role of the Tennessee grand jury foreman in *Rose* and the federal grand jury foreman in *Hobby*, and stating that *Rose* must be read in light of its facts. In Tennessee, the foreman is appointed as a thirteenth juror at the sole discretion of the judge from the population as a whole, as opposed to appointment from the grand jury itself after impanelling of randomly selected jurors. The Tennessee foreman has independent investigative powers, can order the issuance of subpoenas, and, since an indictment unendorsed by the foreman is "fatally defective," possesses virtual veto power over the indictment process. *Hobby*, --- U.S. at ---, 82 L.Ed. 2d at 268-69, 104 S.Ct. at 3098. *See Rose v. Mitchell, supra* (White, J., dissenting) ("vital importance" of Tennessee foreman). The federal foreman's responsibilities, by comparison, are "essentially clerical": administering oaths, maintaining records, and signing indictments. The foreman has no veto power since the absence of the foreman's signature on an indictment is a mere technical irregularity. The federal foreman must be selected from among the grand jurors. The court concluded from these facts that the impact of the grand jury foreman on the federal criminal justice system is minimal, and that if the grand jury from which he or she is selected is properly constituted, there can be little effect on the fairness of the prosecution. *Hobby*, --- U.S. at ---, 82 L.Ed. 2d at 266, 104 S.Ct. at 3097.

In North Carolina, the foreman is appointed by the trial judge from among the grand jurors after they have been impaneled. G.S. 15A-622(e). The foreman exercises only limited powers: he or she "presides" over all hearings and may administer oaths, G.S. 15A-623(b); he or she may excuse jurors, but only for particular sessions and in limited numbers, G.S. 15A-622(d); and he or she must communicate the desire of the grand jury as a whole to examine new witnesses, G.S. 15A-626(b). The foreman is charged with returning all bills of indictment and presentments, G.S. 15A-628(c), but this function involves no protected rights of defendants. *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1967), *death penalty vacated*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2278 (1971). It has been held, under former G.S. 15-141, that failure to return bills of indictment strictly according to statute was not prejudicial. *State v. Reep*, 12 N.C. App. 125, 182 S.E. 2d 623 (1971). Finally, although the foreman by statute must indicate which witness(es) were sworn and examined, G.S. 15A-623(c), and must sign the indictment, G.S. 15A-644(a)(5), the absence of these endorsements will not render an otherwise valid indictment fatally defective. *State v. Avant*, 202 N.C. 680, 163 S.E. 806 (1932); *State v. Midyette*, 45 N.C. App. 87, 262 S.E. 2d 353 (1980). With the exception of presiding, these statutory duties appear entirely ministerial. Clearly these duties in no way approach the level of authority exercised by the Tennessee foreman in *Rose*.

Defendant argues that the North Carolina foreman exercises enormous influence in comparison to the federal foreman by emphasizing his duty to preside over the grand jury's hearings. In the federal system, the prosecutor may be present in the grand jury room, Fed. R. Crim. P. 6(d), and although formal control of the proceedings technically rests with the foreman, the foreman frequently allows the prosecutor to conduct the examination. 8 Moore's Federal Practice Section 6.04[1] at 6-79 (2d rev. ed. 1985). In North Carolina, on the other hand, the prosecutor is excluded from the grand jury room. G.S. 15A-623(d). Defendant contends that this necessarily magnifies the foreman's role, since the foreman must consult with the prosecutor about the indictment and the relevant law and the witnesses. However, the usual practice is that the proposed indictment is presented to the grand jury drafted in full with the witnesses' names filled in, leaving the grand jury foreman the essentially ministerial task of checking

the appropriate boxes indicating which witnesses were called and signing the bill upon approval of a true bill by the grand jury. The judge, not the prosecutor, advises the grand jury on the applicable law. G.S. 15A-624(b). Other less formal procedures may have developed, but they do not appear in this record. We do not believe these few, essentially clerical functions constitute a significant difference between the roles of the federal and the North Carolina grand jury foreman.

Therefore, following *Hobby*, we conclude that defendant has failed to show any prejudicial impact on his rights. The role of the foreman of a North Carolina grand jury is not "so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment." --- U.S. at ---, 82 L.Ed. 2d at 266, 104 S.Ct. at 3097. This court has only recently decided *State v. Cofield*, 77 N.C. App. 699, 336 S.E. 2d 439 (1985), on similar grounds: there we held that not only did defendant fail to show a significant pattern of discrimination but that even if he had, again relying on *Hobby*, the ministerial nature of the position made any effect insubstantial at best.

Based on the foregoing discussion, we conclude that the court did not err in denying defendant's motion. The first assignment is therefore overruled.

II

[2] Defendant was indicted for conspiring with Wilkins to sell and deliver cocaine. The State proceeded, and the court instructed, on the theory that defendant and Wilkins formed a criminal agreement to supply Cox with cocaine. Only the single transaction in the pool hall was proved. Defendant was also convicted of possession of cocaine with intent to sell (at some point the separate substantive count of felony sale of cocaine was voluntarily dismissed). Defendant now contends that the evidence did not suffice to establish a conspiracy.

We note that since the two convictions involved are possession with intent to sell and conspiracy to sell and deliver, "Wharton's Rule," under which a conspiracy count merges with a substantive offense which by definition requires at least two peo-

ple to commit it, *see State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091, 97 S.Ct. 2971 (1977), does not apply. Federal cases, which hold that a single buyer-seller transaction cannot constitute a conspiracy, *see United States v. DeLutis*, 722 F. 2d 902 (1st Cir. 1983), also do not apply. As the case was presented to the jury, the conspiracy, if any, was the agreement of defendant and Wilkins to transfer cocaine to Cox.

A conspiracy is an unlawful 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, 220 S.E. 2d 521 (1975). It is the unlawful agreement that constitutes the crime; under North Carolina law, no overt acts need be proven to establish a conspiracy. *State v. Allen*, 57 N.C. App. 256, 291 S.E. 2d 341 (1982). The defendant's contact with the co-conspirators need not be extensive or of long duration. *See id.* The conspiracy may be shown by circumstantial evidence. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982). Ordinarily the existence of a conspiracy is a jury question. *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984).

We conclude that there was at least a jury question here as to the existence of a conspiracy. Taken in the light most favorable to the State, the evidence showed that Wilkins knew he could get cocaine from defendant, that Cox asked for some, that Wilkins agreed with defendant on a transfer to Cox and that the transfer was effectuated. On similar facts, we recently reached the same result. *State v. Caldwell*, 68 N.C. App. 488, 315 S.E. 2d 362, *disc. rev. denied*, 312 N.C. 86, 321 S.E. 2d 901 (1984). The only real difference in the operative facts in *Caldwell* was that defendant and the supplier (the two co-conspirators) went away together for thirty minutes, returning with the drugs. While the longer interval may have made a stronger case, the length of time between the agreement and the delivery were matters for the jury to consider. Similarly, the evidence that Cox feigned indifference to the events in the pool hall was for the jury to consider; the evidence showed that Cox sat in the car directly outside the pool hall and that defendant was sitting where he could see Wilkins get out of and return to the car. The jury could logically infer that defendant knew that Wilkins was not buying for his own use. While the

question was close, we conclude that the court ruled correctly and overrule this assignment.

III

[3] Defendant next assigns error to the admission of statements of Wilkins as testified to by Cox. In essence, he argues that the conspiracy did not exist (if it did at all) until Wilkins met defendant in the pool hall, and terminated upon delivery of the cocaine to Cox. Thus the statements were not "during the course and in furtherance of the conspiracy" as required by G.S. 8C-1, R. Ev. 801(d)(E). (The State does not contend, nor does the evidence suggest, that a larger ongoing conspiracy existed. *Compare State v. Rozier, supra.*) Statements made prior to or subsequent to the conspiracy are not admissible under this exception. *See United States v. Tombrello,* 666 F. 2d 485 (11th Cir.), *cert. denied,* 456 U.S. 994, 73 L.Ed. 2d 1291, 102 S.Ct. 2279 (1982); *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969).

Cox testified that one week after the purchase, he went with Wilkins to the pool hall. Defendant objected and argued extensively on the record that any hearsay statements should not be admitted since the conspiracy had ended. The court initially sustained the objection, but the prosecution nevertheless persisted and elicited, over defendant's objection, Cox' testimony that Wilkins told him on this later occasion that he could get "two or three pieces" of cocaine from defendant. No drug purchase transaction took place. Admission of this hearsay testimony was error. *Tombrello; compare State v. Smith,* 48 N.C. App. 402, 269 S.E. 2d 262 (1980) (subsequent statements properly admitted where large ongoing drug operation). It served no legitimate purpose, other than to suggest a disposition to deal in drugs. *See State v. Willis,* 309 N.C. 451, 306 S.E. 2d 779 (1983). The conspiracy shown by the evidence had long since ended; nothing in Cox' and Wilkins' relationship suggested that this later event was connected to the first transaction. No other evidence of Wilkins' relationship, if any, with defendant came before the jury. On this record, we think that the error was prejudicial and requires a new trial.

IV

We address briefly defendant's remaining contentions that may arise on retrial.

A

[4] Cox also testified about a statement by Wilkins, made before the initial visit to the pool hall, that defendant's place was the place to get cocaine. While this statement may not have occurred during the course of the alleged conspiracy, it was admissible to explain why Cox and Wilkins went to the pool hall in the first place. *See State v. McDonald*, 23 N.C. App. 286, 208 S.E. 2d 915 (1974).

B

[5] Immediately following delivery of the cocaine, while Cox and Wilkins were still in front of the pool hall, Wilkins told Cox that it was good stuff because he had had some earlier in the day. While technically the conspiracy may have ended moments before with the actual delivery, when a conspiracy ends for the purposes of R. Ev. 801(d)(E) is a question of fact for the trial court. *United States v. Papia*, 409 F. Supp. 1307 (E.D. Wis. 1976), *aff'd*, 560 F. 2d 827 (7th Cir. 1977). Ordinarily, the conspiracy ends with the attainment of its criminal objectives, but precisely when this occurs may vary from case to case. *See United States v. Silverstein*, 737 F. 2d 864 (10th Cir. 1984). From this record, it appears to us that the statement occurred close enough in time to the criminal acts themselves to be admissible.

C

[6] The State introduced evidence that Wilkins had been charged and tried for narcotics offenses, but did not introduce evidence of the result of the prosecution. The State argues that since the result of the trial was not divulged, the "clear rule" barring evidence of convictions of non-testifying co-defendants does not apply. *See State v. Rothwell*, 308 N.C. 782, 303 S.E. 2d 798 (1983). We are not persuaded. The policies underlying the rule, (1) that an individual defendant's guilt must be determined solely on the basis of the evidence presented *against that defendant* and (2) that the introduction of evidence of charges against co-defendants deprives a defendant of the right to cross examination and confrontation, *Id.* at 785-86, 303 S.E. 2d at 801, apply equally to evidence that they were charged and evidence that they were tried. Wilkins' criminal activity was adequately described for the benefit of the jury; no purpose was served by informing the jury

that he had been tried, other than to suggest that he had also been convicted, and by inference that defendant should receive the same treatment. This evidence should not have been admitted.

D

Defendant assigns error to certain arguments of the prosecutor. We conclude that no prejudicial error occurred. The prosecutor did not so "torture" the sense of the record as to render the argument improper. *State v. Earnhardt*, 56 N.C. App. 748, 290 S.E. 2d 376, *aff'd in relevant part*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

E

[7] Defendant assigns error to the admission of the opinion of an SBI lab analyst that mass spectra of residues found in the pool hall indicated the presence of cocaine, on the ground that the tests were performed by someone else. In order to be a proper basis for expert opinion, such test results, if otherwise inadmissible, must be "of a type reasonably relied upon by experts in the particular field." G.S. 8C-1, R. Ev. 703; W. Blakey, Examination of Expert Witnesses in North Carolina, 61 N.C.L. Rev. 1, 20-32 (1982) (equivalence with "inherently reliable" standard). When testifying, the expert need not identify the basis of the opinion testimony beforehand, absent a specific request. G.S. 8C-1, R. Ev. 705. Defendant did not challenge the technique of mass spectrometry itself in the trial court, nor does he do so here. It appears to be generally recognized as reliable. *See United States v. Distler*, 671 F. 2d 954 (6th Cir.), *cert. denied*, 454 U.S. 827, 70 L.Ed. 2d 102, 102 S.Ct. 118, *reh'g denied*, 454 U.S. 1069, 70 L.Ed. 2d 604, 102 S.Ct. 619 (1981); *People v. DeZimm*, 112 Misc. 2d 753, 447 N.Y.S. 2d 585 (1981), *aff'd*, 102 A.D. 2d 633, 479 N.Y.S. 2d 859 (1984); *Bostic v. State*, 173 Ga. App. 494, 326 S.E. 2d 849 (1985). He does not argue that the expert herself was not qualified to rely on the test data to give opinion testimony. *See State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982) (must be specific request for qualification). Nothing else appearing, the fact that the expert did not perform the tests herself does not require exclusion of the evidence. R. Ev. 705. While the question is not squarely before us at this time, we believe a party who fails to request the specific basis for ex-

pert testimony at trial under R. Ev. 705 should have difficulty sustaining a hearsay objection on appeal.

State v. Tripp, 74 N.C. App. 680, 329 S.E. 2d 710 (1985), relied on by defendant, is clearly distinguishable. There it was held error to admit evidence of mass spectrographs where there was (1) substantial evidence that the machine which produced the data used as the basis of opinion testimony was not functioning correctly throughout the period when the tests were run, and (2) no evidence that the machine's problems had been corrected. Here, however, the expert's testimony clearly indicated that the machine had been replaced with a new machine, and nothing suggested that the new machine did not work properly. Moreover, the expert's other tests were consistent with the presence of cocaine. This assignment is without merit.

F

Defendant argues that the factors found in aggravation of his sentence were based on improper evidence. It is clear that there was sufficient evidence to support each factor.

CONCLUSION

For prejudicial error in the admission of hearsay evidence, there must be a new trial.

New trial.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. EDWARD KEN HARRINGTON

No. 853SC301

(Filed 3 December 1985)

1. Criminal Law § 89.10— impeachment of defendant—details of admitted convictions—no entitlement to mistrial

The trial court did not err in failing to declare a mistrial when the prosecutor asked defendant numerous questions relating to the details of defendant's admitted prior convictions where the court sustained all defense objections relating to such details; defendant did not volunteer any answers to

the questions to which objections were sustained; some of the questions were permissible under *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819; and a question as to whether defendant had been drinking when arrested for careless and reckless driving was a proper subject of inquiry and the record failed to show that it was asked in bad faith.

2. Automobiles and Other Vehicles § 130— DWI—gross impairment as aggravating factor

The finding of a blood alcohol content of 0.20 is not required for the court to make a finding of "gross impairment" as an aggravating factor for driving while impaired pursuant to N.C.G.S. 20-179(d)(1).

3. Automobiles and Other Vehicles § 130— DWI—determination of gross impairment

Where a defendant's blood alcohol content was below 0.20, the appellate court will not draw a bright line which will mark where "impairment" ends and "gross impairment" begins. Rather, that determination must depend on the facts of each individual case.

4. Automobiles and Other Vehicles § 130— DWI—burden of proving aggravating factor

A factor in aggravation of a conviction for driving while impaired must be proved by the greater weight of the evidence. N.C.G.S. 20-179(o).

5. Automobiles and Other Vehicles § 130— DWI—finding of gross impairment—sufficient evidence

The trial court did not err in finding as an aggravating factor for driving while impaired that defendant was "grossly impaired" where there was evidence tending to show that defendant drove erratically and did not keep his car in its lane of travel; defendant was obviously unsteady on his feet, slurred his speech, and had difficulty answering routine questions; defendant could not perform any of the four field sobriety tests satisfactorily; defendant's blood alcohol content was 0.14; and defendant admitted to the arresting officer that he was under the influence of alcohol.

6. Criminal Law § 142.3— DWI—validity of condition of probation

A condition of probation for driving while impaired that defendant not go upon the premises of any business or private club licensed for the sale or on premises consumption of alcoholic beverages between 8:00 p.m. and 6:00 a.m. the following day was not unduly burdensome, was sufficiently related to defendant's rehabilitation, and thus was valid. N.C.G.S. 15A-1343(b1)(9).

APPEAL by defendant from *Winberry, Judge*. Judgment entered 21 March 1984 in Superior Court, PITT County. Heard in the Court of Appeals 16 October 1985.

Defendant appeals a conviction of driving while impaired (DWI).

Attorney General Thornburg, by Assistant Attorney General W. Dale Talbert, for the State.

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

EAGLES, Judge.

Defendant brings forward three assignments of error, one relating to questions asked at trial regarding prior convictions and two relating to punishment, challenging (1) the trial court's finding in aggravation that defendant was "grossly impaired" and (2) a condition of probation. We find no error.

I

State Trooper Davis saw defendant drive by at 1:00 a.m. and began following him, originally because he saw a "state-owned" license plate on defendant's car. Davis followed defendant about one-quarter mile, observing him come to an abrupt stop, make a wide left turn, and weave between two southbound lanes. Davis stopped defendant. Davis noticed that defendant had a strong odor of alcohol about him, his eyes were red and watery, and he walked unsteadily. Defendant failed all four field sobiety tests, and had a blood alcohol concentration (BAC) of .14 when tested approximately forty minutes later. Davis testified that defendant told him he had had four or five mixed drinks within four hours of the stop, and admitted being under the influence. Defendant testified that he had only drunk one beer but had taken a heavy dose of cough medicine to combat a cold, and denied making the admissions to Davis. Upon a jury verdict of guilty of DWI, judgment imposing a sentence of 72 hours active imprisonment, six months imprisonment suspended for five years on conditions of probation, and $1,300 in costs and fines was entered.

II

[1] Defendant testified at trial. On cross examination the prosecutor asked him about his prior convictions:

> Q. What have you been convicted of, Mr. Harrington?
>
> A. Speeding. Careless and reckless driving and a misdemeanor larceny.

Q. When were you convicted of careless and reckless driving?

MR. MILLER [Defense Counsel]: Objection.

THE COURT: Sustained.

Q. What court were you convicted in?

MR. MILLER: Objection.

THE COURT: Sustained.

Q. Do you recall what car you were driving?

MR. MILLER: Objection.

THE COURT: Sustained.

Q. Had you been drinking any alcoholic beverages at the time you were arrested on that charge?

MR. MILLER: Objection and motion for mistrial.

THE COURT: Sustained and denied.

Q. How many times have you been convicted of speeding?

MR. MILLER: Objection.

THE COURT: Sustained.

Q. Have you ever been convicted of speeding?

MR. MILLER: Objection.

THE COURT: Sustained.

Q. What else did you say you had been convicted of other than reckless driving and speeding?

MR. MILLER: Objection.

THE COURT: Overruled.

A. Misdemeanor larceny.

Q. When was that?

MR. MILLER: Objection.

THE COURT: Sustained.

Q. Can you tell us what it was you were convicted of stealing?

MR. MILLER: Objection. Motion for mistrial.

THE COURT: Sustained. Denied. Let's move on. Anything further?

MRS. AYCOCK [Prosecutor]: I don't think so. That's all. (Exceptions omitted.)

Defendant has excepted and assigned error, arguing that the State's improper questions prejudiced him by innuendo.

A

It is well established that specific acts of bad conduct may be inquired into on cross examination for purposes of impeachment. *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). The Supreme Court has specifically declined to set precise limits for the scope of cross examination for impeachment, requiring only that "(1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." *Id.* at 675, 185 S.E. 2d at 181. The abuse of discretion standard is a high one, and ordinarily no abuse occurs unless the prosecutor affirmatively places before the jury his own opinion or makes totally unfounded or overbroad insinuations, *see State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981) (collecting cases), or the court otherwise allows the questioning to "get out of hand." *See State v. Thomas*, 35 N.C. App. 198, 241 S.E. 2d 128 (1978). The admission by a defendant of a prior conviction does not preclude further inquiry. The cross-examiner may also ask about the time and place of the conviction and the punishment imposed. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977).

B

In the instant case, defense counsel objected each time only generally and objected to some questions which were permissible under *Finch*. The court sustained all defense objections relating to the details of the admitted convictions. Defendant did not volunteer any answers to the questions to which objections were

sustained. *See State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984). Of the three unanswered questions urged most strongly as error, responsive answers to the two concerning the type of car and the article(s) stolen could have contained little to prejudice the defendant. The third question, whether defendant had been drinking when arrested for careless and reckless driving, involved misconduct possibly separate from the act of improper driving, *see* G.S. 20-140, 20-138.1, and could be a proper subject of inquiry. *See State v. Atkinson*, 309 N.C. 186, 305 S.E. 2d 700 (1983) (distinguishing proper examination into defendant's efforts to avoid criminal investigation from improper examination into details of underlying charge). On this record, however, we find no abuse of discretion regarding the scope of cross examination, no prejudice to defendant, and no basis for declaring a mistrial.

C

Defendant argues that the prosecution acted in bad faith in asking whether he had been drinking when arrested, since the State had his driving record, and since the prosecution did not respond when defense counsel asserted that no alcohol was involved in the prior offense. For defendant to prevail the record must affirmatively show that the prosecution acted in bad faith. Bad faith will not be implied from an otherwise silent record. *State v. Dawson, supra, followed State v. Corn*, 307 N.C. 79, 296 S.E. 2d 261 (1982). As we noted above, the question appears to have been permissible since we find no evidence of record (as opposed to the bare assertion of defense counsel) that alcohol was not involved in the prior offense. The record does not disclose bad faith. Accordingly, we conclude that defendant was not prejudiced.

III

Defendant next assigns as error that the court erroneously found as a statutory factor in aggravation that defendant was "grossly impaired." The statutory basis for the finding is G.S. 20-179(d)(1): "Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.20 or more within a relevant time after the driving." This language is not explained elsewhere in Chapter 20 nor has it been judicially construed. In construing "gross impairment," the intent of the legislature controls; we look first to the plain and ordinary meanings of the

words, with an eye to previous enactments and decisions construing similar statutes. *See generally In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978).

A

"Gross impairment" must be defined with reference to "impairment." "Impairment" does not appear to have any special legal meaning, but simply means "weakening, making worse, diminishment." *See* Black's Law Dictionary 677 (5th ed. 1979). Under our former "driving under the influence" statutes, the test was whether the accused had "drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." *State v. Carroll*, 226 N.C. 237, 241, 37 S.E. 2d 688, 691 (1946). The new statute, 1983 N.C. Sess. Laws c. 435, s. 24, *codified at* G.S. 20-138.1, consolidated existing impairment offenses into a single offense with two different methods of proof, but it does not appear to have changed the basic definition of "impaired." *See State v. Shuping*, 312 N.C. 421, 323 S.E. 2d 350 (1984); *State v. Coker*, 312 N.C. 432, 323 S.E. 2d 343 (1984).

Under our statutes, the consumption of alcohol, standing alone, does not render a person impaired. *State v. Ellis*, 261 N.C. 606, 135 S.E. 2d 584 (1964). An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired. *State v. Hairr*, 244 N.C. 506, 94 S.E. 2d 472 (1956). Nor does the fact that defendant smells of alcohol by itself control. *State v. Cartwright*, 12 N.C. App. 4, 182 S.E. 2d 203 (1971). On the other hand, the State need not show that the defendant is "drunk," i.e., that his or her faculties are *materially* impaired. *See State v. Painter*, 261 N.C. 332, 134 S.E. 2d 638 (1964). The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired. *See State v. Felts*, 5 N.C. App. 499, 168 S.E. 2d 483 (1969) (new trial on other grounds).

B

"Gross" is susceptible to a range of meanings: "great, culpable, general, absolute"; "out of all measure, . . . flagrant,

shameful." Black's Law Dictionary 632 (5th ed. 1979). Our courts have defined it as meaning "out-and-out, complete, utter, unmitigated." *In re Faulkner*, 38 N.C. App. 222, 247 S.E. 2d 668 (1978) ("gross incompetence"). They have also defined "gross negligence" as ordinary negligence magnified to a high, even shocking, degree, *Doss v. Sewell*, 257 N.C. 404, 125 S.E. 2d 899 (1962), *following Crabtree v. Dingus*, 194 Va. 615, 74 S.E. 2d 54 (1953), but have stopped short of equating it with willful or wanton negligence. *Doss v. Sewell, supra. See Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985) ("twilight zone" of varying degrees of negligence).

C

[2] Defendant urges vigorously that the language of the statutory factor itself suggests that "gross impairment" be considered equivalent to a BAC of 0.20. However, we note that prior to the 1983 amendments the courts consistently rejected the notion that proof of BAC of 0.10 constituted proof of impairment. *See, e.g., State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165 (1967). The legislature, by unequivocal enactment, made the blood alcohol content of 0.10 proof of one type of driving while impaired offense. *State v. Shuping, supra; State v. Rose*, 312 N.C. 441, 323 S.E. 2d 339 (1984). Despite this change, and despite the critical importance of BAC readings in the district courts, the statutory BAC is not a *sine qua non* of DWI. As before, the State may prove DWI where the BAC is entirely unknown or less than 0.10. *State v. Sigmon*, 74 N.C. App. 479, 328 S.E. 2d 843 (1985) (BAC of 0.06 did not create presumption that defendant *not* impaired; conviction, based on opinion of arresting officer, affirmed). While the statutory BAC of 0.20 may provide a "bright line" for determining "gross impairment," the finding of BAC of 0.20 clearly is not required for the court to make the finding of gross impairment. The fact that defendant in this case showed a BAC of 0.14 therefore did not *prevent* the court from finding "gross impairment."

D

[3] It appears then that "gross impairment" is a high level of impairment, higher than that impairment which must be shown to prove the offense of DWI. As demonstrated by the foregoing discussion, where the BAC is below 0.20, we do not draw a bright line which will mark once and for all where "impairment" ends

and "gross impairment" begins. That determination must depend on the facts of each individual case. In other situations where various levels of culpability are presented, the finder of fact ordinarily decides what level the evidence shows. *See Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971) (no negligence, negligence, or willful and wanton negligence); *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984) (sufficiency of evidence that a killing was especially atrocious discussed).

[4] If the evidence is sufficient to submit a choice to the finder for its decision, the decision itself is not ordinarily reviewable. *See In re Caldwell*, 75 N.C. App. 299, 330 S.E. 2d 513 (1985). The burden to prove a factor is by the greater weight of the evidence, G.S. 20-179(o), similar to the preponderance standard used in the Fair Sentencing Act. G.S. 15A-1340.4; *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). The greater weight of the evidence does not mean the number of witnesses or volume of testimony, but involves a reasonable impression from the totality of the evidence and circumstances. *Id.* at 596, 300 S.E. 2d at 697. Unless the evidence *compels* the finding of a certain factor, *see State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983), the crucial test on appeal is not whether the finder of fact erred in actually making the finding, but whether there was sufficient evidence of the factor before the finder to allow consideration of the factor in the first place.

E

[5] We believe that the evidence in the present case sufficed to allow the court to consider whether defendant was grossly impaired. Officer Davis testified that defendant drove erratically and did not keep his car in its lane of travel. He was obviously unsteady on his feet and slurred his speech, and had difficulty answering routine questions. Defendant could not perform any of the four field sobriety tests satisfactorily. Defendant's BAC was .14; he admitted to Davis that he was under the influence of alcohol. The evidence showed a person seriously affected by alcohol. We believe the court's finding was proper. The assignment is overruled.

IV

[6] As a condition of probation, the court required that defendant "[n]ot go upon the premises of any business or private club

licensed by the State of North Carolina for the sale or the on premises consumption of alcoholic beverages between 8:00 p.m. and 6:00 a.m. the following day." Defendant assigns error, arguing that this condition was unduly burdensome and unrelated to his rehabilitation.

Under G.S. 15A-1343(b1)(9), formerly G.S. 15A-1343(b)(17), the trial court may in addition to the statutorily described conditions impose "any other conditions . . . reasonably related to [defendant's] rehabilitation." The court has substantial discretion in devising conditions under this section. *See State v. Rogers*, 68 N.C. App. 358, 315 S.E. 2d 492, *cert. denied*, 311 N.C. 767, 319 S.E. 2d 284 (1984), *appeal dismissed*, --- U.S. ---, 83 L.Ed. 2d 766, 105 S.Ct. 769 (1985). A variety of conditions have been found "reasonably related" under this section. *State v. Cooper*, 304 N.C. 180, 282 S.E. 2d 436 (1981) (stolen goods offense; defendant not operate motor vehicle between 12:01 a.m. and 5:30 a.m.); *State v. Rogers*, *supra* (witness tampering; defendant not practice law); *State v. Simpson*, 25 N.C. App. 176, 212 S.E. 2d 566 (false pretenses in construction contract; limiting defendant's construction employment), *cert. denied*, 287 N.C. 263, 214 S.E. 2d 436 (1975). In none of these cases was the restriction found unduly burdensome.

The contested condition here did not restrict defendant's livelihood, *compare Rogers* and *Simpson*, nor did it prevent him from entering any premises during the day and even purchasing alcohol. Rather it reasonably is aimed at preventing recurrence of the subject misconduct by keeping defendant away from alcohol in public places during the hours when he would most likely be tempted to drink and drive. The loss of some convenience in shopping does not appear unduly oppressive when compared to the restrictions on employment previously approved in the cases cited. The assignment is therefore overruled.

CONCLUSION

We conclude that defendant has not shown any prejudicial error in the trial, that the sentence was within the limits allowed by law for this offense, and that the complained of conditions of probation were reasonably related to defendant's rehabilitation.

No error.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. DAVID E. SEAGROVES

No. 858SC60

(Filed 3 December 1985)

1. **Criminal Law §§ 92.5, 128.2— procuring drugs for inmate—motion for severance denied—motion for mistrial following codefendant's guilty plea in mid-trial denied—no error**

The trial court did not err in a prosecution for conspiracy to procure drugs for an inmate and procuring drugs for an inmate by denying defendant's motion to sever his trial from the codefendant's or by denying defendant's motion for a mistrial after the codefendant entered a guilty plea during trial. Most of the evidence at trial pertained to defendant's involvement in the transaction or to the surrounding circumstances rather than to criminal activities of the codefendant in which defendant was not involved; defendant did not show how he was prejudiced by any extraneous evidence; and no prejudice was shown to defendant from the codefendant's guilty plea and departure from the courtroom midway through the trial. N.C.G.S. 15A-1061 (1983).

2. **Narcotics § 4.5— procuring drugs for inmate—instructions—no plain error**

There was no plain error in the jury instructions in a prosecution for conspiracy to provide drugs to an inmate and procuring drugs for an inmate.

3. **Criminal Law § 138— procuring drugs for inmate—mitigating factor of duress not found—no error**

The trial court did not err in a prosecution for conspiracy to provide drugs to an inmate and procuring drugs for an inmate by refusing to find in mitigation that defendant acted under duress and that he was a passive participant in the transaction where defendant's counsel merely stated that defendant acted under compulsion and that he was a passive participant. N.C.G.S. 15A-1340(4)(a)(2)(b), (c) (1983).

4. **Constitutional Law § 48— effective assistance of counsel—cross-examination**

Defendant was not denied effective assistance of counsel in a prosecution for conspiracy to provide drugs to an inmate and procuring drugs for an inmate on the grounds that his counsel failed to adequately cross-examine a guard about a prior inconsistent statement and failed to request certain jury instructions. Defendant's counsel established the fact of the prior inconsistent statement through his cross-examination, a failure to further cross-examine the guard on this point did not amount to a failure to function as counsel, and, there being no plain error in the jury instructions, defendant's assertion of ineffective assistance of counsel with respect thereto must also fail.

5. **Constitutional Law § 34— convictions for conspiracy to provide drugs for an inmate and procuring drugs for an inmate—double jeopardy**

Defendant was convicted of conspiracy to provide drugs to an inmate and of procuring drugs for an inmate in violation of the constitutional guarantee against double jeopardy where defendant's participation in the transaction was asking a guard if he would be interested in making easy money; later

repeating this inquiry and, along with the codefendant, telling the guard where to pick up marijuana; and, after the first pickup was not successful, handing the guard a slip of paper containing the telephone number of the codefendant's wife and a time to call. N.C.G.S. 14-258.1(a) (1981).

APPEAL by defendant from *Bruce, Judge.* Judgment entered 23 August 1984 in Superior Court, GREENE County. Heard in the Court of Appeals 18 September 1985.

Attorney General Thornburg, by Associate Attorney General Barbara P. Riley for the State.

Horton and Crutchfield, by Karen M. Crutchfield, and Morgan, Bryan, Jones & Johnson, by Ed Turlington, for defendant appellant.

BECTON, Judge.

I

Defendant was convicted of conspiring to provide drugs to an inmate in violation of N.C. Gen. Stat. Sec. 14-258.1(a) (1981), and of procuring drugs for an inmate in violation of the same statute. He received concurrent seven year sentences for these convictions. Defendant appeals, arguing that: (1) it was error to deny his motion for severance; (2) it was error to deny his motion for a mistrial; (3) plain error was committed in the jury instructions; (4) it was error to fail to find two statutory mitigating factors; (5) defendant was denied effective assistance of counsel; and (6) defendant's conviction and sentencing constitute double jeopardy. We find merit only in the argument concerning double jeopardy.

II

Defendant and his co-defendant were inmates at Eastern Correctional Center in Maury, North Carolina, at the time of the incidents in question. The State's principal witness was a prison guard, who testified, pursuant to an agreement with the State, as follows. On 1 November 1983, the defendant approached him and asked if he would be interested in making some easy money. The guard said he would have to think about it. On 15 November 1983, the guard was again approached by the defendant who asked the guard if he had thought about what they had discussed the other day. The guard answered, "Yes." The co-defendant then joined

the conversation. The defendant and the co-defendant asked the guard if he would be willing to pick up three ounces of marijuana at a specified pick-up point in Newton Grove, for which the guard would receive one hundred dollars.

The next meeting among the defendant, the co-defendant, and the guard occurred on 20 November 1983 in the prison unit. The defendant asked the guard if he had picked up the marijuana. The guard responded that the marijuana was not at the designated point, whereupon the co-defendant stated that Betty Jean, his wife, had picked it up. The defendant then gave the guard a piece of paper with three things written on it: the name of "Betty Jean," a phone number, and a time to call (before 8:30 a.m.). The co-defendant told the guard to call the number and that Betty Jean would meet the guard. The guard told the defendant and the co-defendant that he would bring in the marijuana on his next day off. They told him to put it under the pool table in the recreation room.

The guard called Betty Jean on Saturday morning, 26 November 1983. They met at MacDonald's in Mt. Olive, and Betty Jean gave the guard the marijuana. The guard took part of the marijuana to the prison on Monday, 28 November 1983. Without saying anything to the defendant or the co-defendant, he hid the marijuana under the pool table. After getting off work on Tuesday night, 29 November 1983, the guard checked to see if the marijuana was still under the table. It was. The guard removed it (apparently having second thoughts about the whole transaction) and put it in his back pocket. As he walked to the front of the prison he was stopped by a number of his superiors and searched. His superiors found the marijuana on him.

The defendant did not put on any evidence.

III

[1] Defendant first argues that it was reversible error to deny his pre-trial motion for severance of his trial from the co-defendant's, as joinder deprived him of a fair trial. The general rule is that a motion for separate trials is in the sound discretion of the trial judge, and absent a showing that the joint trial deprived defendant of a fair trial, the lower court's ruling will not be disturbed on appeal. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921

(1976). Defendant complains that he was prejudiced by joinder because evidence was admitted concerning criminal activities of the co-defendant in which defendant was not involved. Our review of the record discloses that most of the evidence at trial pertained to defendant's involvement in the transaction or to the surrounding circumstances. Furthermore, defendant does not show how he was prejudiced by any extraneous evidence that may have been admitted.

Defendant further asserts that joinder was an abuse of discretion because midway through the trial the court accepted the co-defendant's guilty plea, and the co-defendant departed from the courtroom. Defendant contends that the jury could only infer from the "disappearance" of the co-defendant that the defendant was guilty. We do not agree. The transcript shows that the decision to accept the guilty plea and the plea itself were all conducted outside the presence of the jury. When the jury was called back, they were told by the trial court that they were no longer required to resolve the issues as to the co-defendant and that this development was not to affect their decisions in defendant's case. Again, no prejudice to defendant is shown. This assignment of error is overruled.

IV

In a related argument, defendant contends that reversible error was committed because the trial court refused to grant defendant's motion for a mistrial when the co-defendant entered a guilty plea during the trial. A trial judge may declare a mistrial if an occurrence during the trial results in "substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. Sec. 15A-1061 (1983). Defendant contends that the departure of the co-defendant during trial was such an occurrence. A ruling on a motion for a mistrial is not reviewable absent a showing of gross abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). For the reasons stated in Part III, *supra*, this ruling was not error.

V

[2] The defendant next asserts that the jury instructions were deficient in several respects that amounted to plain error. The "plain error" doctrine is an exception to the requirement that a

party must object to the charge before the jury retires. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). In applying this rule, appellate courts are to "examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilty." *Id.* at 661, 300 S.E. 2d at 379 (citation omitted). We have examined the entire record, and we find no such impact here.

VI

[3] The defendant also contends that the trial court committed reversible error in refusing to find in mitigation that he acted under duress and that he was a passive participant in the transaction. N.C. Gen. Stat. Sec. 15A-1340.4(a)(2)(b), (c) (1983). The sentencing judge is required to find in mitigation any factor proved by uncontradicted, manifestly credible evidence. *State v. Jones*, 64 N.C. App. 505, 307 S.E. 2d 823 (1983). Defendant's contention that he presented such evidence of the two factors in question at the sentencing hearing is incorrect. Defendant's counsel merely stated that defendant acted under compulsion and that he was a passive participant. Such statements do not constitute substantive evidence. Furthermore, a review of the entire record does not disclose either that defendant acted under compulsion or that he played a passive role.

VII

[4] Defendant next contends that his conviction was obtained in violation of his sixth amendment right to effective assistance of counsel. The two-part test for the review of assertions of ineffective assistance of counsel is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made error so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were [sic] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E. 2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, ---, 80 L.Ed. 2d 674, 693, 104 S.Ct. 2052, 2064 (1984)).

Defendant first asserts as error that counsel did not adequately cross-examine the guard regarding the guard's prior inconsistent statement. The record shows that defendant's counsel established the fact of the prior inconsistent statement through his cross-examination. Even assuming, *arguendo*, that counsel should have cross-examined the guard further on this point, we cannot say a failure to do so amounted to a failure to "function" as counsel.

Defendant also asserts that he was denied effective assistance of counsel in that his attorney failed to request certain jury instructions. In Part IV, *supra*, we found no plain error in the judge's charge to the jury. There being no "plain error" in the jury instructions, defendant's assertion of ineffective assistance of counsel with respect thereto must also fail.

VIII

[5] Defendant contends that his convictions were in violation of the constitutional guaranty against double jeopardy because the same evidence supported his convictions for both offenses. *See State v. Irick*, 291 N.C. 480, 502-03, 231 S.E. 2d 833, 847 (1977) ("same evidence" test for double jeopardy). In this assignment of error, we find merit.

Defendant was convicted under N.C. Gen. Stat. Sec. 14-258.1(a) (1981) of conspiring to provide drugs to an inmate and of procuring drugs for an inmate. The pertinent portion of G.S. Sec. 14-258.1(a) reads as follows:

> If any person shall give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, any deadly weapon, or any cartridge or ammunition for firearms of any kind, or any controlled substances . . . he shall be punished as a Class H felon . . . .

This statute delineates two categories of offenses for which an individual might be found guilty: (1) the substantive offense of "giving or selling" or (2) a group of thirteen related acts that

depict involvement with, but fall short of the commission of, the substantive offense; namely, combining, confederating, conspiring, aiding, abetting, soliciting, urging, investigating [instigating?], counseling, advising, encouraging, attempting to procure, or procuring another to commit the offense of giving or selling. In this case, both convictions were obtained under the second category of proscribed acts.

The inquiry naturally arises whether in that second category of proscribed acts, the legislature intended to create thirteen separate criminal offenses, each punishable as a Class H felony. In answering this question, we find an examination of *State v. Sanderson*, 60 N.C. App. 604, 300 S.E. 2d 9, *disc. rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983), helpful. In *Sanderson*, this Court construed current N.C. Gen. Stat. Sec. 90-95(h)(1) (Supp. 1983) as allowing separate convictions for selling, manufacturing, delivering, transporting or possessing in excess of 50 pounds of marijuana. We find *Sanderson* distinguishable. In *Sanderson*, the proscribed activities are physically and conceptually distinct, while in the instant case the proscribed activities are merely gradations and variances of a single act. Interestingly, the result in *Sanderson* was reached "reluctantly," the Court stating that it was bound by a holding in an earlier case. We would be even more reluctant here than in *Sanderson* to hold that the second category of G.S. Sec. 14-258.1(a) created thirteen separate criminal offenses.

Analyzing the legislative history of G.S. Sec. 14-258.1(a) further supports our result. If, as here, the defendant could be separately convicted of "conspiring" and "procuring" to give drugs, then, by extension, a defendant could receive a separate felony conviction for each of the thirteen enumerated acts in the second category of the statute. We are of the opinion that the legislature did not intend such a result.

> The primary function of a court in construing a statute is to ascertain the intent of the legislature . . . . In ascertaining this intent, a court looks to the language and spirit of the statute and what it sought to accomplish. . . . It is also relevant to look to the history of the legislation and the circumstances surrounding its enactment.

State v. Ferrell, 300 N.C. 157, 160-61, 265 S.E. 2d 210, 212 (1980) (citations omitted); *see also State v. Fulcher*, 294 N.C. 503, 520,

243 S.E. 2d 338, 350 (1978) (as aid in ascertaining intent of legislature, courts must take into account law prior to enactment of statute). Courts are to presume the legislature acted with reason and common sense and that it did not intend an unjust or an absurd result. *Smith's Cycles, Inc. v. Alexander*, 27 N.C. App. 382, 219 S.E. 2d 282 (1975).

Looking at the history of current G.S. Sec. 14-258.1, we find that from the passage of Public Law c. 1, sec. 52 in 1899, until 1961, the selling or giving of "narcotics" to an inmate was punishable as a misdemeanor. In 1961, N.C. Gen. Stat. Sec. 14-390 (1953) was amended to include language similar to the second category of offenses in current G.S. Sec. 14-258.1. 1961 N.C. Sess. Laws 394. As amended, the statute still punished the giving or selling of barbiturates or stimulant drugs as a misdemeanor, but a new section made the giving or selling of narcotics, and the offenses ancillary to the giving or selling of narcotics, a felony punishable by up to ten years in prison. However, by 1973 there was no longer a misdemeanor offense—that is, both the giving or selling of a controlled substance to an inmate and any lesser participation therein were generally punishable as felonies with a maximum penalty of ten years imprisonment. 1973 N.C. Sess. Laws 1093; *see also* 1971 N.C. Sess. Laws 919, 929.

This history reveals a growing concern with drug use among North Carolina inmates, which concern has resulted in an effort to deal with those involved in supplying drugs. Although originally giving or selling drugs was a misdemeanor, today all offenses included in G.S. Sec. 14-258.1 are Class H felonies. Thus, statutory coverage has been enlarged, and the penalties for the specified offenses have become more severe. Nothing in the 1961 amendment suggests that the legislature intended to punish the giving or selling of barbiturates or stimulants to an inmate as a misdemeanor, and to impose a maximum prison term of ten years for the giving or selling of narcotics, and still have ancillary offenses involving a narcotic result in separate and multiple sentences. Similarly, nothing in the current statute, which continues to punish both the substantive crime of giving or selling controlled substances and, alternatively, involvement with or participation in the transaction, suggests the legislature intended to prescribe alternate punishment for thirteen separate criminal offenses. We do not presume the legislature intended the unreasonable or unjust re-

sult of potentially imposing a punishment of 130 years in prison for any involvement with giving or selling controlled substances to an inmate short of committed the substantive offense, while the actual giving or selling could only result in a maximum sentence of ten years.

Finally, an application of the "same evidence" test invoked by the defendant demonstrates that his convictions were in violation of double jeopardy. In this connection, the case of *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972) is instructive. In that case, the defendant was charged with resisting arrest and assault upon a police officer. Our Supreme Court observed that although the trial judge was not required to make the State elect between charges at the beginning of the trial, after the evidence was presented, "it had become quite clear that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn." *Id.* at 173, 192 S.E. 2d at 579. That Court further noted that the warrants themselves indicated duplicate charges, each specifying "only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody." *Id.* The Court concluded that, as the defendant had been twice convicted and sentenced for the same criminal offense, the constitutional guaranty against double jeopardy had been violated.

In the instant case, the evidence adduced at trial indicated that defendant's participation in the transaction was asking the guard if he would be interested in making easy money; later repeating this inquiry, and then, along with the co-defendant, telling the guard where to pick up marijuana; and on a third occasion, after the co-defendant had informed the guard the pick-up was not successful because the co-defendant's wife, Betty Jean, had already picked up the drugs, handing the guard a slip of paper containing Betty Jean's telephone number and a time to call. As in *Summrell*, we can make no meaningful distinction, draw no "line of demarcation," between the evidence used to convict defendant of conspiracy and the evidence used to convict the defendant of procuring drugs. Also in our case, analogous to *Summrell*, the indictment itself indicated duplicate charges, the first count charging the defendant with conspiring, combining and confederating with the guard, co-defendant, and Betty Jean to give the co-defendant drugs, and the second count charging him with

aiding, abetting, soliciting, urging, counseling, advising, encouraging and procuring the guard and Betty Jean to give the co-defendant drugs.

Defendant has been convicted twice and sentenced twice for the same offense. The principle of double jeopardy protects against multiple punishments for the same offense. *Sanderson*, 60 N.C. App. at 608, 300 S.E. 2d at 14. Thus, both convictions may not stand, and judgment must be arrested upon one of them. *See Summrell* (fact that concurrent, identical sentences imposed in each case makes duplication of conviction and punishment no less a violation of defendant's constitutional right not to be put in jeopardy twice for same offense). And when, as here, the two offenses are of equal severity, this Court has held "for the sake of consistency . . . the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken." *State v. Pagon*, 64 N.C. App. 295, 299, 307 S.E. 2d 381, 384 (1983).

IX

Therefore, as to defendant's conviction on the first count of the indictment for conspiring to provide drugs to an inmate, we find no error; as to his conviction on the second count for procuring drugs for an inmate, the conviction is vacated and judgment arrested.

Affirmed in part and reversed in part.

Judges WEBB and MARTIN concur.

STATE OF NORTH CAROLINA v. CLYDE RATHBONE

No. 8524SC268

(Filed 3 December 1985)

1. Homicide §§ 9, 21.1— murder—motion to dismiss based on self-defense denied—no error

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss, which was based on self-defense or defense of defendant's wife, where the State offered evidence that defendant had fired

four shots and that two bullets had been shot through a bedroom door; powder burns on the outside of the door indicated that the shots had been fired from the hallway into the bedroom through the closed door; the victim was found dead in the bedroom with an empty pistol; he had been shot four times, once in the back; and defendant had stated to an emergency medical technician that he had shot the victim because "he came in and tried to take over." That statement was inconsistent with self-defense and the evidence permitted an inference that defendant shot the victim in the back as he was retreating with an empty pistol and twice more through the closed door.

2. Criminal Law § 86.3— prior conviction—admitted on direct examination—further questions on cross-examination—no error

The trial court did not err in a prosecution for murder by permitting the prosecution to question defendant about the facts of a prior assault conviction where defendant had testified on direct examination that he had been convicted of assault in Utah. The prosecutor's question as to whether the assault involved a shooting was no more than an inquiry into whether the conviction was for the more serious offense of assault with a deadly weapon, and the prosecutor did not press for details once defendant admitted the conviction but merely inquired as to punishment. N.C.G.S. 8C-1, Rule 609(a); N.C.G.S. 15A-1443(a).

3. Criminal Law § 162— prior criminal act—previously admitted—no error

The trial court did not err in a murder prosecution by admitting testimony concerning defendant's assault on a friend of the victim where defendant had testified to the same incident on direct examination.

4. Homicide § 28.3— murder—instruction on self-defense—no error

There was no error in a prosecution for murder where the trial court instructed the jury that defendant was not entitled to the benefit of self-defense if he was the aggressor or if he used excessive force where defendant did not object to the instruction and there was no plain error in that there was plenary evidence to support the verdict of guilty of voluntary manslaughter based on a killing committed in the heat of passion or by the use of excessive force in the exercise of self-defense, and defendant's statement that he shot the victim because the victim was trying to take over supported a reasonable inference that defendant initiated the exchange of gunfire. N.C.G.S. 15A-1443; N.C. Rules of App. Procedure 10(b)(2).

5. Criminal Law § 138— manslaughter—mitigating factors not found—no error

The trial court did not err in sentencing defendant for voluntary manslaughter by failing to find the mitigating factors that defendant acknowledged wrongdoing at an early stage of the criminal process, that he committed the offense under compulsion, or that he acted under provocation where there was no evidence that defendant acknowledged wrongdoing, no evidence of compulsion, and the evidence of strong provocation was not so manifestly credible that the court was compelled to accept it as true. N.C.G.S. 15A-1340.4(a)(2)(1), N.C.G.S. 15A-1340.4(a)(2)(b), N.C.G.S. 15A-1340.4(a)(2)(i).

State v. Rathbone

APPEAL by defendant from *Lamm, Judge.* Judgment entered 26 October 1984 in Superior Court, MADISON County. Heard in the Court of Appeals 15 October 1985.

Defendant was charged in a bill of indictment proper in form with the murder of his brother, Charles Rathbone. At trial the State presented evidence which tended to show the following: Several months prior to June, 1984 defendant and his wife, Christine, moved in with defendant's father, Homer Rathbone, who was 79 years old, had suffered several strokes, and was in poor health. In early June Charles Rathbone, defendant's brother, came for a visit and was staying at Homer Rathbone's residence. On the morning of 11 June 1984 defendant took his father to the doctor. When they returned, Delbert Reed was at the house visiting Charles. Homer Rathbone and Delbert Reed sat on the front porch and talked. While they were sitting there, defendant came out of the house and struck Delbert on the neck with a power saw chain. Delbert got up and left. Shortly thereafter, Homer Rathbone heard gunshots from inside the house and heard Christine Rathbone say "Shoot him, shoot him, kill him." Homer Rathbone ran down to the highway and flagged down a passer-by for help.

Boyd Norton, an emergency medical technician, testified that he and his partner arrived at the Rathbone residence after the shooting. Defendant was lying on the floor on top of a .22 automatic rifle. Norton examined defendant and found two bullet wounds. Defendant told Norton that there was someone else in the bedroom. Norton found Charles, dead, lying across the bed with an empty pistol in his hand. He had a gunshot wound in his neck and at least two more in his chest. Defendant told Norton that Charles "came in and tried to take over and he shot him and killed him." Christine had a gunshot wound in her upper right arm. Defendant and Christine were taken to the hospital.

Sheriff E. Y. Ponder testified that when he arrived at the Rathbone home, defendant told him "I shot him, I don't know whether I killed him or not. . . . [H]e shot my wife first, and then . . . he shot me." Sheriff Ponder found two bullet holes in the door leading to Charles' bedroom. There were powder burns on the outside of the door around both holes. Four .22 caliber shell

casings were found in various locations in the hall outside the door. In Sheriff Ponder's opinion, defendant had been drinking.

The autopsy report revealed that Charles had four gunshot wounds: one in the neck, two in the chest, and one in the back behind the shoulder. The pathologist, Dr. Richard Landau, testified that Charles died from bleeding caused by two bullets going through his right chest and lung. Charles had a blood alcohol level of .28.

Defendant's evidence tended to show the following: During the week that Charles Rathbone had been staying at the house he drank excessively; he had gotten drunk on the night of 10 June and had been drinking on the morning of 11 June. When defendant and Homer Rathbone returned from the doctor's office, Delbert Reed was there. He and Charles were drinking, which upset Homer Rathbone, so defendant told Delbert to leave. Defendant then went to Hot Springs and bought some whiskey for Charles. When he returned with the whiskey, Delbert Reed was still there. Defendant went outside to work in his garden. After about an hour, he returned to the house and found Delbert Reed sitting on the porch with Homer Rathbone. When he repeated his request for Delbert to leave, Delbert cursed him, so defendant struck him with the saw chain. Delbert left the porch and as defendant walked into the house, Charles shot Christine. Charles then shot at defendant, who ran into his bedroom and got his rifle. When he came out of the bedroom, Charles was holding Christine in front of him and shot defendant in the chest. Charles dragged Christine toward the door to his own room, and as he did so, she fell. Defendant shot three times and Charles disappeared into the bedroom.

Christine Rathbone testified that she was washing dishes when she "heard this racket." She went into the hall and saw Charles standing there with a gun in his hand. When she asked him what was the matter, he just looked at her and shot her in the arm. Then he grabbed her and she yelled "Charles, you've shot me, you've shot me." She felt as though she was going to pass out and doesn't remember anything that occurred thereafter.

The jury found defendant guilty of voluntary manslaughter. After a sentencing hearing, the court imposed judgment sentenc-

ing defendant to prison for a term of eight years, two years greater than the presumptive term. Defendant appeals.

Attorney General Lacy H. Thornburg by Assistant Attorney General Walter M. Smith for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Gordon Widenhouse for defendant appellant.

MARTIN, Judge.

Defendant brings forward assignments of error relating to the sufficiency of the evidence, the admission of evidence, the jury instructions and the sentence. For the reasons stated herein, we find no prejudicial error.

[1] In his first assignment of error defendant argues that his motion to dismiss should have been allowed because the uncontradicted evidence showed, as a matter of law, that defendant killed Charles Rathbone in the exercise of his right of self-defense or defense of his wife. A thorough review of the evidence compels us to reject this contention.

Upon a defendant's motion to dismiss, the question before the court is whether there is substantial evidence of each essential element of the offense charged, and that defendant was the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference arising from the evidence. *Id.* When the State's evidence and defendant's evidence tend only to show that defendant acted in self-defense, then defendant's motion for nonsuit should be allowed. *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964). Similarly, the motion for nonsuit should be allowed when the uncontradicted evidence shows that defendant killed the decedent in defense of a family member. *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461 (1961). However, the right to kill in defense of one's self or family member is not absolute. When one uses excessive force in the exercise of his right of self-defense, he loses the benefit of perfect self-defense and is guilty at least of voluntary manslaughter. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981). Where the evidence is conflicting with respect to the issue of whether the force used by a defendant was excessive under the

circumstances, the question is properly submitted to the jury. *State v. Clark*, 65 N.C. App. 286, 308 S.E. 2d 913 (1983), *disc. rev. denied*, 310 N.C. 627, 315 S.E. 2d 693 (1984).

In the instant case, while defendant's testimony was to the effect that he fired three times at Charles after Christine had fallen to the floor, the State offered evidence that defendant had fired four shots and that two bullets had been shot through the bedroom door. Powder burns on the outside of the door indicated that the shots had been fired from the hallway into the bedroom through the closed door. Charles was found dead in the bedroom with an empty pistol; he had been shot four times, once in the back. This evidence permits an inference that defendant shot Charles in the back as he was retreating with an empty pistol and twice more through the closed door; the evidence is therefore sufficient to carry the case to the jury on the question of whether defendant used excessive force in self-defense. In addition, defendant's statement to Boyd Norton that he had shot Charles because "He came in and tried to take over" is inconsistent with defendant's claim of self-defense. We therefore hold that the court did not err in denying defendant's motion to dismiss.

[2] By his second assignment of error defendant contends that the trial court erred in permitting the prosecutor to question defendant about the facts of a prior assault conviction. On direct examination, defendant testified that he had been convicted of assault in Utah. On cross-examination, the following exchange occurred:

Q. That conviction of assault, did that involve a shooting?

Mr. Huff: Objection.

THE COURT: Overruled.

Q. Did it involve you shooting someone?

A. Yes.

Q. You spent time in prison for it?

A. Six months in jail.

For purposes of impeachment, a witness, including a defendant, may be cross-examined with respect to prior convictions. G.S. 8C-1, Rule 609(a); *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819

(1977). Where the conviction is established, there may be further inquiry into the time and place of the conviction and the punishment imposed. *Id.* This Court has held that inquiry into prior convictions which exceeds the limitations established in *Finch* is reversible error. *State v. Greenhill*, 66 N.C. App. 719, 311 S.E. 2d 641 (1984) (prosecutor inquired into weapons used and gender of victims in thirteen prior assaults); *State v. Bryant*, 56 N.C. App. 734, 289 S.E. 2d 630 (1982) (defendant admitted conviction for larceny, prosecutor proceeded with questions concerning details of theft of police radio from police station and defendant's use of the radio thereafter).

In the instant case, defendant testified on direct examination that he had been convicted of assault. The prosecutor's question as to whether the assault involved a shooting was basically no more than an inquiry into whether the conviction was, in reality, one for a more serious offense, i.e., assault with a deadly weapon. Once defendant admitted that it was, the prosecutor did not press for the details and merely inquired as to punishment, as permitted by *Finch*. Even if the inquiry transcended the bounds of *Finch*, we do not believe the error to be of such magnitude as to require a new trial under the test of prejudicial error contained in G.S. 15A-1443(a). Under the circumstances of this case, it is highly improbable that the evidence tended, as defendant asserts, "to lead the jury to convict defendant because he was prone to assault others by shooting them."

[3] In his third assignment of error defendant argues that the trial court erred in overruling defendant's objections to questions concerning his assault on Delbert Reed. Defendant contends that this testimony was irrelevant and highly prejudicial. Defendant, however, testified to the same incident on direct examination. When evidence is admitted over objection and the same evidence has already been admitted, or is subsequently admitted without objection, the benefit of the objection is lost. *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983); 1 H. Brandis, Brandis on North Carolina Evidence § 30 (2d rev. ed. 1982).

[4] Defendant next contends that the trial court erred in instructing the jury that defendant was not entitled to the benefit of self-defense if he was the aggressor or if he used excessive force. We first note that defendant failed to object to the instruc-

tion at trial, as required to preserve this issue for appellate review. N.C.R. App. P. 10(b)(2). Defendant contends, nevertheless, that the instruction was plain error and is reviewable on appeal even in the absence of timely objection. The plain error rule, adopted by our Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), defines plain error as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 660, 300 S.E. 2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982) (footnotes omitted)). In short, this rule waives Rule 10(b)(2) and allows review of fundamental errors or defects in jury instructions affecting substantial rights, which were not brought to the attention of the trial court. *See also State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984).

The plain error rule does not negate Rule 10(b)(2) and, as explained in *Odom*, rarely will an improper instruction which was not objected to at trial justify reversal. Instead of the standard of prejudicial error contained in G.S. 15A-1443, we must determine whether the jury instruction complained of was erroneous, and if so, whether it had a "probable impact" on the jury's verdict.

Voluntary manslaughter is the unlawful killing of a human being, which is done without malice and without premeditation and deliberation. *State v. Norris, supra.* One who kills a person while in the heat of passion, on sudden and sufficient provocation, is guilty of voluntary manslaughter. *State v. Chamberlain*, 307 N.C. 130, 297 S.E. 2d 540 (1982). Additionally, a killing in the exercise of self-defense, but which fails to meet the standard of

perfect self-defense because the defendant was either the aggressor, without murderous intent, or used excessive force, is voluntary manslaughter. *Norris, supra.* In the instant case the trial judge instructed the jury on imperfect self-defense as follows: "you may convict the defendant of voluntary manslaughter, if the State proves that the defendant was simply the aggressor without murderous intent in bringing on the fight in which the deceased was killed or that the defendant used excessive force."

While this is a correct statement of the law, defendant contends that he was prejudiced because there was no evidence that he was the aggressor or that he used excessive force. He argues that since the court's instruction permitted the jury to base their verdict on a finding, unsupported by the evidence, that he exercised imperfect self-defense, he is entitled to a new trial. We disagree.

In this case, there is plenary evidence to support the jury's verdict finding defendant guilty of voluntary manslaughter on the grounds of a killing committed in the heat of passion or, as previously discussed, committed by the use of excessive force in the exercise of self-defense. We also believe that defendant's statement that he shot Charles after Charles "came in and tried to take over" supports a reasonable inference that defendant initiated the exchange of gunfire, rendering the court's instruction on "first aggressor" appropriate. However, even if we were to assume, *arguendo*, that the evidence was insufficient to warrant the "first aggressor" instruction, any error in giving the instruction could not have had a probable impact on the jury's verdict in view of the evidence supporting defendant's use of excessive force. Finding no "plain error" in the court's instructions and defendant having failed to object thereto, we must overrule this assignment of error.

[5] Finally, defendant assigns as error the failure of the trial judge to find three statutory mitigating factors, *ex mero motu*. In *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984) our Supreme Court stated the rule that the duty of the trial judge to find a statutory mitigating factor that has not been submitted by defendant arises only when defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983),

i.e., the evidence in support of the statutory factor must be substantial, uncontradicted and manifestly credible.

Defendant first contends that the trial court erred in failing to find the factor listed in G.S. 15A-1340.4(a)(2)(1): that at an early stage in the criminal process defendant acknowledged wrongdoing to a law enforcement officer. We find no evidence that defendant ever acknowledged wrongdoing. To prove this mitigating factor defendant must have admitted culpability, responsibility or remorse, as well as guilt. *State v. Brewington*, 71 N.C. App. 442, 322 S.E. 2d 205 (1984). Instead, defendant has consistently maintained that he shot Charles in self-defense or defense of his wife.

Defendant next contends that the trial court erred in failing to find the factor in mitigation listed in G.S. 15A-1340.4(a)(2)(b), that he committed the offense under compulsion. We find no evidence of compulsion in the record.

Defendant finally contends that the court erred in failing to find that he acted under strong provocation, as set forth in G.S. 15A-1340.4(a)(2)(i). The question before us is whether the evidence of strong provocation is substantial, uncontradicted and manifestly credible. As we have discussed, differing inferences may be drawn from the evidence as to who initiated the altercation between defendant and his deceased brother. Although the testimony of defendant and his wife, if believed, would certainly tend to show strong provocation, we cannot say that it was manifestly credible so that the court was compelled to accept it as true. We find no error in the sentence.

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. HUGH JOHNSON, III

No. 856SC609

(Filed 3 December 1985)

1. **Criminal Law § 43— possession of narcotics—photographs found in house with narcotics—properly admitted**

The trial court did not err in a prosecution for possession with intent to manufacture and sell marijuana and cocaine by admitting photographs depicting defendant in close proximity to marijuana plants or holding or smoking marijuana, and photographs of defendant's partially nude girlfriend found in an envelope in his bedroom. Both sets of photographs were admissible to show that defendant was living in the house where the photographs and narcotics were found, and the photographs of defendant looking at marijuana plants and holding "Thai sticks" were also admissible to show defendant's knowledge of the controlled substance marijuana.

2. **Criminal Law § 128.2— mistrial denied—improper questions and argument—no error**

The trial court did not err by denying defendant's motions for mistrials where the court sustained defendant's objections and immediately instructed the jury to disregard the district attorney's argument of facts not in evidence and questions by the district attorney that inferred that defendant had a criminal record and had therefore attempted to solicit someone else to confess to the crimes.

3. **Criminal Law § 48.1— defendant's silence after Miranda warnings—testimony of deputy admitted—no prejudice**

There was no prejudicial error in a prosecution for possession with intent to manufacture and sell marijuana and cocaine where the trial court permitted a deputy sheriff to testify that defendant declined to make a statement after being advised of his *Miranda* rights. The error was harmless beyond a reasonable doubt because of other overwhelming evidence.

4. **Criminal Law § 86.5— possession of narcotics—testimony that defendant's girlfriend also charged—no prejudice**

The trial court did not err in a prosecution for possession of marijuana and cocaine with intent to manufacture and sell by denying defendant's motion for a mistrial where a deputy had testified that defendant's girlfriend had also been charged as a result of a conversation with the deputy. Evidence that a third person had been charged with possession of cocaine could not have been prejudicial to defendant and could have been helpful.

5. **Narcotics § 4.3— cocaine and marijuana—possession with intent to manufacture and sell—evidence sufficient**

The trial court did not err by denying defendant's motions to dismiss charges of possession of cocaine with intent to sell and possession of marijuana with intent to manufacture and sell where the evidence tended to show that defendant lived in the front of the house; cocaine was found in an upstairs

room in the front of the house; a bag of marijuana and cocaine paraphernalia were found in the living room in defendant's part of the house; two bags of marijuana were found in defendant's bedroom; cocaine paraphernalia and a bag of marijuana seeds were found in the kitchen, which was also in the front of the house; a large quantity of marijuana seeds was found in the shed behind the house; and marijuana debris, presumably from drying marijuana, was found in the attic.

6. **Narcotics § 4.5— cocaine and marijuana—refusal to instruct that manufacturing must not be for personal use—no error**

The trial court did not err in a prosecution for possession of cocaine with intent to sell and possession of marijuana with intent to manufacture and sell by refusing to instruct the jury that they must find beyond a reasonable doubt that the manufacturing was not for personal use. The manufacturing relied on by the State was production, propagation, and processing, and there was no evidence that defendant was preparing or compounding marijuana for his own use. N.C.G.S. 90-87(15).

7. **Narcotics § 1.3— possession with intent to sell or manufacture—separate offenses**

In a prosecution for possession of marijuana with intent to sell and possession of marijuana with intent to manufacture in which those charges were combined pursuant to a stipulation by defendant's counsel and submitted to the jury as "possession of marijuana with intent to manufacture or sell . . .," it was noted that possession of a controlled substance with the intent to manufacture is a separate and distinct offense from possession of such substance with intent to transfer. However, the verdict was left intact because the error was favorable and invited by defendant, and there was sufficient evidence to convict defendant of both possession with intent to manufacture and possession with intent to sell. N.C.G.S. 90-95(a)(1).

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 2 October 1984 in Superior Court, HERTFORD County. Heard in the Court of Appeals 28 October 1985.

Defendant was charged in bills of indictment proper in form with possession of more than one gram of cocaine and possession of cocaine with intent to sell it (84CRS2753), possession of marijuana with intent to sell it (84CRS2754), and possession of marijuana with intent to manufacture it (84CRS2754-A). He entered pleas of not guilty to each offense.

At trial the State presented evidence which tended to show the following: On 28 June 1984 Deputy Sheriff Wesley Liverman and three other law enforcement officers went to defendant's residence, a white frame house on Godwin Town Road, with a search warrant. Defendant lived there with his brother, Evans Johnson.

Defendant arrived at his house and, without knowledge of the search warrant, gave his consent to a search. He told the law enforcement officers that the front of the house was his, and the back was Evans'. The front of the house consisted of the living room, kitchen, bedroom, bathroom, and three rooms upstairs. The back of the house had a storage area, a bedroom and a bathroom. The officers found a mirror and a cocaine "snorting spoon" in the living room. In a closet in one of the rooms upstairs, Officer Liverman found several bags of white powder substance, later determined to be 27.07 grams of cocaine. The bags contained Evans Johnson's latent fingerprints. There was marijuana debris on the closet floor. Under the couch in the living room there was a bag containing 15.8 grams of marijuana. Two bags of marijuana were found in defendant's bedroom. On the kitchen table the officers found a mirror with some razor blades on it, a cocaine "crusher," a bag containing marijuana seeds, and photographs of defendant and another person posed in a marijuana field, looking at marijuana plants and holding "Thai sticks."

When Liverman found the first bag of marijuana in defendant's bedroom, defendant said: "Huh, that's a hundred dollars and cost." Defendant made the same remark when Deputy Twine found the second bag of marijuana in the bedroom. In the back of the house, i.e., Evans' part of the house, the officers found two scales, a cocaine "snorting spoon," compounds used for "cutting" cocaine, razors, and baggies. A large bag of marijuana seeds was found in the shed behind the house.

Defendant did not testify, but presented evidence which tended to show the following: Hunter Sharpe and defendant went to Jamaica in January 1984. A tour guide showed them a marijuana field, and that was where the photographs depicting defendant looking at marijuana plants, introduced into evidence by the State, were taken. Evans Johnson, who was also charged and tried jointly with defendant, testified that defendant lived at the Godwin Town Road house until May 1984 when he moved to Jernigan's Airport. During the three years the Johnsons lived on Godwin Town Road several other people had also lived there. In May 1984 Evans and defendant were not getting along because Evans was neglecting his job, had a drinking problem and was using cocaine regularly. He had bought the cocaine found by the officers for $1,900.00, $1,500.00 of which he borrowed from the

bank. Evans Johnson testified that defendant did not know about the cocaine and that most of the marijuana found in the house also belonged to Evans. Evans was in therapy for his alcohol and drug problem. Several witnesses testified as to defendant's good reputation and character in the community.

At the conclusion of the evidence, the State and the defendant agreed that the charges in 84CRS2754 and 84CRS2754-A should be combined. The jury returned verdicts of guilty of "possession of marijuana with intent to manufacture or sell," and "possession of more than one gram of cocaine." From judgments imposing consecutive presumptive sentences defendant appeals.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General Robert A. Melott for the State.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker and W. Hugh Jones, Jr. for defendant appellant.

MARTIN, Judge.

Defendant brings forward eight assignments of error challenging the admission of evidence, the sufficiency of the evidence, the denial of his motion for mistrial, and the denial of one of his requested jury instructions. We find no error prejudicial to defendant.

[1] Defendant first contends that the trial court erred in admitting into evidence photographs depicting defendant in close proximity to marijuana plants, or holding or smoking marijuana. Defendant argues that such photographs were inadmissible because they were evidence of other offenses. We do not agree. G.S. 8C-1, Rule 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." We find that the photographs, which were found in defendant's kitchen, were admissible as evidence that defendant was living at the house on Godwin Town Road, rather than at Jernigan's Airport as Evans Johnson testified. They were also admissible to show defendant's knowledge of the controlled substance marijuana. *See State v. Snyder,*

66 N.C. App. 191, 310 S.E. 2d 799 (1984); 1 H. Brandis, Brandis on North Carolina Evidence § 91 (2d rev. ed. 1982).

In a related assignment of error defendant argues that the trial court erred in permitting testimony that photographs of defendant's girlfriend, partially nude, were found in an envelope in his bedroom. Defendant contends that the photographs had no relevance and were prejudicial. Again, these photographs were relevant as evidence that defendant lived in the house; if defendant had moved out it is unlikely that he would have left behind such personal photographs.

Defendant's next four assignments of error relate to the denial of his motions for mistrial, made during the cross-examination of Evans Johnson and at the conclusion of the jury arguments. Defendant alleges that the cumulative effect of various evidentiary rulings by the court and improper questions and arguments by the prosecutor was to deny his right to a fair trial. We will discuss each of his contentions.

[2] Defendant first directs us to the following portion of the prosecutor's cross-examination of Evans Johnson:

> [MR. BEARD]: As a matter of fact, I'll ask you if your brother —to your knowledge if your brother tell Vicki Baggett—let her know that she didn't have much of a record so she wouldn't have anything to fear if she came up here and took the credit for this.
>
> MR. BAKER AND MR. JONES: Object.
>
> MR. JONES: I'd like to approach the bench.
>
> THE COURT: Sustained.
>
> [Bench conference and motion for mistrial made in the absence of the jury and denied.]
>
> [Jury returns.]
>
> [THE COURT]: Let me again just say one thing to you and please keep this in mind. If a question is asked of a witness and if the Court sustains the objection to that question, that question is not to be answered. The question itself is not to be considered by you. The question asked of a witness to which an objection is sustained is not to be considered in any

way. You are not to draw any inference from it. It is not before you. It is not evidence in the case. You are to disregard it in your consideration of these cases.

Defendant contends that the District Attorney inferred by his question that defendant had a criminal record and that he had therefore attempted to solicit someone else to confess to the crimes. Defendant asserts that this inference was so prejudicial that the trial court should have granted his motion for a mistrial. We disagree. Although the prosecutor's suggestion that defendant had a criminal record was improper, the court immediately sustained defendant's objection to the offensive question and instructed the jury not to draw any inference from it and to disregard it. This instruction sufficed to remove any prejudice. *State v. Robbin*, 287 N.C. 483, 214 S.E. 2d 756 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3208 (1976).

Defendant again moved for a mistrial at the conclusion of the prosecutor's jury argument. He based his motion, and his assignment of error to its denial, upon his assertion that the District Attorney improperly argued facts not in evidence. Again we find that upon defendant's objections to the District Attorney's improper argument the trial court immediately sustained the objections and instructed the jury to disregard the statements. Thus, any impropriety in the argument was cured by the prompt action of the trial court. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982).

[3] As a further basis for his contention that the trial court abused its discretion in denying his motion for mistrial, defendant contends that the trial court erred in permitting a deputy sheriff to testify that defendant declined to make a statement after being advised of his Miranda rights. Although the court's ruling on defendant's objection was not argued by defendant when he made his later motions for mistrial, we will consider his exception to the testimony to determine if he was prejudiced thereby.

It is error to permit the prosecution to present evidence that an accused exercised his constitutional privilege against self-incrimination by remaining silent after having been advised of his Miranda rights. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966); *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975), *vacated and remanded*, 429 U.S. 912, 50 L.Ed. 2d 278, 97

S.Ct. 301 (1976). However, not every violation of a constitutional right is sufficiently prejudicial to warrant a new trial; the test is whether there is no reasonable possibility that the error might have contributed to defendant's conviction. *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980). In this case we find the error harmless beyond a reasonable doubt because of other overwhelming evidence of defendant's guilt, *e.g.*, the bags of cocaine and marijuana which were found in defendant's part of the house, and defendant's voluntary, inculpatory statements when the marijuana was found in his bedroom.

[4] Defendant next contends that the trial court should have declared a mistrial because it erred in allowing a deputy sheriff to testify that defendant's girlfriend, Vicki Baggett White had also been charged with possessing the cocaine in question as a result of some conversation which she had with the deputy. The substance of the conversation was not admitted. Defendant contends that this evidence implied that he coerced Vicki to confess in order to exonerate himself. We read no such implication in the evidence. Evidence that a third person had been charged with possession of cocaine could not have been prejudicial to defendant and could have been helpful. The evidence could be relevant to his case, in that it tended to show that the cocaine was owned by someone other than defendant.

The allowance or denial of a defendant's motion for mistrial is largely within the discretion of the trial court and its ruling is not reviewable in the absence of an abuse of discretion. *State v. Loren*, 302 N.C. 607, 276 S.E. 2d 365 (1981). Defendant has failed to show, in the foregoing four assignments of error relating to the denial of his motions for mistrial, such serious improprieties as to render impossible a fair and impartial trial. The denial of the motions for mistrial was not an abuse of the trial court's discretion.

[5] In his next assignment of error defendant argues that the trial court erred in failing to grant his motion to dismiss the charges. He contends that there was no evidence that he possessed cocaine or that he had any intent to manufacture or sell marijuana. We disagree.

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power

> and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on the charge of unlawful possession.

State v. Harvey, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). *See also State v. Long*, 58 N.C. App. 467, 294 S.E. 2d 4 (1982); *State v. Moore*, 40 N.C. App. 613, 253 S.E. 2d 297 (1979). The possession of the contraband may be shared, the defendant need not have the exclusive power and intent to control the disposition. *State v. Lofton*, 42 N.C. App. 168, 256 S.E. 2d 272 (1979).

In the instant case the evidence, viewed in the light most favorable to the State, tended to show that defendant lived in the front of the house; the cocaine was found in an upstairs room in the front part of the house; a bag of marijuana and cocaine paraphernalia were found in the living room in defendant's part of the house; two bags of marijuana were found in defendant's bedroom; cocaine paraphernalia and a bag of marijuana seeds were found in the kitchen, which was also in the front of the house. Additionally, a large quantity of marijuana seeds were found in the shed behind the house, and marijuana debris, presumably from drying marijuana, was found in the attic. Clearly this evidence was sufficient to withstand defendant's motion to dismiss.

[6] In his last assignment of error defendant argues that the trial court erred by refusing to instruct the jury that in order to convict defendant of possession of marijuana with intent to manufacture or sell they must find beyond a reasonable doubt that the manufacturing was not for personal use. Manufacture is defined in G.S. 90-87(15) as "the production, preparation, propagation, compounding, conversion or processing of a controlled substance by any means . . . ; and 'manufacture' further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use . . . ."

In *State v. Childers*, 41 N.C. App. 729, 255 S.E. 2d 654, *cert. denied*, 298 N.C. 302, 259 S.E. 2d 916 (1979), the defendant was convicted of manufacturing marijuana, and on appeal presented the same argument as defendant in the instant case. This court

explained that manufacture is defined by six terms: production, preparation, propagation, compounding, conversion, or processing. Two of the terms are further qualified in that preparation or compounding for personal use are excepted from the definition of manufacture. Production, propagation (the situation in *Childers*), conversion and processing of marijuana are "manufacture" whether for personal use or for sale. In the instant case, the "manufacturing" relied upon by the State was production, propagation and processing, and the court so instructed the jury. As there was no evidence that defendant was preparing or compounding marijuana for his own use, the requested instruction was appropriately denied.

[7] Defendant's last argument compels us to note that defendant was charged, in separate bills of indictment, with possession of marijuana with intent to sell it and possession of marijuana with intent to manufacture it. Pursuant to a stipulation by defendant's counsel, these charges were combined and submitted to the jury as one charge, i.e., "possession of marijuana with intent to manufacture or sell it." In our view, possession of a controlled substance with the intent to manufacture it is a separate and distinct offense from possession of such substance with the intent to transfer it.

In *State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985), our Supreme Court held that legislative intent declared by G.S. 90-95 (a)(1) "was twofold: (1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another." *Id.* at 129, 326 S.E. 2d at 28. The court held that "transfer" encompassed the terms "sell" and "deliver" and possession of a controlled substance with intent to transfer it is one crime, whether the possessor intended the transfer to be by sale or by delivery. The term "manufacture" however, is not included within the term "transfer." In our view, possession of a controlled substance with the intent to manufacture it is a separate and distinct offense from possession of such a substance with intent to transfer it. Thus, one who possesses a narcotic with the intent to manufacture it and also with the intent to thereafter sell or deliver it is guilty of two crimes. In the case *sub judice*, both charges should have been submitted to the jury. By submitting them as one charge, in the disjunctive, the trial court permitted the jury to return an ambiguous verdict. *See*

State v. McLamb, 313 N.C. 572, 330 S.E. 2d 476 (1985). However, because we find (1) the error in combining the offenses was favorable to defendant; (2) the error in the submission of the verdict form in the disjunctive was invited by defendant, and (3) there was sufficient evidence to convict defendant of both possession with intent to manufacture *and* possession with intent to sell, we decline to disturb the verdict.

No prejudicial error.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. TERRY LEE MOORE

No. 843SC1195

(Filed 3 December 1985)

1. **Criminal Law § 48— silence of defendant—use for impeachment**

Defendant's right to remain silent was not violated by the State's cross-examination of defendant regarding his failure to advise police officers of the defense he asserted at trial during the nine months between the incident and the date he first consulted an attorney. Furthermore, defendant was not prejudiced because some of the questions involved a time after he had been given his *Miranda* warnings.

2. **Criminal Law § 46.1— advice by attorney—reason for flight—exclusion of evidence**

The trial court in a murder prosecution did not err in striking the testimony of an attorney consulted by defendant which allegedly showed that defendant's flight was not from a consciousness of guilt but was on the advice of his attorney not to talk with officers about the case where the principal evidence of flight by defendant was a trip to Mexico which occurred before he consulted the attorney.

3. **Criminal Law § 138— aggravating factor—crimes for which not charged**

The trial court's finding as a non-statutory aggravating factor for second degree murder that defendant admitted during cross-examination that he had committed four criminal offenses punishable by more than 60 days' confinement for which he was never charged was based on sufficient evidence and was reasonably related to the purposes of sentencing.

4. **Criminal Law § 138— age of defendant—failure to find as mitigating factor**

The trial court did not abuse its discretion in failing to find as a mitigating factor for second degree murder that defendant was only 17 years old at the time of the crime.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 20 April 1984 in Superior Court, CARTERET County. Heard in the Court of Appeals 27 August 1985.

The defendant was tried for first degree murder. The State's evidence tended to show that on 9 July 1982 the body of Angela Willis Ballard was found on the beach at Atlantic Beach, North Carolina. On the night of the murder the defendant, Terry Lee Moore, his friend Lee Johnson, and Ms. Ballard went to the beach to smoke marijuana. Johnson testified that while there Ms. Ballard had sexual intercourse first with the defendant and then with Johnson. Johnson left the defendant and Ms. Ballard on the beach. At approximately 2:00 a.m. Johnson returned to the motel room he shared with the defendant. The defendant was there. He had been scratched and was swollen around his face, hands and neck. The defendant told Johnson that while he and Ms. Ballard were on the beach two Marines arrived and started a fight. The defendant was knocked unconscious. When he awoke Ms. Ballard appeared to be dead. Neither the defendant nor Johnson reported the crime.

In March 1983 the defendant and Johnson learned that the police were aware of their involvement and both decided to leave town. They went to Georgia, Louisiana, Texas and Mexico and returned to their hometown of Garner after approximately two weeks. The defendant testified to essentially the same things as Johnson. He also explained that he left Garner because he was confused and afraid that he would be arrested.

Michael Denning testified that he talked to the defendant in August 1982 and the defendant told him that the defendant and a "friend had met a girl at the Big Surf and that they had took her out on the beach and gangbanged her and she started making noise and he fucked her up."

The defendant was convicted of second degree murder and sentenced to 45 years in prison. He appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James Peeler Smith, for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

WEBB, Judge.

[1] In his first assignment of error the defendant argues that the trial court erred in permitting the prosecutor to question the defendant repeatedly concerning his failure to report the murder to the police. The following occurred on cross-examination:

Q: But you never told it [the defendant's version of events] until the police went up there after you?

A: I never told anything to the police until now.

Q: You never told them anything until now?

A: No, sir.

Q: You never even told them this story about the two guys, did you?

A: No, sir.

Q: They asked you?

A: They asked me about it, yes, sir.

Q: And you refused to tell them, didn't you?

A: Yes, sir.

Q: To tell them anything at all?

A: That's my right.

MR. BOSHAMER: Objection.

THE COURT: Well, that objection is sustained. Ladies and Gentlemen of the Jury, disregard counsel's question and disregard the witness' answer.

Later on cross-examination the prosecutor asked the defendant:

Q: Well, didn't you say before the break that you called him [Captain Rose] to tell him that you didn't want to talk to him?

A: Yes, sir, I told him that I didn't want to talk to him but if he needed to get with me about something that I was here.

Q: But you refused to talk to him?

A: Yes, sir, about the case.

Q: And you never did talk to him about the case?

A: No.

After this exchange the court sustained defense counsel's objection but did not instruct the jury to disregard the question and answer. Still later the prosecutor asked the defendant:

Q: You knew that you'd be found sooner or later, didn't you?

A: I just knew that I needed to come back and get this right.

Q: But you also knew that you didn't need to tell Captain Rose about it?

A: That's what my lawyer—

The court again sustained defense counsel's objection without instructing the jury to disregard the question and answer.

The defendant contends that the prosecutor's repeated references to the defendant's failure to report to police his version of the crime abridged the defendant's right to remain silent. The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976) that when a defendant testifies he may not be cross-examined in regard to his remaining silent after he has been warned by the officers of his right to remain silent. In *Jenkins v. Anderson*, 447 U.S. 231, 65 L.Ed. 2d 86, 100 S.Ct. 2124 (1980) the Supreme Court held that a defendant may be cross-examined in regard to pre-arrest failure to tell the officers of a defense he asserts at trial. We followed this rule in *State v. Burnett*, 39 N.C. App. 605, 251 S.E. 2d 717, *disc. rev. denied*, 297 N.C. 302, 254 S.E. 2d 924 (1979). The defendant consulted an attorney in late March or April of 1983. The defendant did not tell the investigating officers anything about the two men he says attacked him and Ms. Ballard during the approximately nine months between the time of the incident and the date he first consulted an attorney. The State was entitled to cross-ex-

amine him as to the failure to so tell the officers during this period. This was the main thrust of the questions asked of the defendant on cross-examination. Although some of the questions may have involved a time after he was given his Miranda warnings we do not believe the defendant was prejudiced. The State elicited, as it had the right to do, testimony that defendant for a period of nine months did not tell the officers he had information in regard to a criminal investigation. We do not believe he was prejudiced because some of the testimony showed he did not tell them of this information after he had received a Miranda warning.

[2] The defendant called as a witness an attorney whom he contacted when he returned from Mexico. The attorney testified in corroboration of the testimony of defendant. The attorney testified on direct examination that he advised the defendant not to talk to the officers about the case. This colloquy then occurred.

Q: Did you talk to him about what would likely happen if he did talk to somebody about it?

A: I told him that it was my opinion that if he recounted to the investigators the events that he recounted to me—

MR. MCFAYDEN: Judge, I'm going to object and move to strike his opinion.

THE COURT: Well, that motion to strike is allowed.

The defendant contends it was error to strike this testimony because it was relevant to show his flight was not from a consciousness of guilt but was on the advice of his attorney. We note that the principal evidence of flight by the defendant was his trip to Mexico which occurred before he consulted an attorney. At any rate we believe there was sufficient testimony from the attorney admitted without objection as to the advice given the defendant not to talk to law enforcement officers that the defendant was not prejudiced by the exclusion of this testimony.

On cross examination of the attorney the following colloquy occurred:

Q: Okay. Now you remember talking with Special Agent Smith on the telephone?

A: Yes.

Q: And Special Agent Smith told you that he would like to sit down with you and your client and discuss this case?

A: He may have.

Q: And you told him that Terry would be going out of town and that you were pretty busy and you'd have to get back together on that?

MR. BOSHAMER: Objection, Your Honor.

. . . .

THE COURT: Overruled.

Q: (Mr. McFayden) Do you recall that, sir?

A: Not specifically, but I may very well have said that, that I would be unable at that time to meet with him, but I don't recall.

Q: And there never came a date when you and Terry Moore sat down with the officers, or any officer?

A: There did not.

The defendant contends it was error to allow this testimony as to the defendant's not talking to law enforcement officers on the advice of his attorney. The defendant elicited testimony from the attorney as to his advice to the defendant not to talk to the investigative officers. We hold it was not error to allow the State to elicit in more detail testimony as to this advice.

[3] The defendant's next assignment of error concerns the trial court's finding as a non-statutory aggravating factor at sentencing that the defendant admitted during cross-examination that he had committed four criminal offenses punishable by more than 60 days' confinement for which he was never charged.

G.S. 15A-1340.4(a) provides in part:

> If the judge imposes a prison term, . . . he must impose the presumptive term provided in this section unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term. . . . In imposing a prison term, the judge . . . may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related

to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein, ...

One of the aggravating factors the judge is required to consider under the statute is whether "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement." G.S. 15A-1340.4(a)(1)(o). In *State v. Thompson*, 60 N.C. App. 679, 300 S.E. 2d 29, *modified on other grounds*, 309 N.C. 421, 307 S.E. 2d 156 (1983), this Court held that a defendant's statement during cross-examination that he had previously been convicted of two felonies was credible evidence and was sufficient to support the aggravating factor that the defendant had prior convictions for offenses punishable by 60 days' confinement under G.S. 15A-1340.4(a)(1)(o). In the instant case the defendant admitted during cross-examination that he had previously committed the crimes of possession of a schedule I controlled substance, LSD, sale of a schedule VI controlled substance, marijuana, breaking or entering and larceny. This testimony was sufficient to support the court's finding this factor. These offenses are all punishable by more than 60 days' confinement. If the fact of a defendant's prior convictions punishable by 60 days' confinement is reasonably related to the purposes of sentencing, we believe the fact of a defendant's admitted commission of prior criminal offenses also punishable by 60 days' confinement is reasonably related to the purposes of sentencing. This assignment of error is overruled.

[4] In his last assignment of error the defendant argues that the trial court erred in failing to find as a factor in mitigation that the defendant was 17 years old at the time of the crime. The defendant does not contend that there is a statutory mitigating factor that specifically applies but argues that age is something which is taken into account in many situations under our law and should be taken into account in this case. We believe a person at 17 years of age should be as well aware as any person of the wrong involved in the commission of murder. We do not believe the court abused its discretion in failing to find this mitigating factor.

No error.

Judge MARTIN concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON concurring in part and dissenting in part.

I concur in the majority's resolution of all of defendant's assignments of error except the assignment of error concerning "the trial court's finding as a non-statutory aggravating factor at sentencing that the defendant admitted during cross-examination that he had committed four criminal offenses punishable by more than sixty days confinement for which he was never charged." Ante p. 82. A defendant's admission on cross-examination that he has been *convicted of* two felonies is not only presumably verifiable but is also presumptively valid, considering the panoply of procedural safeguards that accompany a conviction. The same significance, however, cannot be given to a defendant's admission on cross-examination that "he has *committed* four criminal offenses punishable by more than sixty days' confinement for which he was never charged."

I reject the majority's implicit premises that an uncorroborated admission—without evidence aliunde—is legally sufficient and that a defendant's characterization of conduct as criminal—without regard to whether the conduct was justifiable or excusable—is conclusive. I also cannot subscribe to the reasoning that "[i]f the fact of a defendant's prior convictions punishable by sixty days' confinement is reasonably related to the purposes of sentencing, . . . the fact of a defendant's admitted commission of prior criminal offenses also punishable by sixty days' confinement is reasonably related to the purposes of sentencing." Ante p. 83. This language would allow the enhancement of a sentence based on conduct for which the State may never have sought punishment—e.g., the admission by defendant that he slept with his wife before they got married, *see* N.C. Gen. Stat. Sec. 14-184 (1981), or that he once won $2.00 in a penny ante family poker game. *See* N.C. Gen. Stat. Sec. 14-292 (Cum. Supp. 1985). That these examples, although punishable by sixty days' confinement, are not reasonably related to the purposes of sentencing is clear beyond cavil. Equally clear is the disincentive the majority opinion provides to defendants to demonstrate rehabilitative potential by telling the truth about suspected, but unprovable, criminal conduct. That is, defendants who had hopes the court would find their truthfulness a mitigating factor may now make fewer admis-

sions for fear that the court will use their truthful admissions as aggravating factors.

The purposes of the Fair Sentencing Act have not been advanced by the majority's resolution of this issue. Believing the trial court erred in finding as a non-statutory aggravating factor that defendant admitted during cross-examination that he had committed four criminal offenses punishable by more than sixty days' confinement for which he was never charged, I dissent.

LAND-OF-SKY REGIONAL COUNCIL v. COUNTY OF HENDERSON, NORTH CAROLINA

No. 8528SC168

(Filed 3 December 1985)

Counties § 2; Estoppel § 5.1; Appeal and Error § 42— regional government council—action to collect dues from county—county estopped from denying plaintiff's capacity to sue—summary judgment for plaintiff proper

Summary judgment was properly granted for plaintiff in an action by a regional planning and economic development commission to collect contributions due from a county where defendant county had participated from 1971 through February 1982 as a member in plaintiff's activities; defendant attended meetings, workshops and received the benefits of plaintiff's plans and services; defendant during this time made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's Bylaws; defendant indicated in a 1982 letter that its Board of Commissioners unanimously voted to comply with the obligations incumbent on a withdrawing member; defendant did not raise any material question of fact pertaining to plaintiff's request that defendant should be estopped from denying its obligation; the pleadings on which defendant solely relied did not indicate that estoppel would impair its exercise of governmental functions; and plaintiff relied upon defendant's prior conduct and budgeted and staffed with the reasonable expectation that defendant would pay its proportionate share of plaintiff's budget. Furthermore, the trial court did not err by refusing to include in the record on appeal an additional affidavit filed by plaintiff where the affidavit was not before the court or considered when the court passed on plaintiff's motion for summary judgment. N.C.G.S. 1A-1, Rule 56, N.C.G.S. 158-8, N.C.G.S. 153A-392(3), N.C.G.S. 153A-393.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 18 October 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 24 September 1985.

Plaintiff, Land-of-Sky Regional Council instituted this action 29 February 1984 by filing a complaint seeking $38,277.33 in contributions due from defendant, County of Henderson, North Carolina (Henderson County). The complaint alleged plaintiff is a regional planning and economic development commission created in 1971 by joint resolutions of the Boards of County Commissioners of Madison, Buncombe, Henderson and Transylvania counties.

In its answer defendant moved to dismiss the action for failure to state a claim for which relief may be granted. Rule 12(b)(6), N.C. Rules Civ. P. Defendant's answer denied all pertinent allegations by plaintiff. Their answer denied that plaintiff was properly organized and had capacity to sue. Defendant further denied that there was a joint resolution by which the manner of each member's financial support was determined as required by G.S. 153A-392 and G.S. 158-8. On 28 June 1984, defendant moved for summary judgment. Plaintiff submitted affidavits and on 1 October 1984 moved for summary judgment. The only material filed by defendant in opposition to plaintiff's motion was an affidavit by the chairman of the Henderson County Board of Commissioners. This affidavit by the Board chairman asserted that the minutes of Henderson County's Board of Commissioners do not contain in resolution form the method of determining the Council's financial support from its member governments.

In an order filed 10 October 1984, the court denied defendant's motions for change of venue, summary judgment and to dismiss the action. On 18 October 1984, the court granted plaintiff's motion for summary judgment. Defendant appeals.

McGuire, Wood, Worley & Bissette, by Joseph P. McGuire, for plaintiff appellee.

Morris, Golding, Phillips & Cloninger, by William C. Morris, Jr. and William C. Morris, III, for defendant appellant. Don Garren, for defendant appellant.

JOHNSON, Judge.

The privotal question we must address is whether plaintiff was entitled to a summary judgment as a matter of law. We conclude that as a matter of law plaintiff was entitled to a summary judgment.

A purpose of G.S. 1A-1, Rule 56, motion for summary judgment is to avoid useless trials when a debtor has chosen to defend rather than default. *See Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970). In pertinent part, G.S. 1A-1, Rule 56(c) provides:

> The judgment sought shall be rendered forthwith 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 party is entitled to a judgment as a matter of law.

Rule 56(c) N.C. Rules Civ. P. Summary judgment is not a device to resolve factual disputes, however, complex facts and legal issues do not preclude summary judgment. *Cook v. Baker Equipment Engineering Co.*, 431 F. Supp. 517 (1977). The judge's role is to determine if there is a material issue of fact that is triable. *Wachovia Mortgage Co. v. Autry-Baker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), *aff'd*, 297 N.C. 696, 256 S.E. 2d 688 (1979). The movant has the burden of convincing the judge there are no triable issues of fact. *See Pridgen v. Hughes, supra.*

The moving party may have the burden of establishing a lack of triable issues of fact but, the nonmoving party may not rest upon mere allegations of his pleadings. *Taylor v. Greensborough News Co.*, 57 N.C. App. 426, 291 S.E. 2d 852, *disc. rev. granted*, 306 N.C. 751, 295 S.E. 2d 486 (1982), *appeal dismissed*, 307 N.C. 459, 298 S.E. 2d 385 (1983). Bearing these principles in mind we turn to the propriety of the court's granting a summary judgment for plaintiff.

Defendant's chief contention is that the minutes of the Henderson County Board of Commissioners do not reflect a joint resolution adopting the method of determining each member government's financial support. A joint resolution creating a regional planning commission should "[s]et out the method of determining the financial support that will be given to the commission by each member government." G.S. 153-392(3). "The membership, compensation (if any), and terms of a regional economic development commission and the formula for its financial support, shall be fixed by the joint resolution creating the commission." G.S. 158-8. Defendant contends the legal effects of not adhering to the requirements

of G.S. 158-8 and G.S. 153A-392 control the disposition of this case.

Essentially the legal effects proposed by defendant are as follows: (1) since there is not a financial formula for each member's contribution adopted in resolution form, plaintiff is improperly organized, and (2) therefore, plaintiff is without the capacity to sue.

The pleadings relied on by plaintiff were supported by affidavits which included uncontradicted accounts of the seven (7) year participation by defendant as a member of the council. Plaintiff also submitted a letter in compliance with G.S. 153A-393 and G.S. 158-8, which was directed by action of the Henderson County Board of Commissioners at a regular meeting on 1 March 1982.

> Mr. Charles H. Campbell, Chairman
> Land-of-Sky Regional Council
> 25 Heritage Drive
> Asheville, NC 28806
>
> Dear Mr. Campbell:
>
> This letter is in compliance with G.S. 153A-393 and G.S. 158-8 and was directed by action of the Henderson County Board of Commissioners at a regular meeting on March 1st, 1982.
>
> The members of the Land-of-Sky Regional Council are to be advised that the County of Henderson is, as of this date, submitting this written notice of withdrawal from the Land-of-Sky Regional Council.
>
> In a motion approved by a unanimous vote of all members, the Board voted to submit this two-year notice of withdrawal, and stated its desire to see the Council return to the original purpose for which it was organized. If this is accomplished within the next two years, the County will reconsider its decision to withdraw.
>
> Sincerely,
>
> s/ MILDRED O. BARRINGER
> Chairman

The stated purpose of the letter is to comply with the statutory scheme for withdrawal by a member government. "A

member government may withdraw from a regional planning commission by giving at least two years' written notice to the *other* counties involved." G.S. 153A-393 (emphasis ours). "Any governmental unit may withdraw from a regional commission on two years' notice to the *other members.*" G.S. 158-8 (emphasis ours). The most significant aspect of this letter is that the Henderson County Board of Commissioners admitted they voted to follow the statutory scheme set forth in G.S. 153A-393 and G.S. 158-8. "In a motion approved by a *unanimous vote* of all members, the Board voted to submit this two year notice of withdrawal. . . ." (emphasis ours). Thereafter Henderson County continued to attend plaintiff's meetings, receive the benefit of council programs and otherwise participate as a member of the council.

Henderson County is a corporate body. *See O'Neal v. Wake County,* 196 N.C. 184, 145 S.E. 28 (1928). On the face of it defendant's answer contends that there are no county board meeting minutes reflecting a resolution which adopts a financial formula for each member's financial contribution. Article VII Section 1 of the Bylaws of plaintiff sets forth the formula for calculating contributions for each member.

> Each county shall contribute a share proportionate to the county's proportionate share of the regional population as determined by the most recent decennial census. Municipal shares shall be determined within each county in a method mutually agreeable to the municipalities and county in which said municipalities are located.

Bylaws Land-of-Sky Regional Council Article VII sec. 1. If these Bylaws were adopted by defendant then the requirements of G.S. 153A-392 and G.S. 158-8 would be met. Thus, defendant is asserting that it was never a member of plaintiff because there are no minutes reflecting an adoption of the Bylaws. In order to take valid action, a board of county commissioners must act in its corporate capacity in a meeting duly held as prescribed by law. *See Jefferson Standard Life Ins. Co. v. Guilford County,* 226 N.C. 441, 38 S.E. 2d 519 (1946). It is important to note that at no point does defendant deny that a vote was taken, or that it intended to become a member of plaintiff.

"Proceeds of a corporate meeting of stockholders or directors are facts and they may be proved by parol testimony when they

are not recorded." *Tuttle v. Junior Building Corp.*, 228 N.C. 507, 513, 46 S.E. 2d 313, 317 (1948) (citing *Bailey v. Hassell*, 184 N.C. 450, 115 S.E. 166 (1922)). The failure to record these proceedings is not fatal. *Tuttle*, at 513, 46 S.E. 2d at 317. There is evidence that the Henderson County Board of Commissioners met and voted to adopt plaintiff's Bylaws. The Bylaws contains the formula for financial contributions by each member. Defendant paid its proportionate share of plaintiff's budget until a letter of withdrawal was submitted. Thereafter, defendant made partial payments and continued to avail itself of emergency medical services and programs for the aged. Defendant continued to be represented at plaintiff's meetings, workshops and training sessions. Two different chairmen of the Henderson County Board of Commissioners attended plaintiff's meetings during the two year period of withdrawal.

The most significant evidence is the 8 March 1982 letter from a third chairman of the Henderson County Board of Commissioners. The letter is important for two reasons. The letter is evidence that defendant considered itself a member, subject to the two year withdrawal period. G.S. 153A-93; G.S. 158-8. Defendant was seeking to withdraw from a commitment entered into in 1971. If defendant's joining of plaintiff is lawful and not in violation of constitutional provisions or in contravention of policy it would be capable of ratification. *See Jefferson Standard Life Ins. Co., supra.* Thus the letter of withdrawal is more than some evidence of the current Board's recognition of the resolution in 1971 which now requires them as a member government to go through a withdrawal procedure. The letter is also a ratification of defendant's acts as a member of plaintiff since 1971. The Henderson County Board of Commissioners unanimously voted to withdraw, but at the same time the Board ratified the actions of the Board in organizing plaintiff in 1971. Defendant urged plaintiff "to *return* to the original purpose for which *it was organized.*" (emphasis ours).

Defendant asserts that it was beyond the power and authority of its delegates to bind it to plaintiff for support. Liability cannot be incurred for the *ultra vires* acts of officers of employees of a municipality. *Kennerly v. Dallas*, 215 N.C. 532, 2 S.E. 2d 538 (1939). Defendant would render meaningless a vote by the full Board of Commissioners each year from 1972 to 1982. Each year

the Commissioners voted and approved payment to plaintiff for defendant's proportionate share of the budget. We conclude that Henderson County Board of Commissioners had the power to obligate defendant to financially support plaintiff.

On 12 September 1984, defendant filed only one affidavit in opposition to plaintiff's motion for summary judgment. The affiant, Chairman of the Henderson County Board of Commissioners, asserted that in the Board's minutes there was no record of a joint resolution establishing the necessary formula for financial contributions by each member. G.S. 153A-393; G.S. 158-8. Consistent with the discussion hereinabove, this affidavit does not raise a material issue of fact to preclude summary judgment.

On 17 December 1984, plaintiff filed an additional affidavit by Mr. Drake. Defendant assigns as error the court's refusal to include the affidavit in the Record on Appeal. This affidavit was not before the court, or considered when it passed on plaintiff's motion for summary judgment. We find no error in the court's refusal to allow the affidavit to be included in the Record on Appeal.

Plaintiff's motion for summary judgment requests that defendant should be estopped from denying: (1) plaintiff's capacity to sue, and (2) that plaintiff is properly organized as a regional planning and economic development commission. Plaintiff's request for the application of the equitable principle of estoppel is in response to defendant's third and fourth defenses in its answer. Defendant's answer asserted that plaintiff is without capacity to sue and is improperly organized to exercise any of its powers. Defendant contends that the equitable principle of estoppel may not be invoked against it because the exercise of its governmental powers will be impaired. We disagree.

We recognize that counties are not subject to an estoppel to the same extent as a private individual or a private corporation. *See Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E. 2d 754 (1948). Otherwise a county could be estopped from exercising a governmental right. *Id.* However, a governmental entity may be estopped if it is necessary to prevent loss to another and the estoppel will not impair the exercise of governmental powers. *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E. 2d 402, 406 (1953).

Estoppel is a means whereby a party may be prevented from asserting a legal defense contrary to or inconsistent with previous conduct. *Godley v. County of Pitt*, 306 N.C. 357, 360, 293 S.E. 2d 167, 169 (1982). In *Godley*, the court determined that detrimental reliance need not be established to invoke the remedial doctrine of quasi estoppel. *Id.* at 361, 293 S.E. 2d at 170. Quasi estoppel "is directly grounded upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Id.* One who has the right to accept or reject the benefits flowing from a transaction or instrument and does not do so but instead accepts these benefits has ratified that transaction. *Redevelopment Comm. of City of Greenville v. Hannaford*, 29 N.C. App. 1, 4, 222 S.E. 2d 752, 754 (1976).

Applying the equitable principles above we conclude that defendant ratified its actions as a member of plaintiff. From 1971 through February 1982, defendant participated as a member in plaintiff's activities. Defendant attended meetings, workshops and received the benefits of plaintiff's plans and services. During this time defendant made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's Bylaws. Most significantly of all, defendant indicated in the 8 March 1982 letter that the Henderson County Board of Commissioners unanimously voted to comply with the obligations incumbent on a withdrawing member. G.S. 153A-393; G.S. 158-8. Defendant has not raised any material question of fact pertaining to plaintiff's request that defendant should be estopped from denying its obligation. The pleadings which defendant solely relies on do not indicate that an estoppel would impair its exercise of governmental functions.

Plaintiff has relied upon defendant's prior conduct in paying its proportionate share of plaintiff's budget and providing the two-years notice of withdrawal. Plaintiff has budgeted and staffed with the reasonable expectation that defendant would pay its proportionate share of plaintiff's budget. It would be unconscionable to allow plaintiff to take a position inconsistent with the actions it has taken for over a decade.

Affirmed.

Judges WEBB and PHILLIPS concur.

RESSIE DEHART v. R/S FINANCIAL CORPORATION

No. 8530DC93

(Filed 3 December 1985)

1. **Evidence § 33— testimony not hearsay**

Testimony by a witness regarding statements plaintiff's deceased husband made in his presence to a bank representative about a one hundred percent loan to build a house was not inadmissible hearsay where it was not offered to prove the truth of the matters stated but rather to show that the statements were made and to show the witness's active participation in assisting plaintiff and her husband to secure a loan to build a house.

2. **Evidence § 11.5— testimony not barred by Dead Man's Statute**

Testimony by a witness regarding statements plaintiff's deceased husband made in his presence to a bank representative about a one hundred percent loan to build a house did not violate N.C.G.S. 8C-1, Rule 601(c), the present Dead Man's Statute, since there was no evidence that the witness was a party or a person interested in the event or a person from or through whom plaintiff derives any interest.

3. **Evidence § 32.2— base amount of loan—interest rate—parol evidence rule not violated**

Where plaintiff claimed that she had been charged a usurious rate of interest on a loan secured by a promissory note and deed of trust, interest was added to the amount of the note in advance, and the note and deed of trust show a face amount due of $9,645.12 payable in 144 equal monthly installments of $66.98 but neither states the base amount of the loan or the interest rate, the parol evidence rule was not violated by testimony that the base amount of the loan was $5,600 at a six percent interest rate and that the actual interest rate of the loan was ten percent.

APPEAL by defendant from *Snow, Jr., Judge*. Judgment entered 28 August 1985 in District Court, SWAIN County. Heard in the Court of Appeals 30 August 1985.

Ressie DeHart (hereinafter plaintiff) instituted this action by filing a complaint 11 August 1978 alleging that on 24 February 1965 she and her husband, since deceased, procured a loan from Modern Homes Construction Company (hereinafter Modern Homes), the proceeds of said loan intended for the improvement of the DeHart's real property; that in making the loan, Modern Homes required the DeHarts to execute a promissory note and deed of trust; that thereafter, Modern Homes assigned all their right, title and interest in the note and deed of trust to G.A.C. Transworld Acceptance Corp. which in turn assigned the note and

deed of trust to defendant, R/S Financial Corporation, who is now the owner and holder of the note and deed of trust; that plaintiff has paid all monies due under the provisions of the note and deed of trust; that the rate of interest on the loan secured by the note and deed of trust was in excess of the six percent (6%) permitted by G.S. 24-1 as it then existed. Plaintiff sought judgment twice the amount of the alleged usurious interest. Defendant's answer denied the allegations of usury.

The jury awarded plaintiff $1,774.08 which amount the trial court doubled pursuant to G.S. 24-2. Defendant appeals.

Gerald R. Collins, Jr., for plaintiff appellee.

Holt, Haire & Bridgers, P.A., by R. Phillip Haire, for defendant appellant.

JOHNSON, Judge.

This is the second appeal of this case to this Court. In the first appeal this Court held that the trial court improperly granted defendant's motion for a directed verdict. *DeHart v. R/S Financial Corp.*, 66 N.C. App. 648, 311 S.E. 2d 694 (1984) (hereinafter *DeHart I*).

On retrial of the case plaintiff presented evidence which tended to show the following: In 1965, plaintiff and her late husband Clarence D. DeHart owned land in Bryson City upon which they wanted to build a house. On 24 February 1965, Nathaniel Coleman, the stepson of plaintiff, carried Mr. and Mrs. DeHart to Modern Homes to procure a loan for the construction of the house. Modern Homes agreed not only to loan the DeHarts $5,600.00, which was 100% of the costs of building the house, but also agreed to build the house for them. Plaintiff and her late husband executed a promissory note in the amount of $9,645.12, payable in equal monthly installments of $66.98 for 144 months, the first payment due on 1 December 1965, "with interest on each installment maturity thereof until paid at six percentum (6%) per annum." The DeHarts also executed a deed of trust as security for the loan. The deed of trust required the DeHarts to maintain $5,600 of insurance coverage on the property.

Nathaniel Coleman was allowed to testify, over defendant's objection, to things he personally did and observed while assist-

ing the DeHarts to secure a loan of $5,600 to build a house; statements he heard Mr. DeHart make to a third person regarding a loan to build the house; and oral communications between Mr. Coleman and Mr. DeHart.

William A. Harwell, a certified public accountant testified that, based upon amortization tables, six per cent (6%) interest on $5,600.00, the principal amount, would yield a monthly payment of $54.65 over twelve years. Payments of interest and principal would therefore total the sum of $7,871.04 over twelve years. Deducting $5,600.00 principal from that total would yield a total of interest of $2,271.04 over twelve years. In contrast, plaintiff was charged $4,045.12 in interest. Further, based upon the same tables, a ten per cent (10%) interest rate would yield a monthly payment of $66.93, which closely approximates the $66.98 monthly payment charged plaintiff, tending to indicate that plaintiff was charged a ten per cent (10%) rate.

Although plaintiff does not deny signing the promissory note in the amount of $9,645.12, in all of the plaintiff's evidence the only sum of money testified about as being the amount of the loan is $5,600.00.

Defendant presented evidence which tends to show that on 9 February 1965, approximately two weeks before the DeHarts executed the promissory note and deed of trust they executed a sales contract with Modern Homes for the construction of a house on their property for the sum of $9,645.12.

Defendant's first four issues raised on appeal are directed to assignments of error relating to the admission into evidence certain testimony of Nathaniel Coleman, Ressie DeHart and William A. Harwell.

Nathaniel Coleman's testimony can be summarized as relating to: (1) things he personally did and observed while assisting the DeHarts in securing a one hundred percent loan to build the house, (2) statements Clarence DeHart made to a representative of the Bryson City Bank while in Mr. Coleman's presence concerning a one hundred percent loan to build a house, and (3) oral communications between Mr. Coleman and Clarence DeHart regarding Mr. DeHart's efforts to secure a one hundred percent loan to build the house.

[1, 2] Defendant contends the trial court erred in allowing Mr. Coleman's testimony regarding statements Mr. DeHart made in his presence to a representative of the Bryson City Bank about a one hundred percent loan to build the house; and oral communications between Mr. Coleman and Mr. DeHart about securing a one hundred percent loan. Defendant argues that the testimony was inadmissible hearsay and that its admission violated Rule 601 of the N.C. Rules of Evidence which states in pertinent part that:

> [u]pon the trial of an action, a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest . . . shall not be examined as a witness . . ., concerning any oral communication between the witness and the deceased person. . . .

Rule 601, N.C. Rules Evid. We find no merit in defendant's contentions.

"[W]henever the assertions of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." *State v. Miller*, 282 N.C. 633, 642, 194 S.E. 2d 353, 359 (1973) (citing Stansbury, N.C. Evidence sec. 138 (2d ed. 1963)). It does not appear that the challenged testimony was offered to prove the truth of the matters stated, but rather offered solely to show that the statements were made and to show Mr. Coleman's active participation in assisting the DeHarts to secure a one hundred percent loan to build the house. Nor is there any evidence that Mr. Coleman is a party or a person interested in the event, or a person from or through whom plaintiff derives any interest to preclude the testimony under Rule 601, N.C. Rules of Evidence.

Defendant also claims unfair surprise in the admission of this challenged testimony. This claim is without merit since counsel for defendant had a transcript of the first trial of this case and the evidence presented then is substantially the same evidence plaintiff presented at the second trial.

[3] Defendant argues that Mr. Coleman's and plaintiff's testimony that the DeHarts borrowed a one hundred percent loan of $5,600 at an interest rate of six percent (6%) violates the parol

evidence rule. Defendant also argues that Mr. Harwell's testimony establishing the interest rate of the loan by use of the amortization tables was also in violation of the parol evidence rule.

The general rule is that "in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new or different contract from the one evidenced by the writing, is incompetent." *Carroll v. Industries, Inc.*, 296 N.C. 205, 211, 250 S.E. 2d 60, 64 (1978) (citing *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953)). "Promissory notes are not generally subject to the parol evidence rule to the same extent as other contracts. . . . [I]t is rather common for a promissory note to be intended as only a partial integration of the agreement in pursuance of which it was given, and parol evidence as between the original parties may well be admissible so far as it is not inconsistent with the express terms of the note." *Bank v. Gillespie*, 291 N.C. 303, 308, 230 S.E. 2d 375, 378-79 (1976).

The testimony of which defendant complains in the case *sub judice* is in no way at variance with the express terms of the promissory note, deed of trust or sales contract. Each of these documents show a face amount as being $9,645.12, payable in one hundred forty-four (144) equal monthly installments of $66.98. Neither the note nor deed of trust states on its face the specific interest rate charged over the term of the note. Interest was charged in advance, and added to the amount of the note in advance. The note itself only provides for interest in case of default and from maturity of each installment payment. Although the note and sales contract show the amount of $9,645.12, there is nothing on the face of either document nor is there any evidence to support said sum as being the base amount of the loan. It would appear that interest was computed in some manner on a base amount and added to the base amount so as to equal the face amount of the note and sales contract. The challenged testimony does not in any way vary the terms of either of the written documents requiring the DeHarts to pay $9,645.12 in one hundred forty-four (144) equal monthly installments of $66.98. The challenged testimony simply provides evidence that the base loan amount of the $9,645.12 was $5,600 at an interest rate of six percent (6%); that six percent (6%) interest of $5,600 would yield a monthly payment of $54.65 over a twelve year period; that

payments of interest at six percent (6%) plus a base loan amount of $5,600 equal to $7,871.04 over twelve years; that deducting $5,600 from $7,871.04 would yield total interest of $2,271.04 over twelve years; that a ten percent (10%) interest rate over twelve years would yield a monthly payment of $66.93, which is approximately the $66.98 monthly payment defendant charged the DeHarts, tending to indicate that the DeHarts were charged an interest rate of ten percent (10%).

We find no merit in defendant's challenge to the testimony of plaintiff's witnesses. We have also considered and find no merit in defendant's challenge to the court allowing Mr. Harwell to use charts and graphs to illustrate his testimony.

Next, defendant contends the trial judge erred in his jury instruction. We note that defendant, although given the opportunity to do so, failed to take any exception to the jury charge. Therefore, defendant has not preserved any assignment of error to the jury charge for review on appeal. Rule 10(b)(2), N.C. Rules of App. P.; *Durham v. Quincy Mutual Fire Insurance Co.*, 311 N.C. 361, 317 S.E. 2d 372 (1984).

By his final assignment of error defendant contends the court erred in the denial of (1) its motion for a directed verdict at the close of all the evidence, and (2) its motion for judgment notwithstanding the verdict.

A motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In passing on a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn therefrom must be resolved in favor of the nonmovant. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978). A verdict may never be directed when there is conflicting evidence on contested issues of fact. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971).

A motion for judgment notwithstanding the verdict is simply a renewal of the movant's earlier motion for directed verdict. It is a motion for the trial court to enter judgment in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict actually returned by the jury. *Summey v.*

Cauthen, 283 N.C. 640, 197 S.E. 2d 549 (1973). The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict. *Id.*

Defendant would be entitled to a directed verdict and, thus a judgment notwithstanding the verdict only if the evidence, when considered in the light most favorable to plaintiff, fails to show the existence of all the elements required to establish an action for usury, the only theory raised in the pleadings. *Id.* In *DeHart I, supra*, this Court stated, "[s]ince plaintiff did produce sufficient evidence of all of the constituent elements of usury, the trial court improperly granted the defendant's motion for a directed verdict. *DeHart*, at 651, 311 S.E. 2d at 696.

Plaintiff presented substantially the same evidence at retrial that she presented in *DeHart I, supra*, again presenting sufficient evidence of all the constituent elements of usury. The only additional evidence presented at retrial not presented in *DeHart I* was the sales contract introduced by defendant. The sales contract does not establish as a matter of law that the transactions with the DeHarts constituted a sale as opposed to a loan which was the contested issue of fact. It simply raises a conflict in the evidence on an issue of fact which was for the jury to decide from all of the facts and circumstances of the case. "If the transaction is of doubtful character it should be submitted to the jury for determination." *Bank v. Merrimon*, 260 N.C. 335, 338, 132 S.E. 2d 692, 694 (1963).

We conclude that the trial judge correctly denied defendant's motion for judgment notwithstanding the verdict for the same reasons that he denied the motion for a directed verdict, that being on the grounds that the evidence viewed in the light most favorable to plaintiff was sufficient to sustain the verdict. Accordingly, we find

No error.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES CLIFFORD LILLEY

No. 8515SC342

(Filed 3 December 1985)

1. **Assault and Battery § 14.1— assault with a deadly weapon inflicting serious injury—evidence sufficient**

There was no error in a prosecution for assault with a deadly weapon inflicting serious injury in the denial of defendant's motion to dismiss at the close of the State's evidence and his motion to set aside the verdict where defendant waived his right to assign error to the denial of his motion to dismiss by introducing testimony and there was no abuse of discretion in the denial of the motion to set aside the verdict in that the State's evidence tended to show that defendant was under the influence of drugs and alcohol at the time of the shooting; that defendant had pointed the gun at the victim earlier; that defendant and the victim's sister were fighting when the victim entered the apartment; that the victim pushed defendant to interpose himself between his sister and defendant; that defendant intentionally shot the victim, inflicting serious injury; defendant presented evidence tending to show he acted in self-defense; and the jury simply chose to believe the victim's version of events rather than defendant's.

2. **Assault and Battery § 15.6— assault with a deadly weapon inflicting serious injury—instruction on self-defense—no error**

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by instructing the jury on self-defense that one who is the aggressor in an altercation cannot claim self-defense unless he abandons the fight where there was evidence to enable a reasonable person to conclude that defendant was the aggressor in that the victim testified that defendant had pointed a gun at him in a threatening manner less than five minutes before the shooting; that his sister and the defendant were arguing when he entered their apartment; and that the defendant still had the gun in his hand.

3. **Assault and Battery § 15.6— assault with a deadly weapon inflicting serious injury—instruction on self-defense—abandonment of fight by aggressor**

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial court's instruction on the rule of restoration of the right to act in self-defense by an aggressor was sufficient to avoid plain error where the court instructed the jury that an aggressor cannot claim self-defense "unless he thereafter attempted to abandon the fight and gave notice to his opponent that he was doing so." N.C. Rules of App. Procedure 10(b)(2).

4. **Assault and Battery § 15.6— assault with a deadly weapon inflicting serious injury—instruction on self-defense—no prejudicial error**

There was no prejudicial error in the trial court's instructions on self-defense in a prosecution for assault with a deadly weapon inflicting serious injury where the court instructed the jury in its summary of defendant's theory of the case that "the defendant retreated into his apartment . . .," the victim

". . . advanced in a menacing manner . . ." and "I tell you that there is evidence tending to show that the defendant acted in self-defense," even though those phrases were not contained in the same paragraph as the instruction on self-defense, because the instructions must be construed contextually. N.C.G.S. 15A-1232.

5. **Assault and Battery § 15.2— assault with a deadly weapon inflicting serious injury—erroneous instruction—no prejudicial error**

There was no prejudicial error in a prosecution for assault with a deadly weapon inflicting serious injury where the trial court erroneously instructed the jury that when the victim entered defendant's bedroom he saw defendant holding a gun pointed in the victim's sister's direction even though there was no evidence presented at trial which showed that defendant had ever pointed the gun at the victim's sister. The erroneous statement did not relate to a crucial element of the offense or to defendant's claim of self-defense, the trial judge instructed that the jurors' own recollection of the evidence was to control, and defendant failed to point out the error to the trial judge when given the opportunity to do so before the jury retired.

6. **Assault and Battery § 15.7— assault with a deadly weapon inflicting serious injury—no duty to retreat in home—failure to instruct—not plain error**

There was no plain error in a prosecution for assault with a deadly weapon inflicting serious injury in the trial court's failure to instruct the jury that defendant had no duty to retreat in his own home where the rule that a defendant is not required to retreat in his own home applies only when the defendant is free from fault in bringing on the difficulty leading to the assault; there was evidence showing that defendant had hit the victim's sister, that defendant had earlier pointed a gun at the victim, that defendant had asked the victim to come over, that the victim heard the defendant and his sister quarreling when he entered their apartment, and that defendant still had the gun in his hand when the victim entered the bedroom; there was conflicting evidence as to whether the victim actually attacked defendant; the jury apparently reached the conclusion that defendant used excessive force in responding to the assault by the victim or that there had been no assault by the victim; and an instruction on the right of one to stand his ground and not retreat when attacked in his own home would not likely have changed the result in this case.

7. **Assault and Battery § 15.7— assault with a deadly weapon inflicting serious injury—right to defend one's habitation—instruction not given—no error**

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by failing to give an instruction on the right to defend one's habitation where the defendant, regardless of whose version of the incident is believed, was aware of the victim's presence and his purpose. The rules governing defense of habitation are designed to allow the occupants of a home to protect themselves and their home where they may not have an opportunity to see their assailant or ascertain his purpose; however, once the assailant has gained entry, the usual rules of self-defense replace the rules governing defense of habitation.

Judge BECTON dissenting.

State v. Lilley

APPEAL by defendant from *Preston, Judge.* Judgment entered 11 October 1984 in Superior Court, ORANGE County. Heard in the Court of Appeals 16 October 1985.

Defendant was convicted in a jury trial of assault with a deadly weapon inflicting serious injury. The State's evidence showed that defendant was 37 years old at the time of the incident and lived with the victim's 20 year old sister. They and Michael Wilson, the victim, lived in the same apartment complex in Chapel Hill. On 24 June 1984, defendant came to Wilson's apartment and asked if Wilson could take his sister to the hospital because he, the defendant, was too "messed up" to drive her. Wilson questioned defendant as to what was wrong with his sister and defendant admitted to hitting her. Wilson replied, "You hit my sister. I'll kill you." Upon hearing this, defendant raised a pistol he had in his hand, pointed it at Wilson and said, "You ain't going to do a god damn thing." Wilson ignored defendant, who then left and returned to his own apartment. Wilson went to defendant's apartment a few minutes later, entered the open front door without knocking, and heard his sister and the defendant fighting. He walked back to the bedroom. Defendant was in the bedroom, standing between the door and the bed with the gun still in his hand. Wilson pushed defendant aside to get to his sister at which point defendant shot him.

Defendant's evidence tended to show that Wilson was a violent man with a reputation for "going after" men who had hurt his sister. Defendant admitted to hitting Wilson's sister and testified he went to get Wilson to drive her to the hospital. He denied taking a gun with him. After he returned to his own apartment, he was worried about what Wilson would do to him for hitting Wilson's sister, especially in light of Wilson's threat to kill him. Defendant placed a single bullet in his handgun and waited by his girlfriend's bedside for Wilson to arrive. Defendant testified he knew of Wilson's reputation for violence and that he believed Wilson owned several guns. Wilson arrived in the defendant's bedroom unannounced and defendant testified that Wilson immediately began pushing and shoving him. Defendant said Wilson reached a hand around to his back at the waistline; he believed Wilson was going for a gun and shot Wilson at that moment.

The trial judge granted defendant's motion to dismiss the "intent to kill" element of the indictment for assault with a deadly weapon with intent to kill inflicting serious injury. He instructed the jury on assault with deadly weapon inflicting serious injury, assault with a deadly weapon, assault inflicting serious injury and not guilty because defendant was acting in self-defense. The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury, and the trial judge sentenced defendant to the presumptive term of three years imprisonment. Defendant appeals.

Attorney General Thornburg by Assistant Attorney General William N. Farrell, Jr., for the State.

Epting and Hackney by Robert Epting for defendant appellant.

PARKER, Judge.

[1] Defendant's first assignment of error is that the trial judge erred in denying defendant's motion to dismiss at the close of the State's evidence and his motion to set aside the verdict. By introducing testimony, however, defendant waived his right to assign as error the denial of his motion to dismiss at the close of the State's evidence. G.S. 15-173; *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978). The motion to set aside the verdict is a post-trial motion pursuant to G.S. 15A-1414, the disposition of which is within the discretion of the trial court. Therefore, refusal to grant a motion to set aside the verdict is not error absent a showing of abuse of that discretion. *State v. Batts*, 303 N.C. 155, 277 S.E. 2d 385 (1981).

The State's evidence tended to show that, at the time of the shooting, defendant was under the influence of drugs and alcohol; that defendant had pointed the gun at the victim earlier; that defendant and the victim's sister were fighting when the victim entered their apartment; that the victim pushed defendant to interpose himself between his sister and the defendant; and that defendant intentionally shot the victim, inflicting serious injury. While defendant did present evidence tending to show he acted in self-defense, the jury simply chose to believe the victim's version of events rather than defendant's. Defendant has failed to show that the trial judge abused his discretion in any way by denying

the motion to set aside the verdict as contrary to the weight of the evidence.

[2] Defendant's second assignment of error relates to the instruction given by the trial judge on the issue of self-defense; specifically, that it was error for the trial judge to instruct that one who is the aggressor in an altercation cannot claim self-defense unless he abandons the fight. Defendant asserts that no evidence supported a conclusion that he was the aggressor and that the instruction prejudiced him by misleading the jury. Clearly, it would be error for a trial judge to instruct the jury on a theory which could be used to convict defendant when that theory has no evidentiary support. *See, e.g., State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984). However, there is evidence in this case to enable a reasonable person to conclude that defendant was the aggressor. The victim testified that defendant had pointed a gun at him in a threatening manner less than five minutes before the shooting; that his sister and the defendant were arguing when he entered their apartment; and that the defendant still had the gun in his hand. The defendant's conduct at or around the time of the shooting was such as to justify a conclusion that the defendant was the aggressor or, at least, not without fault in bringing on the altercation which led to the shooting. *See State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970). Thus, the giving of the challenged instruction was not error.

[3] Defendant next argues that the form of the above challenged instruction was erroneous because it did not specifically include an instruction that the claim of self-defense can be revived by withdrawing from the original difficulty. Defendant failed to object to this omission at trial when given an opportunity to do so. Therefore, unless "plain error" is found, this assignment of error has not been properly preserved for appeal. N.C. Rules App. Proc. 10(b)(2). The trial judge did include in his instruction on self-defense that an aggressor cannot claim self-defense "unless he thereafter attempted to abandon the fight and gave notice to his opponent that he was doing so." This statement on the rule of restoration of the right to act in self-defense is sufficient to avoid a finding of "plain error."

[4] Defendant also argues that the self-defense instruction did not meet the requirements of G.S. 15A-1232 by failing to ade-

quately apply the law as given to the evidence in the case. This argument is without merit. The trial judge gave a full summary of both the State's theory of the case and the defendant's. In that summary, the trial judge states, "The defendant retreated to his apartment . . ."; "Mike Wilson advanced in a menacing manner . . ." and "I tell you that there is evidence tending to show that the defendant acted in self-defense." While these phrases are not contained in the same paragraph as the instruction on self-defense, the instructions must be construed contextually and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978).

[5] The same rationale applies to defendant's third assignment of error. In summarizing the evidence, the trial judge erroneously stated that when Mike Wilson entered defendant's bedroom, "He saw James Lilley holding a gun pointed in her direction" (referring to Wilson's sister). All agree that there was no evidence presented at trial which showed that defendant had ever pointed the gun at Wilson's sister. This misstatement of fact, however, did not amount to prejudicial error. As noted above, an isolated statement in an otherwise substantially correct charge does not constitute prejudicial error. *State v. Gatling*, 275 N.C. 625, 170 S.E. 2d 593 (1969). The erroneous statement did not relate to a crucial element of the offense or of defendant's claim of self-defense. Additionally, the trial judge instructed that the jurors' own recollection of the evidence was to control. This instruction served to offset whatever prejudice may have resulted from the misstatement. Finally, defendant failed to point out the error to the trial judge when given an opportunity to do so before the jury retired. By failing to give the trial judge the opportunity to remedy the error, defendant effectively waived his right to assert this statement as error. *State v. Pratt*, 306 N.C. 673, 295 S.E. 2d 462 (1982).

[6] Defendant's fourth assignment of error is that the trial judge committed prejudicial error by failing to instruct the jury on the right of one to use force in self-defense without retreating when he is in his own home. Although defendant did not request such an instruction at trial, nor did he object to its omission, he asks us to consider it on appeal under the "plain error" rule, adopted in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) as an excep-

tion to North Carolina Rule of Appellate Procedure 10(b)(2). The exception provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Id.* at 660, 300 S.E. 2d at 378, *citing* Fed. R. Crim. P. 52(b). Even after the adoption of the "plain error" rule, " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. *Id.* at 661, 300 S.E. 2d at 378, *quoting Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed. 2d 203, 212 (1977).

In the case before us, the trial court should have included an instruction to the effect that the defendant had no duty to retreat when attacked in his own home. However, for the reasons set forth below, the failure to give such an instruction, in our view, falls short of the requirements of the "plain error" rule.

First, the rule allowing a person to stand his ground and not requiring him to retreat when attacked in his home applies only when the defendant is free from fault in bringing on the difficulty leading to the assault. *State v. Pearson*, 288 N.C. 34, 215 S.E. 2d 598 (1975). In this case, a reasonable juror could conclude that the defendant was not free from fault where there was evidence showing that defendant had hit the victim's sister; that defendant had earlier pointed a gun at the victim; that defendant had asked the victim to come over; that the victim heard the defendant and his sister quarrelling when he entered their apartment; and that defendant still had the gun in his hand when the victim entered the bedroom. This evidence is sufficient to support a conclusion that the defendant was not free from fault and, thus, could not avail himself of the general rule that one has no duty to retreat when attacked at home.

Second, there is conflicting evidence as to whether the victim actually "attacked" defendant. The victim testified that he had merely pushed the defendant to step in between his sister and the defendant. The defendant and his girlfriend testified that the victim "jumped on" defendant. Had the jury chosen to believe their testimony, defendant would likely have been acquitted. The jury apparently found the victim to be more credible. In the cases cited by the defendant supporting this assignment of error, the evidence was uncontroverted that the victim in each case had

made some sort of murderous assault on the defendant. Here, the jury, believing the testimony of the victim, found that there had been no violent attack by the victim on the defendant warranting the use of a deadly weapon. Even in one's own home, a person is not entitled to use excessive force to repel an attack. *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979). Whether excessive force was used is a question for the jury. *Id.* The jury in this case apparently reached the conclusion that defendant had used excessive force in responding to any assault by the victim, or even that there had been no assault by the victim. An instruction on the right of one to stand his ground and not retreat when attacked in his own home would not likely have changed the result in this case. For that reason, the failure to give such an instruction was not "plain error" and this assignment of error is overruled.

[7] Defendant's fifth and final argument is that the trial judge erred in failing to give an instruction on the right to defend one's habitation. Such an instruction is not supported by the evidence, however, and this defendant was not entitled to have the instruction given. The rules governing defense of habitation are designed to allow the occupants of a home to protect themselves and their home where they may not have an opportunity to see their assailant or ascertain his purpose. *McCombs, supra.* However, once the assailant has gained entry, the usual rules of self-defense replace the rules governing defense of habitation. *Id.* The defendant in this case, regardless of whose version of the incident is believed, was aware of the victim's presence and his purpose. Thus, only the normal rules of self-defense applied, and the defendant could not claim defense of habitation to justify shooting the victim.

In light of the facts of this case, the trial judge's instructions to the jury cannot be said to have prejudiced the defendant, nor affected the result. Having carefully reviewed the record and thoroughly considered all assignments of error, we find

No error.

Chief Judge HEDRICK concurs in the result.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that the trial judge committed "plain error" by failing to instruct the jury on the right of defendant to use force in self-defense without retreating because he was in his own home, I dissent. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). That the error prejudicially affected substantial rights of the defendant is buttressed by my belief that this is a close case on all issues, especially the issues involving whether defendant was the aggressor and the court's obvious misstatement that Mike Wilson, the victim, "saw James Lilley [the defendant] holding a gun pointed in her direction" (referring to Wilson's sister).

TRUSTEES OF THE GARDEN OF PRAYER BAPTIST CHURCH v. GERALDCO BUILDERS, INC., RUBY BYERS AND HER HUSBAND, JAMES A. BYERS, WILLIAM THOMAS, AND HIS WIFE, JANET G. THOMAS, WADDELL PEARSON AND GREENSBORO NATIONAL BANK

No. 8518SC402

(Filed 3 December 1985)

1. Judgments § 37.1— subrogation action—prior declaratory judgment not res judicata

A prior declaratory judgment was not *res judicata* in an action seeking the equitable remedy of subrogation to the extent that plaintiffs are legally obligated to pay on defendants' behalf amounts in excess of the amount the court in the earlier action determined to be due defendant builder under a construction contract where the subsequent action is dependent on facts unknown to plaintiffs and the court at the time of the prior judgment.

2. Subrogation § 1— equitable remedy of subrogation

Legal or equitable subrogation is an equitable remedy which arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable. The party in whose favor the right to subrogation exists is entitled to all of the remedies and security which the creditor had against the person whose debt was paid.

3. Subrogation § 2— equitable subrogation inapplicable to volunteers

The equitable remedy of subrogation may be invoked whenever the party claiming the benefit of subrogation pays the obligation of another for the purpose of protecting some real or supposed interest of his own but will not be applied in favor of a volunteer who discharges the debt of another.

4. Subrogation § 2— lien and construction loan payments on behalf of contractor not voluntary—right of subrogation

Where it was determined in a prior lawsuit that plaintiff church trustees owed defendant contractor a certain amount for construction of a church addition, plaintiff trustees agreed to disburse funds from the proceeds of a permanent loan on the building to repay defendant contractor's construction loan with the bank, and plaintiff trustees paid an amount to satisfy the bank construction loan and to discharge liens filed by subcontractors which exceeded the amount they owed defendant contractor, the trustees' payment of an amount to the lien claimants which exceeded the difference between the construction loan and the amount they owed defendant contractor was not voluntary because the trustees were obligated to pay the lien claimants from funds held by them and owed to defendant contractor before paying defendant's construction loan. Nor was their payment of the construction loan voluntary because they were obligated by contract to do so. Therefore, plaintiff trustees were entitled to be subrogated to all rights of the bank against defendant contractor for the amount they paid the bank in excess of the contract balance due to defendant contractor after satisfaction of the valid lien claims.

5. Subrogation § 1— subrogation to right to foreclose deed of trust—action insufficient to support lis pendens

An action seeking subrogation to rights of a bank to foreclose a deed of trust was insufficient to support a notice of lis pendens where the trustee in the deed of trust was not made a party to the action and the bank was voluntarily dismissed with prejudice.

APPEAL by defendants from *Walker, Hal H., Judge.* Judgment entered 12 December 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 October 1985.

Plaintiffs, the Trustees of the Garden of Prayer Baptist Church (hereinafter Trustees), brought this civil action to recover $14,277.66 from Geraldco Builders, Inc. (hereinafter Geraldco). Plaintiffs also seek to be subrogated to the rights of Greensboro National Bank (hereinafter GNB) to enforce certain guaranty agreements signed by the individual defendants and to the rights of GNB to foreclose on a deed of trust given GNB by defendants to secure repayment of a note. After answers were filed, plaintiffs submitted to a voluntary dismissal with prejudice as to GNB. Trustees and defendants filed cross-motions for summary judgment. The Trustees' motion for summary judgment was allowed and judgment was entered against Geraldco and the individual defendants, jointly and severally, in the amount of $14,277.66. Defendants appeal.

Smith, Patterson, Follin, Curtis, James and Harkavy by Norman B. Smith for plaintiff appellees.

Hunter, Hodgman, Greene & Donaldson by Richard M. Greene for defendant appellants.

MARTIN, Judge.

This action is the third in a series of lawsuits arising out of a contract between plaintiffs and defendant Geraldco for the construction of an addition to the Trustees' church. The contract price, including subsequent modifications, was $96,541.06. The Trustees had arranged permanent financing for the project, but were unable to arrange for a construction loan because Geraldco had no performance bond. Geraldco applied to GNB for a construction loan in the amount of $40,000.00. As an inducement for GNB to make the loan, the Trustees and the permanent lender agreed to disburse directly to GNB, at the time of closing the permanent loan upon completion of construction, funds sufficient to pay any outstanding balance due GNB in its loan to Geraldco. GNB made the $40,000 loan to Geraldco. The loan was secured by a deed of trust on Geraldco's property and, additionally, by guaranty agreements signed by the individual defendants.

After the addition was completed, in early September 1983, the Trustees refused to pay Geraldo the full amount of the contract price, claiming that Geraldco had materially breached the contract. On 24 October 1983 the Trustees filed a complaint (83CvD7533) seeking a declaratory judgment to determine "what amount of indebtedness [Trustees] have to [Geraldco], and what provisions are to be required to protect [Trustees] from lien claims of [Geraldco's] creditors . . . ." Judgment was entered in that action on 9 December 1983. The trial court found and concluded that Geraldco had materially breached the contract and that due to the breach, the amount due from the Trustees to Geraldco was only $70,906.06. The court also found that the Trustees had agreed to disburse to GNB from the proceeds of the permanent loan on the building, $40,000.00 to repay Geraldco's construction loan. In addition, the court found that six of Geraldco's suppliers or subcontractors were unpaid and had filed liens totalling $27,278.12. The court entered judgment as follows:

1. Plaintiffs are justly indebted to defendant in the amount of $70,906.06.

2. From the foregoing amount, plaintiffs are entitled to disburse directly to Greensboro National Bank the sum of $40,000, and directly to all lien claimants of record the respective amounts due by virtue of their liens on the construction project in question.

There was no appeal from the judgment, which was entered prior to the expiration of the period within which Geraldco's suppliers and subcontractors could file labor and material liens pursuant to G.S. 44A-12(b).

On 6 December 1983 (three days before the judgment was entered in 83CvD7533), GNB filed an action (83CvS8501) against Geraldco and Ruby Byers, James A. Byers, William Thomas, Janet G. Thomas and Waddell Pearson, alleging, *inter alia*, that Geraldco had failed to pay the indebtedness evidenced by the $40,000.00 note when it became due on 30 August 1983, and that the individual defendants, who were guarantors, had likewise refused to pay after demand had been made on them. The Trustees moved to be permitted to intervene pursuant to G.S. 1A-1, Rule 24, and filed a notice of *lis pendens* with respect to the property of Geraldco which was subject to the deed of trust securing Geraldco's note to GNB. The Trustees' motion to intervene was denied and the notice of *lis pendens* was cancelled. On 29 March 1984, judgment was entered in favor of GNB against Geraldco and the individual defendants in the amount of $45,295.34.

On the same day, the Trustees filed this action against Geraldco, the individual defendants and GNB. The Trustees alleged that pursuant to the judgment in the first lawsuit 83CvD7533, it was determined that they owed Geraldco $70,906.06; that in order to discharge all liens filed by creditors of Geraldco the Trustees were required to pay $41,192.88; and that by reason of the defendants' failure to satisfy Geraldco's note to GNB, the Trustees were required to pay GNB the sum of $43,990.84. They alleged that the total amount of payments made by them on behalf of Geraldco and the individual defendants exceeded the amount which they owed Geraldco by $14,277.66. Therefore, the Trustees alleged, they are entitled to be subrogat-

ed to all rights of GNB against Geraldco and the individual defendants to the extent of the overpayment. The Trustees prayed for judgment against Geraldco and the individual defendants, jointly and severally, in the amount of $14,277.66 and for the right to foreclose on the deed of trust securing Geraldco's note to GNB. The Trustees also filed notice of *lis pendens* asserting an interest in the property described in the deed of trust.

Defendants answered, alleging that the declaratory judgment action (83CvD7533) was *res judicata* as to all claims which the Trustees had against Geraldco. They also filed a motion to cancel the notice of *lis pendens*, which was allowed.

Both sides moved for summary judgment. At the hearing on the motions for summary judgment, the parties stipulated that Geraldco's subcontractors and material suppliers were paid $36,935.02 out of the proceeds of the Trustees' permanent loan for work done and materials provided on the construction project. The Trustees also presented evidence that they had paid $44,236.26 to GNB in payment of principal and accrued interest, but exclusive of attorneys' fees and court costs, due on Geraldco's note. The trial court entered summary judgment for the Trustees against Geraldco and the individual defendants, jointly and severally, in the amount of $14,277.66. The judgment did not address the Trustees' claim for foreclosure on the deed of trust held by GNB.

[1] Defendants initially argue that the Trustees' claim in this action is barred by the doctrine of *res judicata*. A final adjudication of an action, on its merits, by a court of competent jurisdiction is conclusive, as to the parties, of the issues raised therein and the doctrine of *res judicata* bars subsequent actions involving the same issues and parties and those in privity with them. *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 306 S.E. 2d 513 (1983). Strict identity of issues is not required; the doctrine of *res judicata* also applies to issues which could have been, but were not, raised in the prior action. *Id.* However, where subsequent to the rendition of judgment in the prior action, new facts have occurred which may alter the legal rights of the parties, the former judgment will not operate as a bar to the later action. *Flynt v. Flynt*, 237 N.C. 754, 75 S.E. 2d 901 (1953); *Dawson v. Wood*, 177 N.C. 158, 98 S.E. 459 (1919).

Applying these principles to the case before us, we hold that the present action is not barred by the declaratory judgment in 83CvD7533. It is true that both actions arose out of the relationship created by the construction contract between the Trustees and Geraldco. The issues before the court in the prior action were (1) whether Geraldco had constructed the building in conformity with the plans and specifications, (2) what amount was owed by the Trustees to Geraldco for the construction and (3) what provision was to be made by the Trustees to protect themselves from liens filed by Geraldco's subcontractors. The court determined that Geraldco had breached the contract and, in consequence thereof, the Trustees were not obligated to pay the full contract price. As to the final issue, the court determined that liens had been filed and that the Trustees had also obligated themselves to pay GNB any outstanding indebtedness owed GNB by Geraldco by reason of the $40,000 construction loan. Based upon the evidence before the court, the total amount due the lien claimants as of the date of the declaratory judgment, together with the principal amount of GNB's loan to Geraldco, was less than the amount due from the Trustees to Geraldco. The court authorized the Trustees to pay GNB and the lien claimants directly.

In the present action, the Trustees allege that subsequent to the entry of the earlier judgment, but before the expiration of the time within which Geraldco's subcontractors could file liens, additional liens were filed. As a result, they allege that they were obligated to pay, in satisfaction of the claims of lien creditors and GNB, an amount in excess of that owed by them to Geraldco. The issue before the court in the second action, therefore, is whether the Trustees are entitled to the equitable remedy of subrogation to the extent that they were legally obligated to pay, on behalf of defendants, amounts in excess of that which the court in the earlier action had determined to be due Geraldco. The answer to the issue depends, in part, on facts unknown to the Trustees and the court at the time of the prior judgment. Since the issue and the facts upon which it arises were not before the court in the earlier action, the declaratory judgment in that action does not bar the present action.

[2, 3] Having determined that the present action is not barred by *res judicata*, we must next consider whether, in the absence of an assignment of rights by GNB, the plaintiffs are entitled to

reimbursement from defendants on the basis of legal subrogation. Legal subrogation, also referred to as equitable subrogation, is an equitable remedy which arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable. *Beam v. Wright*, 224 N.C. 677, 32 S.E. 2d 213 (1944). Its purpose is "to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it." *Id.* at 683, 32 S.E. 2d at 218. Where the equitable right to subrogation arises, the party in whose favor it exists is entitled to all of the remedies and security which the creditor had against the person whose debt was paid. 73 Am. Jur. 2d *Subrogation* § 3, at 600 (1974). The remedy is highly favored and liberally applied; it may be invoked whenever the party claiming the benefit of subrogation pays the obligation of another for the purpose of protecting some real or supposed interest of his own. *Boney, Insurance Commissioner v. Insurance Co.*, 213 N.C. 563, 197 S.E. 122 (1938). However, the doctrine of subrogation will not be applied in favor of a volunteer, who, being under no legal or moral obligation and having no right or interest of his own to protect, discharges the debt of another. *Id.*

[4] Defendants contend that the Trustees are not entitled to the benefit of subrogation because they had no obligation to pay GNB and the lien claimants any more than the contract price due Geraldco as determined by the declaratory judgment. They argue that since the funds remaining in the hands of the Trustees, after payment of Geraldco's note to GNB, were insufficient to pay all of the lien claimants, then the lien claimants were entitled only to share the remaining funds on a pro rata basis. According to defendants, any payments by the Trustees in excess of the balance due Geraldco were purely voluntary. We disagree.

Defendants' argument is flawed in that it incorrectly assumes that the lien claimants were entitled to payment only from those funds remaining in the hands of the Trustees after payment of the GNB note. Chapter 44A, Article 2, Part 2 of the North Carolina General Statutes provides for liens of laborers and materialmen dealing with a contractor who contracts with an owner to improve real property. Upon compliance with the notice provisions of the statutes, subcontractors are entitled to a lien upon funds owed to the contractor by the owner, G.S. 44A-18(1), up to the total amount of the lien claims for which notice is given.

G.S. 44A-20(a). In the event the funds owed by the owner to the contractor are insufficient to satisfy the full amount of the valid lien claims, the lien claimants are entitled to share the funds on a pro rata basis. G.S. 44A-21. However, labor and material liens which have been properly perfected *have priority over all other claims* created in the funds by the person against whose interest the lien is asserted. G.S. 44A-22. Thus, the Trustees were obligated to discharge the lien claimants from the funds held by them and owed to Geraldco before paying Geraldco's note to GNB. Since the amount due from the Trustees to Geraldco was more than the aggregate amount of lien claims, each of the claimants was entitled to full payment. Thus, the Trustees, being legally obligated to pay the lien claimants in full, were not acting as mere volunteers in satisfying Geraldco's obligations to its subcontractors.

Neither can the Trustees be held to have been acting as volunteers in paying Geraldco's obligation to GNB. The Trustees' payment to GNB was made as a result of their promise to permit disbursement, from the proceeds of their permanent loan, of an amount sufficient to "pay all of the outstanding indebtedness which [Geraldco] owes [GNB] arising out of the said $40,000 construction loan." A payment made on behalf of another, under either a legal or moral obligation to pay, is not a voluntary payment so as to defeat one's claim to equitable subrogation. *Boney, Insurance Commissioner v. Insurance Co., supra.*

To the extent that the Trustees paid GNB with funds which the Trustees owed Geraldco as a part of their primary obligation to pay for the construction, clearly the Trustees are not entitled to be subrogated to the rights of GNB. Payments made with the debtor's money are considered payments by the debtor. 60 Am. Jur. 2d *Payment* § 70, at 659 (1974). However, to the extent that the Trustees paid GNB an amount in excess of that which they owed Geraldco, the Trustees paid a debt for which Geraldco, as maker of the note, and the individual defendants, as guarantors, were liable. The Trustees, therefore, are entitled to reimbursement from Geraldco and to be subrogated to GNB's rights against Geraldco and the individual defendants, as guarantors on Geraldco's note, for any amount which the Trustees paid GNB which was in excess of the contract balance due from the Trustees to Geraldco after satisfaction of the valid lien claims.

The parties stipulated that the Trustees paid $36,935.02 to lien claimants, however the record before us discloses no evidence, nor any stipulation, that all of these claimants gave timely notice of their claims of lien so that the Trustees were legally obligated to pay them. We are therefore unable to determine the amount by which the Trustees' payment to GNB exceeded the balance of the contract price due Geraldco from the Trustees, after satisfaction of *valid* lien claims. Moreover, the trial court entered judgment for the Trustees in the amount of $14,277.66, while the evidence in the record before us discloses that the total funds paid by the Trustees on behalf of Geraldco exceeded the amount due on the contract by only $10,265.22. Accordingly, although we conclude that the Trustees were entitled to summary judgment establishing their right to recover of the defendants by way of subrogation, we must vacate that portion of the judgment setting the amount due and remand this case to the Superior Court of Guilford County for further proceedings to determine the amount which the Trustees are entitled to recover of defendants.

[5] By cross-assignment of error, the Trustees contend that the trial court erred in cancelling the notice of *lis pendens*, filed simultaneously with their complaint in the action. They argue that since they were subrogated to GNB's rights to security under the deed of trust securing Geraldco's note and requested the right to foreclose thereon, they were entitled, pursuant to G.S. 1-116, to protect their interest in the property subject to the deed of trust by filing a notice of *lis pendens*. We find, however, that the complaint was insufficient to support the Trustees' claim to a right of foreclosure because the trustee in the deed of trust was not made a party to the action. In addition, the Trustees submitted to a voluntary dismissal with prejudice as to GNB, the holder of the note secured by the deed of trust. It is well established that a mortgagee or trustee in a deed of trust is a necessary party to an action for foreclosure. *Underwood v. Otwell*, 269 N.C. 571, 153 S.E. 2d 40 (1967). Plaintiffs' cross-assignment of error is overruled.

Affirmed in part; vacated in part, and

Remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

WARREN G. NEAL, PLAINTIFF v. LESLIE FAY, INC. AND/OR BURLINGTON INDUSTRIES, AND/OR DORA YARN MILL, DEFENDANT, AND AMERICAN MOTORISTS INSURANCE COMPANY AND/OR LIBERTY MUTUAL INSURANCE COMPANY, AND/OR STANDARD FIRE INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8410IC1083

(Filed 3 December 1985)

1. **Master and Servant § 68— workers' compensation—recovery for chronic obstructive lung disease**

When exposure to cotton dust is an insignificant causal factor in, or does not significantly contribute to, the development of a disabling lung disease, it is not an occupational disease within the purview of N.C.G.S. 97-53(13) and no compensation is due therefor; but when the exposure to cotton dust significantly contributed to, or is a significant causal factor in, the development of a disabling lung disease, it is an occupational disease and compensation for the full extent of the disability is due.

2. **Master and Servant § 68— workers' compensation—chronic bronchitis as occupational disease—insufficient findings and conclusions**

Plaintiff's claim to recover workers' compensation for chronic obstructive lung disease is remanded for redetermination upon appropriate findings of fact and conclusions of law where the Industrial Commission made inconsistent findings concerning plaintiff's last injurious exposure to cotton dust, the Commission's findings as to occupational exposure and its effects were incomplete, and the Commission made contradictory conclusions of law that plaintiff has an occupational disease, chronic bronchitis, which was in part precipitated, aggravated and accelerated by his employment in the cotton textile industry and that plaintiff is not temporarily or permanently disabled, in whole or in part, by reason of his occupational disease.

Judge EAGLES concurs in the result.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 4 April 1984. Heard in the Court of Appeals 8 May 1985.

Plaintiff's claim is for a disabling lung disease allegedly caused by his exposure to cotton dust while subject to the Workers' Compensation Act. After various hearings Deputy Commissioner Linda Stephens entered an opinion and award denying plaintiff's claim, though it was concluded that part of his disabling chronic obstructive lung disease was caused by his employment in the textile industry. Upon appeal the Deputy Commissioner's findings and conclusions were adopted by the Full Commission and the decision denying relief was affirmed.

The record and the findings show that: When the claim was filed plaintiff was fifty-nine years old, has a ninth grade education, and no training or job skills except those of a textile industry worker for more than thirty years. From 17 January 1949 to 12 April 1968 he worked in the spinning and carding departments of Dora Yarn Mill where only cotton materials and cotton blends were processed at first and only synthetic materials thereafter. From 22 April 1968 until 28 March 1969 he worked as a spinning doffer at Burlington Industries, where cotton blends were processed part of the time and synthetics the rest. And from 31 May 1969 until 4 January 1980, when he became totally and permanently disabled, he worked in the finishing department of Leslie Fay, Inc., either dry cleaning or finishing knitted and woven cloth, some of which was cotton, some wool, some synthetic, and some blends. When he operated the dry cleaning machine he had to fill it periodically with 20 to 30 gallons of perchloroethylene, a chemical known to produce nervous depression, liver impairment and irritation of the skin, eyes, nose and throat. He first experienced breathing problems, shortness of breath and chest tightness in the 1960's while working at Dora Mill and he developed a cough while working at Burlington Industries. His respiratory difficulties worsened at Leslie Fay where he experienced chest tightness, pain, wheezing, shortness of breath and a productive cough every day, because of which he had to quit working on 4 January 1980. At that time plaintiff was totally and permanently disabled because of chronic obstructive pulmonary disease with components of chronic bronchitis and emphysema. The Commission found that at least one-half of his impairment is due to emphysema and that the emphysema "is due exclusively to his cigarette smoking." Plaintiff, who started smoking in the late 1950's, testified that he stopped smoking in 1968, but other evi-

dence indicated that he did not stop until 1980. The Commission also found that his "exposure to cotton dust" caused part of his chronic bronchitis, smoking caused the rest, and the portion caused by cigarette smoking "was aggravated and accelerated by his exposure to cotton dust." Based on these and other findings the Commission concluded that plaintiff's chronic bronchitis was an occupational disease pursuant to G.S. 97-53(13), but that no part of his disability was due to it.

Frederick R. Stann for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by Michael K. Gordon, for defendant appellees Leslie Fay, Inc. and American Motorists Insurance Company.

Hedrick, Eatman, Gardner & Kincheloe, by J. A. Gardner, III and Hatcher B. Kincheloe, for defendant appellees Burlington Industries and Liberty Mutual Insurance Company.

Underwood, Kinsey, Northey & Linn, by Kenneth S. Cannaday and John H. Northey III, for defendant appellees Dora Yarn Mill and Standard Fire Insurance Company.

PHILLIPS, Judge.

Since, as the trier of fact, the Industrial Commission has the same prerogatives as a jury in weighing evidence, appeals from the Commission often raise but two legal questions: Are the Commission's findings of fact supported by competent evidence? And do the findings support the Commission's conclusions of law and decision? 8 Strong's N.C. Index 3d, *Master and Servant* Sec. 96 (1977); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). Though this appeal raises these questions they cannot be determined because the Commission's findings of fact and conclusions of law are inconsistent and contradictory, some of which support and some of which undermine the decision made, and the findings are also incomplete because the proper legal standard was not applied to the evidence. The contradictory findings are not in regard to plaintiff being totally and permanently disabled due to an impaired and diseased breathing system; or in regard to the impairment being caused by chronic obstructive pulmonary disease with components of chronic bronchitis and emphysema; or in regard to at least one-half of the impairment being due to em-

physema, which is "due exclusively to his cigarette smoking"; or in regard to plaintiff being exposed to cotton dust when he worked for Dora Mill and Burlington Industries, but not when he worked at Leslie Fay. These findings, each supported by evidence, are all of a piece and thus have been set at rest. The contradictions are in the findings and conclusions concerning the other component of plaintiff's chronic obstructive pulmonary disease, chronic bronchitis, and its causal relationship to his employment.

[1, 2] After finding that plaintiff was "exposed to respirable cotton dust in his employment with Dora Yarn Mill and Burlington Industries," the Commission found on the one hand that his "chronic bronchitis is due in part to his occupational exposure to cotton dust . . . [which] was an etiologic factor in the incipience and development of such disease process," and that the other part caused by cigarette smoking "was aggravated and accelerated by his exposure to cotton dust"; but found on the other hand that plaintiff's exposure to cotton blends or dust at Burlington Industries and Dora Yarn Mill "did not augment his lung disease process to any degree." Both of these findings cannot be. If part of plaintiff's chronic bronchitis, a component of his chronic obstructive pulmonary disease, is due to "occupational exposure to cotton dust" and cotton dust was a factor in the "incipience and development of such disease process," it necessarily follows that the disease's development was augmented by his exposure to cotton dust while in the employment of Burlington Industries and Dora Yarn Mill, as those are the only places where plaintiff was exposed to cotton dust, according to the Commission's findings. The Commission's findings as to occupational exposure and its effects are also incomplete, because if any part of plaintiff's chronic obstructive lung disease was occupationally caused or aggravated, as the findings state, the Commission was required to determine whether "the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E. 2d 359, 369-70 (1983). For *Rutledge* (decided after the Deputy Commissioner's opinion and award in this case, it should be said) lays down the following rule for determining chronic obstructive lung disabilities which, as in this case according to the Commission's findings, are caused in part by occupational exposure to cot-

ton dust and in part by some other cause or causes unrelated to the employment: When exposure to cotton dust is an insignificant causal factor in, or does not significantly contribute to, the development of the disabling lung disease, it is not an occupational disease within the purview of G.S. 97-53(13) and no compensation is due therefor; but when the exposure to cotton dust significantly contributes to, or is a significant causal factor in, the development of a disabling lung disease it is an occupational disease and compensation for the full extent of the disability is due. Measured against this rule or standard the Commission's two conclusions of law in this case are also contradictory and inconsistent, as one is that plaintiff has an occupational disease, chronic bronchitis, which was in part "precipitated and aggravated and accelerated" by his employment in the cotton textile industry, while the other is that plaintiff "is not disabled, in whole or in part, temporarily or permanently, by reason of his occupational disease." Under the rule of *Rutledge* if cotton dust significantly contributed to the development of plaintiff's disabling lung condition he has an occupational disease for which compensation is due, but if cotton dust did not significantly contribute to the development of his lung impairment he has no occupational disease and compensation is not due. Thus, the opinion and award of the Industrial Commission must be and is vacated and the case is remanded for re-determination upon appropriate findings of fact and conclusions of law, made in accordance with the provisions of this opinion and the rule laid down in *Rutledge v. Tultex Corp., supra* as above and hereafter interpreted.

If, upon remand, the Commission concludes that plaintiff has an occupational disease within the purview of the *Rutledge* rule, it will then have to determine in which employment plaintiff was "last injuriously exposed to the hazards of such disease," G.S. 97-57; *Rutledge v. Tultex Corp., supra; Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 170, 22 S.E. 2d 275, 279 (1942), and award compensation accordingly. In chronic obstructive lung disease cases the last injurious exposure to "the hazards of such disease" is not necessarily limited to cotton dust; it can be to other conditions that enhance or augment the disease process and the worker's condition to any extent. In *Caulder v. Waverly Mills*, 67 N.C. App. 739, 314 S.E. 2d 4 (1984), *aff'd*, 314 N.C. 70, 331 S.E. 2d 646 (1985), the last injurious exposure to the hazards of plaintiff's

chronic obstructive lung disease was held to be dust from synthetic materials processed in the defendant's mill. Thus, if such a determination has to be made, and the evidence warrants and the Commission is so inclined, it could be found that plaintiff's last injurious exposure to the hazards of his chronic obstructive lung disease was to cotton or synthetics dust in the Dora Yarn Mill, to cotton or synthetics dust in Burlington Industries' mill, or to dry cleaning fluid or possibly other substances in Leslie Fay. As noted in *Rutledge* and other decisions, it is not necessary that the last injurious exposure to the hazards of chronic obstructive lung disease either caused or significantly contributed to the occupational disease; it is enough if the exposure augmented the disease to any extent whatever.

The Commission's conclusion that plaintiff is not disabled by reason of the occupational disease that it found appears to be based, in part at least, upon its findings that the impairment not resulting from emphysema was "due to the progression of his lung disease between 1969 and 1980," and that the "progression of his lung disease during such period of time is due to factors other than either of his occupational exposures." As we understand the *Rutledge* rule as it applies to plaintiff's chronic obstructive lung disease, the disease's progression is not the test of compensability; rather, the test is whether the occupational exposure significantly contributed to the disabling disease's development. Since that test has not been applied to the evidence and little, if any, of the testimony presented was addressed to it, upon remand if any of the parties so desire evidence bearing thereon should be received, along with evidence on any other subject material to the case that the Commission deems appropriate.

Vacated and remanded.

Judge BECTON concurs.

Judge EAGLES concurs in the result.

STATE OF NORTH CAROLINA v. ELMORE PROCTOR GRAINGER

No. 8511SC278

(Filed 3 December 1985)

1. **Narcotics § 3.1— SBI agent's working definition of marijuana—competency of testimony**

An SBI agent was properly permitted to testify as to his working definition of marijuana where there was no indication in the jury instructions that the agent's working definition could serve as a basis for defendant's conviction and the jury was specifically instructed on the definition of marijuana under N.C.G.S. 90-87(16).

2. **Narcotics § 4— trafficking in marijuana—sufficient evidence of weight**

The State presented sufficient evidence of the weight of marijuana to support submission of an issue as to defendant's guilt of trafficking by felonious possession of 2,000 pounds or more but less than 10,000 pounds of marijuana where the evidence tended to show that marijuana plants cut from fields on defendant's farm were loaded onto three trucks; one truck was already one-fourth loaded with plastic pipes and marijuana plants cut from a field not on defendant's farm; mature stalks constituted one-fourth of the weight of the marijuana plants; and the weight of marijuana on the two trucks loaded exclusively with marijuana from defendant's farm exceeded 2,000 pounds when one-fourth of the weight is factored out to eliminate the weight of mature stalks. N.C.G.S. 90-95(h)(1)(c).

3. **Narcotics § 4.3— constructive possession of marijuana—sufficient evidence**

The jury was not improperly permitted to infer that defendant had constructive possession of marijuana solely because the marijuana was found growing on a farm which defendant controlled where other evidence presented by the State tended to show that defendant distributed marijuana to his farm workers during their lunch breaks; defendant paid a farm worker to put marijuana stalks in sheets of tobacco and tie them up; and another farm worker assisted defendant in planting the marijuana crop and was paid by defendant to harvest the crop and haul it to South Carolina.

APPEAL by defendant from *Martin, John C., Judge.* Judgment entered 10 February 1984 in Superior Court, HARNETT County. Heard in the Court of Appeals 15 October 1985.

On 31 August 1982 local Harnett County authorities were alerted by the SBI that several fields of marijuana had been spotted in southern Harnett County. The local authorities investigated and found that one of the larger fields was located on defendant's farm. Three trucks were dispatched to haul away the marijuana plants that authorities were cutting down. One truck

was already loaded with 1,280 marijuana plants from another field and some plastic pipes. The three trucks were loaded with plants and weighed on scales at a nearby fertilizer distributor. The trucks had a combined weight of thirty-seven thousand three hundred ten (37,310) pounds. The combined weight of the empty trucks was twenty-four thousand nine hundred (24,900) pounds.

On 1 August 1983, a bill of indictment was returned against the defendant for trafficking by: (1) felonious manufacture of 2,000 pounds or more but less than 10,000 pounds of marijuana, and (2) felonious possession of 2,000 pounds or more but less than 10,000 pounds of marijuana. G.S. 90-95(h)(1)(c). Defendant's motion to dismiss at the close of all the evidence was denied. The court, *inter alia*, instructed the jury on constructive possession and on the issue of the weight of the marijuana. The jury returned a verdict of not guilty to the charge of trafficking by felonious manufacture of 2,000 pounds or more but less than 10,000 pounds of marijuana. The jury returned a guilty verdict on the charge of trafficking by possession of 2,000 pounds or more but less than 10,000 pounds of marijuana. G.S. 90-95(h)(1)(c). Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard Carlton, for the State.

Bryan, Jones, Johnson & Snow, by Robert Bryan and Dwight W. Snow, for defendant appellant.

JOHNSON, Judge.

[1] Defendant contends the trial court erred by allowing an SBI agent to testify about what part of the plant is marijuana. The SBI agent stated his familiarity with the statutory definition of marijuana, and then proceeded to give his definition. The agent testified that "[a]ny part of a growing plant, that is a group of marijuana and or a group of plant material which is identified to be marijuana if it is a plant at the time it is submitted or obtained by the submitting officer, it is considered by *me* to be marijuana." (Emphasis ours.) The agent specifically stated that this was his working definition of marijuana. We find no error in allowing the SBI agent's testimony. The agent did not specifically include mature stalks in his definition of marijuana. Nor was there any indication in the jury instructions that this lab expert's working definition could serve as a basis for defendant's convic-

tion. Moreover, the jury was specifically instructed that pursuant to G.S. 90-87(16), mature stalks were not considered to be marijuana.

[2] Defendant contends the court erred in its denial of defendant's motion to dismiss at the close of all the evidence. Defendant argues that the evidence regarding the essential element of weight of the marijuana was insufficient to support a conviction. In considering motions for dismissal the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom, disregarding defendant's evidence. *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981); *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). The function of a trial judge when passing on a motion to dismiss is to determine if a reasonable inference of defendant's guilt of the crime may be drawn from the evidence. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

Viewing the evidence in the light most favorable to the State we find that the evidence tended to show the following: Two areas of marijuana were located on defendant's farm. Approximately 2,921 marijuana plants were cut from these areas and stacked. The plants were loaded onto three trucks. One truck, a blue two-ton truck, was already one-quarter loaded with plastic pipes and one thousand two hundred eighty (1,280) marijuana plants cut from a field that was not on defendant's farm. However, the marijuana plants loaded onto a grey pickup truck and a red GMC two-ton truck were cut exclusively from a field on defendant's farm. The three loaded trucks had a combined weight of 37,310 pounds. The combined weight of the three trucks without the plastic pipes and marijuana plants was 24,900 pounds. This was 12,410 pounds less than the loaded trucks. The mature stalks of the marijuana plants would constitute one-quarter of their poundage.

The reasonable inference from the State's evidence is that the two trucks loaded exclusively with the marijuana plants cut from the field on defendant's farm exceed the 2,000 pounds for a violation of G.S. 90-95(h)(1)(c). The blue two-ton truck had 1,280 marijuana plants cut from a field not on the Grainger farm. The tare weight of the blue two-ton truck was 9,560 pounds. The red two-ton GMC truck had a tare weight of 11,090 pounds. The com-

bined tare weight of these two trucks was 20,650 pounds. The combined weight of these two trucks with their loads was 32,530 pounds.

The difference between the combined loaded weight of the two trucks and their combined tare weight is 11,880 pounds. Even when viewing the evidence in the light most favorable to defendant, by taking one-half this weight to represent the weight of the load on the blue two-ton truck and subtracting that from 11,880 pounds leaves 5,940. This figure would definitely eliminate any wrongful inclusion of the plastic pipe and the 1,280 plants cut from a field not owned by defendant. This is particularly true since approximately three-quarters of the marijuana plants loaded on the blue two-ton truck were cut from the field on defendant's farm. Testimony by the State's witness was that the mature stalks constituted one-quarter of the weight of the marijuana plants. Even taking that into consideration, the red two-ton GMC truck loaded with approximately 5,940 pounds of marijuana plants cut exclusively from fields on defendant's farm would equal approximately 4,455 pounds of marijuana as defined by G.S. 90-87 (16). The weight of the marijuana on this one truck alone is over twice the 2,000 pounds specified in G.S. 90-95(h)(1)(c).

The tare weight of the grey pickup truck was 4,250 pounds. This truck had a weight of 4,780 pounds when loaded with marijuana plants cut exclusively from defendant's farm. The 530 pound difference represents the weight of the marijuana plants. When one-quarter of that weight is factored out to eliminate the weight of the mature stalks, there is an additional 375 pounds of marijuana that may be added to the 4,455 pounds of marijuana cut from the field on defendant's farm and loaded on the red two-ton GMC truck. This represents a total of 4,830 pounds of marijuana as defined by G.S. 90-87(16). This amount of marijuana cut from a field on defendant's farm clearly exceeds the 2,000 pounds specified in G.S. 90-95(h)(1)(c).

In an analogous case, this Court has held that the proof of weight becomes more critical as the State's evidence of weight approaches the statutory minimum for a violation of G.S. 90-95 (h)(1)(c). *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163 (1982). In *Anderson*, this Court held that the burden was on defendant to show that enough of the 2,700 pounds of material

seized did not qualify as marijuana. In the case *sub judice*, defendant has not shown that enough of the material seized did not qualify as marijuana. The trial judge was correct in allowing the case to go to the jury.

Defendant contends that the trial court committed plain error in its charge to the jury on constructive possession. There was no objection by defendant to the jury instructions. Rule 10(b)(2), N.C. Rules App. P. However, despite defendant's failure to specifically object to the trial court's constructive possession instruction, we have reviewed the entire jury instruction under the plain error rule. *State v. Odum*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Plain error in the context of jury instructions is when "the instructional mistake had a probable impact on the jury's finding that defendant was guilty." *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 447 U.S. 927, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982). If this occurred such a plain error would deprive defendant of his fundamental right to a fair trial. *State v. Odum, supra.* After reviewing the entire jury instruction we find the instructions were without error.

Prior to the instructions on constructive possession the judge instructed the jury to weigh all the evidence and if they were not convinced beyond a reasonable doubt then they must find defendant not guilty.

The charge to the jury on constructive possession was as follows:

> Now a person has constructive possession of marijuana if he does not have it on his person but is aware of its presence, and has either by himself or together with others both the power and intent to control its disposition or use. Now a person's awareness of the presence of marijuana and his power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances. If you find beyond a reasonable doubt that marijuana was found on the defendant's farm and that the defendant exercised control over those premises, whether or not he owned them, this would be a circumstance from which you may infer, but are not required to infer, that the defendant was aware of the presence of the marijuana and had the power and intent to control its disposition or use.

This jury instruction comports with the accepted definition of constructive possession as enunciated in *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.

Id. at 12, 187 S.E. 2d at 714.

[3] Defendant contends that the jury was allowed to make an inference sufficient to find defendant guilty of knowingly possessing, solely because the marijuana was found on a farm which he controlled. We disagree. There were other circumstances from which a jury could reasonably infer defendant knew marijuana was on his farm. The State's evidence tended to show that defendant distributed marijuana to his farm workers during their lunch breaks; a farm worker testified defendant paid him to put marijuana stalks in sheets of tobacco and tie them up; another farm worker testified that he assisted defendant in planting the marijuana crop, and that defendant has paid him to harvest the marijuana crop and haul it to South Carolina.

In the judge's recapitulation of the evidence a reference was made to the fact that the land was not posted and people hunted on the lands. Viewing the entire instruction as a whole we find that the jury was properly instructed that they could infer constructive possession, but were not required to make that inference.

After the jury returned its verdict and before the entry of judgment defendant made a motion to dismiss pursuant to G.S. 15A-1227(3) on the ground that the evidence was insufficient to sustain a conviction. As discussed above we find that the evidence was sufficient to take the case to the jury and to sustain a conviction.

By his final assignment of error, defendant contends the jury returned inconsistent verdicts. During oral argument defendant

abandoned this issue on appeal and therefore we do not address it.

Defendant received a trial free of prejudicial error.

No error.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RONNIE D. PULLIAM

No. 8515SC404

(Filed 3 December 1985)

1. **Narcotics § 4.2— possession of LSD with intent to sell or deliver—sufficient evidence**

Defendant's motion to dismiss the charge of possession of LSD with intent to sell or deliver was properly denied where there was testimony that defendant pulled a large bag of pills from his back pocket, counted out twenty-five of them and gave them to the witness, and the pills were later identified as LSD. Even though the witness was a participant in the transaction and received a favorable plea bargain in exchange for his testimony, matters relating to the credibility of the witness were for the jury to decide.

2. **Narcotics § 5— sale or delivery of LSD—disjunctive verdict inherently ambiguous**

A verdict of guilty of sale or delivery of LSD was inherently ambiguous and fatally defective where the evidence was sufficient to go to the jury on delivery but there was insufficient evidence of the sale.

Chief Judge HEDRICK concurs in part and dissents in part.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 1 August 1984 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 21 October 1985.

Defendant was indicted for conspiracy to sell and deliver Lysergic Acid Diethylamide (LSD), possession of a controlled substance (LSD) with the intent to sell or deliver and sale or delivery of LSD. LSD is a Schedule I controlled substance under G.S. 90-89.

The evidence for the State showed that on 9 February 1983, Martha Anne Walker, an undercover agent for the State Bureau

of Investigation, was taken by a confidential informant to the home of Samuel A. "Rock" Cobb for the purpose of purchasing LSD. Cobb told Agent Walker that he did not have any "acid" but that he knew where she could find some. He rode with Agent Walker and the informant, directing them to defendant's trailer. Cobb testified that he went inside the trailer and asked the defendant, who he said was "always holding acid," for twenty-five hits of acid. Cobb's testimony conflicted as to who he told defendant the acid was for. Defendant pulled a large plastic bag from his back pocket and counted out the number requested and handed them to Cobb in a small bag. Chris Nichols, a friend of defendant, then accompanied Cobb back out to Agent Walker's car in order to collect the amount owed, which was said to be $62.25. Agent Walker did not have the exact amount owed and gave Nichols $80.25. A dispute later developed about the change due. Agent Walker went inside and was directed by Nichols to the back bedroom of the trailer.

When she walked into the bedroom, she saw several men and three women sitting around the bedroom. The men were playing cards. Defendant was closest to the door and Agent Walker addressed herself to him. She complained that there was a dispute as to how much money she still owed for the acid. Defendant replied either "Poor you" or "Who're you?" Walker indicated her willingness to work out the dispute, but defendant said "Forget it" or "It's okay." Walker testified that defendant appeared aware at all times of the transaction to which she was referring.

Defendant denied knowledge of the transaction and contended that only Cobb and Nichols were involved in the deal. Defendant did not testify, but did present three witnesses who had been in the bedroom playing cards. All three testified that they never saw defendant give Cobb anything and that defendant had not indicated he knew who Walker was or what she was doing there.

At the close of the State's evidence, the trial judge granted defendant's motion to dismiss the conspiracy charge. The motion was denied as to the other charges. Defendant renewed his motion at the close of all the evidence. The motion was denied and the charges were submitted to the jury, which returned guilty verdicts as to both. Defendant was sentenced to the presumptive term of three years for each offense, to run consecutively. Defend-

ant appeals the denial of his motion to dismiss the charges at the close of all the evidence.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Charles V. Bell for the defendant appellant.

PARKER, Judge.

Defendant's only assignment of error is the denial of his motion to dismiss, at the close of all the evidence, the charges of possession of LSD with intent to sell or deliver and sale or delivery of LSD. The motion to dismiss challenges the sufficiency of the evidence and must be granted unless there is "substantial evidence of all material elements of the offense in order to create a jury question on defendant's guilt or innocence." *State v. Locklear*, 304 N.C. 534, 538, 284 S.E. 2d 500, 502 (1981). When ruling on a motion to dismiss, the court is required to consider the evidence in the light most favorable to the State and every reasonable inference which can be drawn from the evidence must be drawn in favor of the State. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

[1] As to the charge of possession of LSD with intent to sell or deliver, the motion was properly denied. The testimony of Samuel "Rock" Cobb was sufficient to create a jury question on each element of that offense. The elements are (i) the unlawful (ii) possession (iii) of a controlled substance (iv) with the intent to sell or deliver it. Cobb testified that the defendant pulled a large bag of pills from his back pocket, counted out twenty-five of them and gave them to Cobb. Those pills were later identified as LSD, a controlled substance. Cobb's testimony, if believed by the jury, amounted to "substantial evidence" of all the elements of the offense of possession with intent to sell or deliver. Even though he was a participant in the transaction and had received a favorable plea bargain in exchange for his testimony, the jury could have believed him, as matters relating to the credibility of a witness are for the jury to decide. *Powell, supra.* The trial judge properly denied the motion to dismiss the possession with intent to sell or deliver charge and submitted the case to the jury.

[2] The motion to dismiss the charge of sale or delivery of LSD presents a much closer question. The law is settled in North Caro-

lina that an indictment for the sale and/or delivery of a controlled substance must name the person to whom the defendant allegedly sold or delivered. *State v. Ingram*, 20 N.C. App. 464, 201 S.E. 2d 532 (1974), *citing State v. Bennett*, 280 N.C. 167, 185 S.E. 2d 147 (1971). A defendant must be convicted, if at all, of the particular offense charged in the indictment. *State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890 (1979). The State's proof must conform to the specific allegations contained in the indictment. If the evidence fails to do so, it is insufficient to convict the defendant. *Id.* Therefore, a challenge to a fatal variance between indictment and proof may be raised by a motion to dismiss for insufficient evidence. *Id.*; *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946). In *Law*, Chief Justice Stacey said:

> The question of variance may be raised by demurrer to the evidence or by motion to nonsuit. "It is based on the assertion, not that there is no proof of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill of indictment has been committed. In other words, the proof does not fit the allegation, and, therefore, leaves the latter without any evidence to sustain it. It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as a matter of law, that the State has failed in its proof."

Id. at 104, 40 S.E. 2d at 700, *quoting State v. Gibson*, 169 N.C. 318, 322, 85 S.E. 7, 9 (1915).

In order to survive defendant's motion to dismiss the charge of selling or delivering to Agent Walker, the State would, at minimum, have to show two things—first, that defendant had knowledge Cobb was buying the drugs for another person and, second, that the person named in the indictment was that other person. *See State v. Black*, 34 N.C. App. 606, 239 S.E. 2d 276 (1977), *disc. rev. denied*, 294 N.C. 362, 242 S.E. 2d 632 (1978). This guilty knowledge may be shown by circumstantial evidence. *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984).

On a motion to dismiss, not only is the evidence viewed in the light most favorable to the State, *Powell, supra*, but, further, contradictions in the State's evidence are disregarded and only

the favorable evidence is considered. Thus, the contradiction in Cobb's testimony relating to who he told defendant the acid was for is ignored. *Black, supra.* When so considered, the State's evidence shows that Cobb told defendant that he was buying the acid for a friend. Cobb then had to take the drugs outside to get money from this "friend." This evidence showed defendant's knowledge that Cobb was buying the drugs for someone else. That Agent Walker was this other person is clearly shown both by her testimony and by Cobb's.

We conclude that this evidence is sufficient to go to the jury on the charge of delivery to Agent Walker. However, Nichols, who handled the money, did not testify, and no evidence was presented which showed defendant actually received any remuneration, a necessary element of the offense of sale. The charge submitted to the jury and the verdict returned was in the disjunctive for "sale or delivery." Under the holdings of our Supreme Court, most recently in *State v. McLamb*, 313 N.C. 572, 330 S.E. 2d 476 (1985), this verdict is ambiguous and fatally defective. This Court in reviewing defendant's conviction has no way of knowing for which of the distinct crimes of sale of a controlled substance or delivery of a controlled substance the jury convicted defendant. Being inherently ambiguous, the verdict does not support the judgment and there must be a new trial. *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381 (1953).

As to the conviction for possession with intent to sell or deliver, there is no error. As to the conviction for sale or delivery of a controlled substance, new trial.

Judge BECTON concurs.

Chief Judge HEDRICK concurs in part and dissents in part.

Chief Judge HEDRICK concurring in part and dissenting in part.

I concur with that part of the majority opinion finding no error in the case wherein defendant was charged with felonious possession with intent to sell or deliver a controlled substance.

I dissent, however, in the case wherein defendant was charged with sale or delivery of a controlled substance, was found guilty of that offense, and had judgment imposed on the verdict.

In *State v. Helms*, 247 N.C. 740, 102 S.E. 2d 241 (1958) the Supreme Court held that a bill of indictment charging a defendant with separate crimes in the disjunctive was fatally defective and arrested judgment. Selling a controlled substance and delivering a controlled substance are separate crimes. *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976).

In the present case, defendant was charged in the disjunctive with the separate crimes of selling a controlled substance and delivering a controlled substance. The critical part of the indictment states as follows: ". . . the defendant named above unlawfully, willfully, and feloniously did sell or deliver to Special Agent M. A. Walker, a controlled substance. . . ." Thus this indictment which charges separate crimes in the disjunctive is *fatally* defective and judgment should be arrested.

While I realize that such a holding cannot be wholly reconciled with the holding in *State v. McLamb*, 71 N.C. App. 220, 321 S.E. 2d 465 (1984), *affirmed in pertinent part*, 313 N.C. 572, 330 S.E. 2d 476 (1985), I nevertheless vote to arrest judgment in the present case, and suggest that the State might proceed against defendant on a new and proper indictment. This of course the State can do even under the mandate of the majority decision in this case. In my opinion, the State would be ill-advised to afford defendant a new trial on the bill of indictment charging defendant in the disjunctive.

MARCELLUS LINDBERG PITTMAN, EMPLOYEE, PLAINTIFF v. INCO, INC., EMPLOYER, AND HOME INSURANCE AGENCY, CARRIER, DEFENDANTS

No. 8510IC267

(Filed 3 December 1985)

1. Master and Servant § 55.1— workers' compensation—crew not short-handed—work not outside normal routine

The fact that plaintiff was working with only one other man at a metal shearing machine when he suffered a back injury while lifting a sheet of metal

did not make the work crew "short-handed" and the work outside the normal routine where the evidence showed that only two people were actually assigned to operate the machine, that plaintiff was to assist the other two operators in any way he could, and that he frequently worked with only one of the other men.

2. **Master and Servant § 55.1— workers' compensation—normal work routine—effect of disability certificate**

Plaintiff's back injury while lifting a heavy sheet of metal did not occur as a matter of law outside the normal work routine because plaintiff's employer had been given a disability certificate from plaintiff's doctor stating that he could not lift heavy objects until he regained strength in an injured hand; rather, the disability certificate was only a factor to be considered in determining what plaintiff's normal work routine was.

3. **Master and Servant § 55.1— absence of accident—no discretion to award compensation**

The Industrial Commission did not have discretionary authority to award compensation where it determined that plaintiff's injury was not accidental. N.C.G.S. 97-2(6).

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 12 September 1984. Heard in the Court of Appeals 16 October 1985.

Plaintiff appeals a decision of the Full Commission that his injury was not accidental and therefore not compensable.

Lore & McClearen, by R. James Lore, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Martha W. Surles, for defendant-appellees.

EAGLES, Judge.

Following a hand injury in 1981, plaintiff returned to work in May 1982. He gave defendant employer INCO a "disability certificate" from his treating physician which stated he could do "light work" but "will not be able to lift heavy objects until he gets strength back in [left] hand." Plaintiff initially worked in shipping, doing deliveries and light errands. At some point in May, plaintiff was assigned to work in the machine shop. According to his supervisor, he was to help two men who ordinarily operated a shearer machine, which cut sheets of metal. When sheets had to be cut more than once, the workers picked them up from underneath the machine and put them back up on the bed of the

machine. Using only his good hand, plaintiff helped one or both of the other workers lift the cut sheets. Some sheets weighed as much as 200 pounds, and 20 to 30% weighed between 50 and 100 pounds. (The "disability certificate" was not retracted or modified at any pertinent time.) On 27 July 1982, after two months at his new assignment, plaintiff was assisting one other man in lifting a sheet weighing between 50 and 100 pounds, in the usual manner. He felt an acute onset of pain in his back. Plaintiff thereafter filed this claim for compensation, which Deputy Commissioner Shuping and then the Full Commission denied on the ground that the injury was not accidental within the meaning of the Workers' Compensation Act. G.S. 97-2(6).

I

Review in this court of opinions and awards of the Industrial Commission is limited in scope. If the findings of fact are supported by any competent evidence, even if there is evidence *contra*, they are binding. The conclusions of law will not be disturbed if supported by the findings of fact. *See Robinson v. J. P. Stevens & Co., Inc.*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982); *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980). In addition, failure to specifically except to individual findings of fact generally precludes review of the sufficiency of the evidence to support them. App. R. 18(c)(ix); App. R. 10(b)(2); *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E. 2d 159 (1982).

The only finding of fact excepted to was that the injury was not accidental "in that, the evidence fails to disclose an interruption of [plaintiff's] normal work routine, which, . . . involved the regular and repetative [sic] lifting, albeit without usage of his left hand, of similarly described pieces of metal . . . in like manner." Plaintiff does not dispute that he lifted metal regularly and repetitively during the two months in question, nor that this regularly was done without using his left hand, nor that the piece of metal in question was similar to others he had lifted. The only real question is whether there was an "interruption" of plaintiff's "normal work routine."

This factual issue controls the issue of whether the injury was accidental within the meaning of G.S. 97-2(6): "In deciding whether there was an accident, the only question on appeal is whether there was 'an unlooked for and untoward event' or 'the

interruption of the routine work and the introduction thereby of unusual conditions' [citations omitted]." *Ross v. Young Supply Co.*, 71 N.C. App. 532, 535, 322 S.E. 2d 648, 651 (1984).

II

[1] Plaintiff argues that the fact that he was working with only one other man at the time of injury made the work crew "short-handed" and therefore the work was outside the normal routine. *See Davis v. Summitt*, 259 N.C. 57, 129 S.E. 2d 588 (1963) (per curiam) (evidence that injury occurred while doing work normally assigned to two workers supported finding of accident); *Godley v. Hackney & Sons*, 65 N.C. App. 155, 308 S.E. 2d 492 (1983) (reduction in work crew from four to three "short time prior to" injury allowed finding of accident). The unexcepted to relevant finding of fact is that plaintiff ". . . was responsible for assisting, one or both of the others assigned to the same machine. . . ." The sufficiency of the evidence to support this finding is not before us. App. R. 10(b)(2). The evidence supports the finding in any event: it consistently showed that only two people were actually assigned to operate the machine, that plaintiff was to assist the other two operators in any way he could, and that he frequently worked with only one of the other men. There was no evidence that this job required three people or that the third person was absent in dereliction of his working assignment at the time of injury. The finding thus supported disposes of plaintiff's contention that the crew was short-handed at the time of the injury. Plaintiff relies on *Davis* and *Godley* but we note that those decisions do not *compel* a different result: they stand only for the proposition that this sort of evidence can support a finding that the injury was outside the work routine. Here, the Commission having found otherwise based on sufficient evidence, its finding controls.

III

[2] Plaintiff also argues that because INCO knew of the disability certificate and nonetheless assigned him duties which involved lifting heavy objects, the injury occurred as a matter of law outside the normal work routine. Plaintiff argues that the employer should not be excused from liability for such dangerous conduct merely because the employee managed to survive two months of heavy lifting without suffering injury. This appears to be a novel question. We find nothing in the Workers' Compensation Act or

in the Occupational Safety and Health Act, G.S. 95-126 *et seq.*, or the regulations promulgated thereunder which addresses this problem.

We conclude that while the disability certificate was a factor to be considered in determining what plaintiff's "normal work routine" was, it was not dispositive. We have found no statute or administrative rule requiring disability certificates or specifying their legal effect. The certificate here was open-ended, in effect until plaintiff "gets strength back," with no provision for determining when that might occur. It did not prohibit all lifting. The disability certificate here was on stationery of plaintiff's physician and on its face showed no indicia of agreement or acceptance by the employer. While it appears INCO complied with the restrictions to some extent, much was left by the certificate to both plaintiff's and INCO's discretion. In short, the certificate did not establish plaintiff's working relationship with INCO as a matter of law.

Here the Commission considered plaintiff's partially disabled condition, but also had before it substantial evidence that plaintiff had been assigned duties which appeared within his capabilities and which he was able to successfully perform over a period of two months until this unexpected injury. The Commission's finding and conclusion that this work had become routine are thus supported by the evidence.

IV

We are aware that in other back injury cases we have affirmed awards based on less than overwhelming evidence of departure from normal work routine. *See Gladson v. Piedmont Stores*, 57 N.C. App. 579, 292 S.E. 2d 18 (crate "heavier than usual"), *disc. rev. denied*, 306 N.C. 556, 294 S.E. 2d 370 (1982); *Gaddy v. Cranston Print Works Co.*, 73 N.C. App. 313, 326 S.E. 2d 331 (1985) (plaintiff substituted for other employees five times previously); *Godley v. Hackney & Sons, supra* (reduction in work force from four to three short time prior to injury). However, in none of those cases have we held that the evidence *compelled* a conclusion that the injury resulted from the departure, and we have affirmed the Commission when it has reached the opposite result. *See Phillips v. The Boling Co.*, 73 N.C. App. 139, 326 S.E. 2d 76 (1985) (infrequent repair work involved heavy lifting, but

part of job description). Here, we have found no error by the Commission in its fact finding function.

Our decision in *Sanderson v. Northeast Const. Co.*, 77 N.C. App. 117, 334 S.E. 2d 392 (1985) rested on the *total absence* of evidence that plaintiff was performing his routine duties at the time of injury. Sanderson, a carpenter, was injured moving tile, a work assignment which all the evidence showed to be a one-time or very infrequent occurrence. Here, plaintiff was injured doing work he had done regularly for two months at a time when he had no other regular duties and no apparent schedule for changing duties. We conclude that *Sanderson* does not control.

V

[3] Plaintiff argues that the Commission acted under misapprehension of law in adopting the Deputy Commissioner's conclusion that his claim "must be denied." Following proper finding of facts and conclusion of law that plaintiff's injury was not accidental, no other conclusion was possible. G.S. 97-2(6). The Commission does not have discretionary authority to award compensation where the statutory prerequisites are not met; its ruling that the claim "must be denied" was therefore legally correct. The Full Commission exercises plenary power in reviewing the decision of the Deputy Commissioner. G.S. 97-85; *Pollard v. Krispy Waffle #1*, 63 N.C. App. 354, 304 S.E. 2d 762 (1983). Its ruling here, that it could "find no reversible error," while unusual, does not appear to be erroneous in light of the Commission's decision, which was within its power, to adopt as its own the findings and conclusions of the Deputy Commissioner. *See Phillips v. The Boling Co., supra* (approving similar award).

Plaintiff has failed to demonstrate any prejudicial error in the finding of facts, and the Commission's conclusions are supported by its findings. The award is accordingly

Affirmed.

Judges WHICHARD and COZORT concur.

WILLIAM A. DAVIDSON v. UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 8526SC481

(Filed 3 December 1985)

Insurance § 69— underinsured motorist coverage—reduction by settlement with tort-feasor

Where the unambiguous terms of plaintiff's automobile insurance policy and N.C.G.S. 20-279.21(b)(4) limited his underinsured motorist coverage to the difference between his underinsured coverage and the sum collected from the tort-feasor for bodily injury, plaintiff's policy provided underinsured motorist liability for bodily injury of $25,000 per person, and plaintiff settled with the tort-feasor for $25,000 for his bodily injuries, plaintiff was not entitled to recover anything from defendant insurer under his underinsured motorist coverage since the $25,000 limit on such coverage was reduced by the $25,000 plaintiff received in the settlement.

Judge BECTON concurring in the result.

Judge COZORT dissenting.

APPEAL by the plaintiff from *Burroughs, Judge.* Judgment entered 10 December 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 31 October 1985.

This is a declaratory judgment action by the plaintiff seeking a declaration that he is entitled to recover under an underinsured motorists provision in an automobile insurance policy. The plaintiff purchased from the defendant a policy which included coverage for underinsured motorists liability for bodily injury at a limit of $25,000.00 per person and $50,000.00 per accident. The plaintiff was in an automobile accident and sustained serious injuries resulting in medical expenses exceeding $100,000.00. He settled with the driver of the other automobile for $25,000.00, the policy limit on liability coverage for bodily injury to one person in one accident. Thereafter the plaintiff filed this action against the defendant for payment of benefits under his underinsured motorists coverage.

The trial court denied the plaintiff's motion for summary judgment and entered summary judgment in favor of the defendant. The plaintiff appealed.

Lewis, Babcock, Gregory & Pleicones, by A. Camden Lewis and Daryl G. Hawkins and Hamel, Hamel & Pearce, P.A., by Hugo A. Pearce, III and Reginald S. Hamel, for plaintiff appellant.

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

WEBB, Judge.

This appeal brings to the Court a question as to uninsured and underinsured motorist coverage in a motor vehicle liability policy. G.S. 20-279.21 which provides for the issuance of motor vehicle liability policies requires that liability policies issued in this state have uninsured and underinsured motorist coverage unless the policyholder rejects them. If underinsured coverage is accepted by the policyholder G.S. 20-279.21(b)(4) provides in part:

> The insurer shall not be obligated to make any payment because of bodily injury to which underinsured motorist insurance coverage applies and that arises out of the ownership, maintenance, or use of an underinsured highway vehicle until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, and provided the limit of payment is only the difference between the limits of the liability insurance that is applicable and the limits of the underinsured motorist coverage as specified in the owner's policy.

The insurance policy in this case has underinsured motorists coverage. Among other things the policy provides as to underinsured motorist coverage:

> Any amounts payable under this coverage shall be reduced by all sums:
>
> 1. Paid because of bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible.

The unambiguous terms of the plaintiff's underinsured motorist coverage provide that any amount payable by the defendant will be reduced by all sums paid because of bodily injury by those

legally responsible. The $25,000.00 limit on the plaintiff's underinsured motorist coverage is therefore reduced by the $25,000.00 the plaintiff received in settlement from Perry, leaving nothing due to plaintiff from defendant.

If the terms of the policy were ambiguous, we would reach the same result under G.S. 20-279.21(b)(4) which under our law is a part of this policy. *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 298 S.E. 2d 56 (1982), *cert. denied*, 307 N.C. 698, 301 S.E. 2d 101 (1983). This section of the statute provides that the limit of payment for underinsured motorist coverage is "only the difference between the liability insurance that is applicable [the $25,000.00 limit on the tortfeasor's liability coverage] and the limits of the underinsured motorist coverage as specified in the owner's policy [the $25,000.00 limit on the underinsured motorist coverage in the plaintiff's policy with the defendant]." In this case the difference between these limits is zero.

When the plaintiff purchased the underinsured motorist coverage an endorsement was added to the policy which defined an "uninsured motor vehicle" as follows:

> To which, with respect to bodily injury only, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is:
>
> a. equal to or greater than the minimum limit specified by the financial responsibility law of North Carolina; and
>
> b. less than the limit of liability for this coverage.

The appellant argues that the first requirement of this endorsement is met because the tortfeasor had the minimum limit specified by our law. He argues that the phrase "less than the limit of liability for this coverage" found in requirement "b" refers to the plaintiff's liability coverage for claims against him. He has liability coverage of $100,000.00 for each person and he contends his underinsured motorist coverage should be the difference between $25,000.00 and $100,000.00. If we should interpret the words "liability for this coverage" to mean the plaintiff's own liability coverage we are still faced with the plain words of the policy and the statute which limit the plaintiff's coverage to the difference

between his underinsured coverage and what he collects from the tortfeasor. We believe the proper interpretation of words "liability for this coverage" is that they refer to the underinsured coverage the plaintiff received from the endorsement.

The plaintiff argues that under the terms of the policy without the endorsement for underinsured motorist coverage he could collect on his uninsured motorist coverage for any loss from any tortfeasor who has no coverage or less coverage than the minimum required. He contends that there are no circumstances under which he can collect on his underinsured coverage and he has paid his premium for this coverage in exchange for nothing. It appears that the plaintiff is correct in this argument but it does not justify our rewriting the policy.

Affirmed.

Judge BECTON concurs in the result.

Judge COZORT dissents.

Judge BECTON concurring in the result.

I am deeply troubled that, on the facts of this case, plaintiff has paid a premium for no coverage. And I concur in the result solely because, in my view, this Court has no authority to rewrite the policy.

Judge COZORT dissenting.

I dissent from the majority's opinion affirming summary judgment for the defendant. I do not disagree with the majority's interpretation of its quoted provisions of the policy and the statutes. However, to reach its decision, the majority assumes that the limits of the underinsured motorist coverage in the policy are $25,000 per person and $50,000 per accident. Those limitations are not specifically stated in that fashion in the policy. The limitation of liability for the underinsured motorist coverage is different from the limitation on the other kinds of coverage. For example, for bodily injury liability coverage, the stated limits are: "$100,000 EACH PERSON, $300,000 EACH ACCIDENT." Similarly, the *uninsured* motorist bodily injury coverage is limited to "$25,000

EACH PERSON, $50,000 EACH ACCIDENT." For *underinsured* motorist coverage, however, the phrases "EACH PERSON" and "EACH ACCIDENT" are not used. Instead, the limit of liability is stated merely as "$25,000-$50,000."

I find the language setting forth the limitation on underinsured motorist coverage to be ambiguous. It is a fundamental principle of legal analysis that "insurance policies should be given a reasonable construction in accordance with their terms and should be interpreted to provide coverage when rationally possible to do so, rather than to defeat it. Ambiguities in language are resolved in favor of the insured, and exceptions to liability are not favored." *Great American Insurance Co. v. C. G. Tate Construction Co.*, 46 N.C. App. 427, 433, 265 S.E. 2d 467, 471 (1980).

With those principles in mind, I would construe the policy as follows: For the first $25,000 in damages to the plaintiff, he would be covered by his *uninsured* motorist coverage, if the tortfeasor had no liability insurance or less than the statutory minimum of $25,000. For the next $25,000 in damages to the plaintiff ("$25,000-$50,000"), plaintiff would be covered by his *underinsured* motorist coverage, if the tortfeasor had no liability insurance beyond the $25,000 statutory minimum, or less than $50,000 liability coverage. In other words, the uninsured motorist coverage protects plaintiff up to $25,000 in damages, and the underinsured motorist coverage protects him when his damages are from "$25,000-$50,000."

To hold otherwise means the plaintiff would never have any coverage for the itemized premiums paid for his underinsurance coverage, a result which was surely never intended by the General Assembly in its enactment of G.S. 20-279.21. I would reverse the trial court.

CINDY T. AYSCUE AND DIANE S. HARRIS v. REBECCA S. MULLEN AND RICHARD (RICK) MULLEN

No. 8510DC460

(Filed 3 December 1985)

1. **False Imprisonment § 2.1— false imprisonment of customers by cashier—evidence sufficient**

Motions for a directed verdict and judgment n.o.v. on claims of false imprisonment were properly denied as to both plaintiffs where there was evidence that the cashier in the store in which plaintiffs were shopping bolted the door, stood in front of the door blocking plaintiffs' exit, pushed plaintiff Ayscue to prevent her from leaving, refused to tell plaintiffs why they could not leave, and refused to call the police or search plaintiffs' pocketbooks. A touching is not necessary to find false imprisonment and the use of force against plaintiff Ayscue when she attempted to leave would be sufficient to induce in plaintiff Harris a reasonable apprehension of force; moreover, all the evidence indicated that the door was locked and that plaintiff Harris' path was blocked by defendant.

2. **False Imprisonment § 1— action against merchant detaining customers—unreasonable detention—merchant not immune**

A merchant who detained customers was not immune from civil liability under N.C.G.S. 14-72.1(c) where there was evidence indicating an unreasonable manner of detention in that defendant refused to explain to plaintiffs why they could not leave and refused to call the police or search plaintiffs' pocketbooks when plaintiffs offered.

3. **False Imprisonment § 3— detention of customers by merchant—punitive damages—evidence insufficient**

The trial court erred by denying defendants' motions for a directed verdict or judgment n.o.v. on the issue of punitive damages in an action by customers who had been detained by a merchant where there was an entire lack of those elements of outrageous conduct which would subject the defendants to punitive damages.

APPEAL by defendants from *Cashwell, Judge*. Judgment entered 13 February 1985 in District Court, WAKE County. Heard in the Court of Appeals 31 October 1985.

Plaintiffs instituted this action against defendants to recover compensatory and punitive damages for false imprisonment. Defendant Rebecca S. Mullen is the sole owner of the "Shop Easy" store in Fuquay-Varina, North Carolina. Her son, defendant Richard (Rick) Mullen, is the cashier. The store is divided into three levels or sections, including the craft section located on the upper

level. All sales go through the cash register on the first level. In order to discourage shoplifting, defendant Rebecca Mullen instituted a "no sale slip" policy whereby a clerk in the craft section gives a customer leaving that section either a ticket for items chosen for purchase or a "no sale slip" if the customer chooses not to make a purchase. The "no sale slip" is to be shown to the cashier upon leaving the store.

Plaintiffs presented evidence tending to show the following:

On 30 March 1984 plaintiffs Diane S. Harris and Cindy T. Ayscue, accompanied by plaintiff Ayscue's six-year-old daughter, visited the "Shop Easy" store for the first time. Plaintiffs browsed through the craft section of the store, but did not receive a "no sale slip" when they left that section. Upon returning to the first level, plaintiffs looked at a porcelain pail which plaintiff Harris considered buying, but which she replaced on the shelf. Plaintiffs then started to leave the store. Defendant Rick Mullen asked them if they had a "no sale slip." Plaintiffs did not know what a "no sale slip" was, and they replied they did not have one. Defendant then asked plaintiff Ayscue if she was going to get one. Ayscue replied "no," still not knowing what defendant was talking about. Defendant then jumped over the counter, bolted the door, stood in front of it, and would not let plaintiffs out. Defendant stated plaintiffs were not going to get out until they had a "no sale slip." Defendant then asked plaintiff Harris if she was going to get a "no sale slip." She replied "no," she also being confused as to the identity and purpose of such slip. Defendant refused to tell plaintiffs why they were being held. Plaintiff Ayscue then pushed defendant to move him out of the way. Defendant pushed her back with his chest to prevent her from leaving. Plaintiffs offered to have defendant call the police or search their pocketbooks. Defendant refused. During this time defendant had sent an employee to get defendant Rebecca Mullen who was working that day in the craft section. Rebecca Mullen came down and told her son that plaintiffs were okay and to let them out. The incident lasted from three to five minutes.

For matters of this appeal, it is not necessary to recite the evidence presented by defendants.

After hearing all the evidence the jury returned a verdict awarding plaintiff Cindy Ayscue $350 in actual damages and

$1,000 in punitive damages, and awarding plaintiff Diane Harris $200 in actual damages and $1,000 in punitive damages. From the judgment entered in accordance with the verdict, defendants appeal to this Court.

Calder, Narron & Jordan, by Joseph A. Calder and V. Thomas Jordan, Jr., for plaintiff appellees.

Moore, Ragsdale, Liggett, Ray & Foley, by Peter M. Foley and Nancy Dail Fountain, for defendant appellants.

ARNOLD, Judge.

[1] Defendants first contend that there is insufficient evidence to support plaintiffs' claims of false imprisonment and therefore the trial court erred in denying defendants' motions for a directed verdict and for judgment notwithstanding the verdict. We disagree.

Settled principles establish that the purpose of a motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs; that in determining such a motion the evidence should be considered in the light most favorable to plaintiffs, and the plaintiffs should be given the benefit of all reasonable inferences; and that the motion should be denied if there is any evidence more than a scintilla to support plaintiffs' prima facie case in all its constituent elements. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). A motion for judgment notwithstanding the verdict is essentially the renewal of a prior motion for a directed verdict. Therefore, where the evidence admitted at trial, taken in the light most favorable to plaintiffs is sufficient to support the verdict, it should not be set aside. *Harvey v. Norfolk Southern Railway*, 60 N.C. App. 554, 299 S.E. 2d 664 (1983).

> False imprisonment is the illegal restraint of the person of any one against his will. . . . Force is essential only in the sense of imposing restraint. . . . There is no legal wrong unless the detention was involuntary. False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched. . . . Any exercise of force, or express or implied threat of force, by which

> in fact the other person is deprived of his liberty [or] compelled to remain where he does not wish to remain . . . is an imprisonment. . . . The essential thing is the restraint of the person. This may be caused by threats, as well as by actual force, and the threats may be by conduct or by words. If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. (Citations omitted.)

Hales v. McCrory-McLellan Corp., 260 N.C. 568, 570, 133 S.E. 2d 225, 227 (1963).

The evidence presented by plaintiffs which indicated defendant Rick Mullen bolted the door, stood in front of the door blocking plaintiffs' exit, pushed plaintiff Ayscue to prevent her from leaving, refused to tell plaintiffs why they could not leave, and refused to call the police or search their pocketbooks was sufficient to submit the case to the jury and to support the verdict awarding plaintiffs actual damages for false imprisonment.

Defendants nevertheless argue that plaintiff Harris failed to prove that she was unlawfully restrained by force or threat of force and that she was restrained against her will. Specifically defendants assert that defendant Richard Mullen never used any force against Harris, Harris had no conversation with defendant during the incident, and that Harris stood at least seven to eight feet away. However, as stated above, a touching is not necessary to find false imprisonment. All evidence indicated that the door was locked and plaintiff Harris' path was blocked by defendant. Her ability to leave was in fact restrained. Further, the use of force against plaintiff Ayscue when she attempted to leave would certainly be sufficient to induce in plaintiff Harris a reasonable apprehension of force. Finally, in her testimony Harris stated that defendant locked the door, stood in front of it, and would not move to "let us out." The evidence is sufficient for the jury to conclude that plaintiff Harris was unlawfully restrained against her will.

[2] Defendants next contend that they are immune from civil liability for false imprisonment under G.S. 14-72.1(c). This statute provides that a merchant or his employee shall not be held liable for detention or false imprisonment of a person where such deten-

tion is in a reasonable manner for a reasonable length of time and there is probable cause to believe that the person has wilfully concealed goods or merchandise from the store. However, the evidence indicating that defendant refused to explain to plaintiffs why they could not leave and refused to call the police or search plaintiffs' pocketbooks when plaintiffs offered could be said to constitute an unreasonable manner of detention. This evidence supports the jury's finding that G.S. 14-72.1(c) is not applicable and the finding of false imprisonment in favor of plaintiffs. We therefore find defendants' contention without merit.

[3] Finally, defendants contend there is insufficient evidence to support the claim for an award of punitive damages. As to this contention, we agree.

Punitive damages are allowed only in cases where the tortious conduct is accompanied by some element of aggravation. *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Emphasis is frequently given to the presence or absence of evidence of "insult, indignity, malice, oppression or bad motive" in determining the applicability of punitive damages to a particular factual situation. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). Whether there is any evidence to be submitted to the jury that would justify assessment of punitive damages is a question for the court. *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936); Ervin, *Punitive Damages in North Carolina*, 59 N.C. L. Rev. 1255 (1981). In the testimony of this case, there was an entire lack of those elements of outrageous conduct which would subject the defendants to punitive damages. We therefore hold that the trial court erred in denying defendants' motions for a directed verdict and for judgment notwithstanding the verdict as to the issue of punitive damages.

The judgment appealed from is therefore

Affirmed in part, reversed in part.

Judges WELLS and PARKER concur.

JUDY BRADLEY v. VERNON R. BRADLEY, JR.

No. 8528DC581

(Filed 3 December 1985)

1. **Divorce and Alimony § 30— equitable distribution—mutual division of property—plaintiff's income consisting of public assistance and child support**

The trial court in an action for equitable distribution did not err by finding that there was a disparity in the parties' incomes and concluding that an equal division of marital property would not be equitable where the husband's income was between five and six thousand dollars and the wife had an annual income of $5,940 consisting of Aid to Families with Dependent Children, food stamps, and child support paid by the husband. Dictionary definitions of income refer to earned income and income derived from investments; 7 U.S.C. Sec. 2017(b) provides that the food stamp allotment shall not be considered income; and the amounts received by the wife in the form of child support are for the benefit and support of the parties' children and are not income within the meaning of N.C.G.S. 50-20(c)(1), N.C.G.S. 50-20(f).

2. **Evidence § 44; Divorce and Alimony § 30— lay witness—testimony as to state of health—sufficient to support findings**

The trial court's findings in an action for equitable distribution regarding plaintiff's health, capacity to work, and loss of weight were supported by plaintiff's testimony even though no expert medical testimony was presented. A lay witness may testify as to the present state of her health and her ability to do work.

APPEAL by defendant from *Roda, Judge*. Judgment entered 17 January 1985 in District Court, BUNCOMBE County. Heard in the Court of Appeals 20 November 1985.

This is an appeal by defendant from a judgment granting the parties an absolute divorce and dividing their marital property. The court found as follows in pertinent part: The parties own a house and lot and various items of landscaping equipment. Such property is marital property. Defendant is, and was throughout the marriage, gainfully employed in the landscaping business and is able to earn an income sufficient to support himself and to pay the child support ordered. Plaintiff engaged herself during the marriage in sewing, designing, and caring for the parties' five children but is no longer so employed and is totally incapacitated to work because of her physical condition which includes multiple sclerosis and rheumatoid arthritis. Because of her illness, plaintiff lost over 150 pounds in the last six months.

The court concluded that because of the disparity in the parties' incomes, an equal division of the marital property would not be equitable and ordered an unequal division of the property.

John E. Shackelford for plaintiff, appellee.

George W. Moore for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred in concluding that an equal division of the marital property would not be equitable based on the disparity in the parties' incomes. He argues that the evidence shows that his income for 1984 was between five and six thousand dollars; that plaintiff has an annual income of $5,940.00 consisting of $145.00 per month as Aid to Families with Dependent Children ("AFDC"), $149.00 per month in food stamps, and $134.00 per month as child support paid by him; and that therefore the evidence does not support the court's finding that there is a disparity in the parties' incomes. Defendant further contends that plaintiff did not meet her burden of showing that an equal division would not be equitable and that therefore the judgment entered must be reversed. We find defendant's argument unpersuasive.

An equal division of marital property is mandatory unless the court determines from evidence presented on one or more of the factors enumerated in G.S. 50-20(c) that an equal division would not be equitable. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985); G.S. 50-20(c). When evidence concerning one or more of the factors in the statute and tending to show that an equal division of the marital property would not be equitable is admitted, the court must balance that evidence with the other evidence presented, keeping in mind the legislative policy strongly favoring an equal division, and determine what constitutes an equitable division in that particular case. *Id.* The balance struck by the court in weighing such evidence will not be disturbed absent a clear showing of abuse of discretion. *Id.*

One of the factors the trial court is to consider in determining an equitable division of marital property is "[t]he income, property, and liabilities of each party at the time the division of property is to become effective." G.S. 50-20(c)(1). Thus, it was ap-

propriate for the court here to consider the income, or lack thereof, of each party in determining an equitable distribution. It is apparent from the judgment entered that the court did not consider the amounts received by plaintiff as child support, AFDC, and food stamps to be income within the meaning of G.S. 50-20(c)(1). We must therefore determine whether this was error requiring that the judgment be vacated.

We presume since there is no indication to the contrary that the legislature used the word "income" in G.S. 50-20(c)(1) to convey its natural and ordinary meaning. *See Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E. 2d 289 (1968); *Yacht Co. v. High, Commissioner of Revenue*, 265 N.C. 653, 144 S.E. 2d 821 (1965). In determining what that meaning is, it is appropriate for us to resort to dictionaries for assistance. *See Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469 (1985). *Black's Law Dictionary* 687 (rev. 5th ed. 1979) defines "income" as "[t]he return in money from one's business, labor, or capital invested; gains, profits, salary, wages, etc." "Income" has also been defined as "a gain or recurrent benefit [usually] measured in money that derives from capital or labor." *Webster's New Collegiate Dictionary* 424 (1969).

These definitions generally refer to earned income, *see Black's Law Dictionary* at 687 (earned income), and income derived from investments. It is not clear whether amounts received as public assistance, such as food stamps and AFDC payments, or as child support should be considered income under these definitions. We are inclined to think that they should not be so considered since they are not derived from capital or labor and are not taxable as income as are earned income and income derived from investments. *See* 26 U.S.C. Sec. 71(c) (Supp. 1985) (child support); 7 U.S.C. Sec. 2017(b) (1985) (food stamps); G.S. 105-141(b)(7) (1979) (AFDC). *See generally* 26 U.S.C. Sec. 61 (1984) and G.S. 105-141 (definitions of gross income).

7 U.S.C. Sec. 2017(b) in fact provides that "[t]he value of the [food stamp] allotment provided any eligible household shall not be considered income or resources for any purpose under any Federal, State, or local laws. . . ." This provision, as an act of Congress pursuant to the Constitution of the United States, is the supreme law of the land and is controlling upon this State. *See*

Bouligny, Inc. v. Steelworkers, 270 N.C. 160, 154 S.E. 2d 344 (1967). Based on 7 U.S.C. Sec. 2017(b), we conclude that the value of food stamps received by a party may not be considered as income under G.S. 50-20(c)(1). Thus, the court here acted correctly with respect to the food stamps received by plaintiff.

With respect to the amounts received by plaintiff as AFDC and child support, we note that G.S. 50-20(f) states in pertinent part that "[t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties." This provision indicates that amounts paid or received by a party as support for the children of the parties are not to be considered in determining an equitable distribution. It would be inconsistent with G.S. 50-20(f) to allow amounts received by a party for the benefit and support of the parties' children, whether in the form of child support from the other party or public assistance such as AFDC payments, to be considered as income under G.S. 50-20(c)(1).

It is an accepted principle of statutory construction that parts of the same statute dealing with the same subject are to be considered and interpreted as a whole and every part of the law is to be given effect if this can be done by any fair and reasonable intendment. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968); *In re Hickerson*, 235 N.C. 716, 71 S.E. 2d 129 (1952). G.S. 50-20(c)(1) and G.S. 50-20(f) interpreted together demonstrate the legislature's intent that amounts received by a party for the benefit and support of the parties' children should not be considered as income under G.S. 50-20(c)(1). This interpretation does not prevent either G.S. 50-20(c)(1) or G.S. 50-20(f) from having effect and is certainly a fair and reasonable interpretation of those statutory provisions. Since the amounts received by plaintiff in the form of child support and AFDC are for the benefit and support of the parties' children, we conclude that they are not income within the meaning of G.S. 50-20(c)(1).

The evidence shows that at the time the division of property was to become effective plaintiff had no earnings and was receiving no monies other than those in the form of child support, food stamps, and AFDC, whereas defendant had earnings of *at least* five to six thousand dollars a year. This evidence supports the court's finding that there is a disparity in the parties' incomes

within the meaning of G.S. 50-20(c)(1) and tends to show that an equal division of the marital property would not be equitable. We are unable to say that the trial court abused its discretion in concluding that an equal division of the marital property would not be equitable based on the disparity in the parties' incomes or in ordering an unequal division in favor of plaintiff particularly in light of plaintiff's poor health. We therefore find no error in the division ordered.

[2] Defendant next argues that the evidence is insufficient to support the court's findings regarding plaintiff's health, incapacity to work, and loss of weight because no medical expert testimony was presented. The findings in question are fully supported by plaintiff's testimony. It is well-established that a lay witness may testify as to the present state of his health and his ability to do work. *See Carter v. Bradford*, 257 N.C. 481, 126 S.E. 2d 158 (1962); 1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 129 (rev. 2d ed. 1982). Thus, plaintiff's testimony is sufficient to support the findings made.

Lastly, defendant argues that the court's finding that the parties' own landscaping equipment worth $5,000.00 which is marital property is not supported by the evidence. The finding in question was not excepted to or made the basis of an assignment of error in accordance with Rule 10 of the Rules of Appellate Procedure. Therefore, the question of the sufficiency of the evidence to support it is not presented for our review. *See* Rule 10(a) of the Rules of Appellate Procedure.

Affirmed.

Judges EAGLES and MARTIN concur.

JOHN D. UNDERWOOD, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER, SELF-INSURED

No. 8510IC144

(Filed 3 December 1985)

Master and Servant § 68— workers' compensation—time of disability—timeliness of claim for occupational disease

Plaintiff did not become disabled until the date he was forced to stop work of any kind because of his occupational disease, and his claim to recover compensation for chronic obstructive pulmonary disease filed within two years after that date was timely filed without regard to when he was first informed of the nature and work-related cause of his disease. N.C.G.S. 97-58(b) and (c); N.C.G.S. 97-54; N.C.G.S. 97-2(9).

APPEAL by defendant from Opinion and Award of the North Carolina Industrial Commission filed 9 November 1984. Heard in the Court of Appeals 19 September 1985.

Plaintiff was born on 2 November 1922. He has a fifth grade education and worked on a farm until 1954 when he began working for Cone Mills. He worked in the card room in an extremely dusty environment for almost a year. The dust bothered him so much that he returned to work on a farm for about five months. He returned to work for Cone Mills in 1955. This time he worked in the winding room which was dusty, but not as dusty as the card room. Plaintiff has been a heavy smoker for most of his life, estimating that he smoked two packs a day for about forty years until strongly urged by his doctor to quit. He has now cut down to about half a pack a day.

Plaintiff first began noticing he was having breathing problems in 1977, after twenty years of working for Cone Mills. He noticed that these breathing problems worsened as the day went on, and also were worse later in the week. The problem became severe in 1980, and plaintiff consulted his family physician, Dr. Joe Robinson, about his breathing difficulties. Dr. Robinson advised plaintiff that he had chronic bronchitis, respiratory infection and allergies, and that it was possible that these conditions were aggravated by the cotton dust at Cone Mills. Because of the severity of plaintiff's breathing problems, Dr. Robinson recommended a medical leave of absence from Cone Mills, which plaintiff took from May 1980 until October 1981. Plaintiff returned to

work in October 1981 at Cone Mills in the weaving room, an area with less cotton dust than the winding room. Plaintiff continued to work full time in the weaving room as a sweeper until 3 June 1982, when he left Cone Mills permanently.

On that same day, plaintiff was checked into Greensboro Hospital for thorough testing and diagnosis of his breathing difficulties. Dr. Robinson had made the diagnosis of chronic obstructive pulmonary disease (COPD) in March 1981, but it was not until plaintiff was admitted to the hospital in June 1982 that plaintiff was told that he was permanently and totally disabled due to COPD.

On 2 February 1983 plaintiff filed a claim with the Industrial Commission for an occupational disease caused by exposure to cotton dust. Deputy Commissioner Sellers entered an order on 1 June 1984 dismissing plaintiff's claim as untimely because she found it was filed more than two years after plaintiff was disabled and was informed by competent medical authority of the nature and work-related cause of his occupational disease. Plaintiff filed for review of the dismissal by the Full Commission. By order entered 9 November 1984, the Commission reversed Commissioner Sellers, ruling the plaintiff's claim had been timely filed based on a finding that plaintiff was not informed of the work-related cause of his disease until March of 1981. The Commission entered an Order and Award ordering Cone Mills to pay plaintiff $143.65 weekly compensation for life and plaintiff's medical expenses incurred as a result of his COPD. Defendant appeals.

Ling and Farran by Stephen D. Ling for plaintiff-appellee.

Smith, Moore, Smith, Schell and Hunter by J. Donald Cowan, Jr., and Caroline Hudson for defendant-appellant.

PARKER, Judge.

The issue presented by this appeal is whether the plaintiff filed his claim within the time prescribed by G.S. 97-58, which provides:

> (b) . . . The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be . . . .

This two year statute of limitation is a condition precedent with which a plaintiff must comply in order to confer jurisdiction on the Industrial Commission. *Poythress v. J. P. Stevens & Co.*, 54 N.C. App. 376, 283 S.E. 2d 573 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982).

Findings of fact by the Industrial Commission are normally conclusive on appeal when supported by any competent evidence even if there is evidence to support contrary findings. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). An exception exists, however, for findings of fact relating to jurisdiction. *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215 (1983), *rehearing denied*, --- N.C. ---, 311 S.E. 2d 590 (1984). The reviewing courts have a duty to make their own independent findings of jurisdictional facts based upon their consideration of the entire record. *Id.*

The record on appeal reveals the following facts relevant to jurisdiction and the statute of limitation: (i) plaintiff filed his claim on 2 February 1983; (ii) plaintiff had permanently quit working at Cone Mills on 3 June 1982, when he was hospitalized for COPD; (iii) plaintiff had been hospitalized on 29 March 1981 for testing and diagnosis; he was discharged on 9 April 1981 with a final diagnosis of COPD; (iv) plaintiff took a leave of absence from work in 1980 on the advice of his family physician who had told him that the cotton dust at work could be a factor aggravating his breathing problems. These facts lead to the conclusion that plaintiff's claim was filed in a timely manner and that the Industrial Commission properly asserted jurisdiction.

In *Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), our Supreme Court held that sections (b) and (c) of G.S. 97-58, *supra*, must be construed *in pari materia*. When so construed, the Court held that the two year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time

of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease. *Id.* at 98-99, 265 S.E. 2d at 147. The two year period for filing claims for an occupational disease does not begin to run until all of these factors exist. *Dowdy v. Fieldcrest* at 706, 304 S.E. 2d at 218-219.

This determination was based upon a reading of the definitions of "disablement" and "disability" contained in North Carolina's Workers' Compensation Act. G.S. 97-2(9) provides, "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or *any other employment*" (emphasis added). General Statute 97-54 provides that in all cases of occupational disease other than asbestosis or silicosis (not involved here), " 'disablement' shall be equivalent to 'disability' as defined in G.S. 97-2(9)."

Under these definitions and the holding in *Taylor v. Stevens & Co., supra*, it becomes clear that plaintiff's claim was timely filed. He did not become disabled within the meaning of the Workers' Compensation Act until 3 June 1982, when he was forced to stop work of any kind because of his occupational disease. Because plaintiff was able to earn the wages he had always received until that date, the arguments as to when plaintiff was first informed of the nature and work-related cause of his disease become irrelevant. All factors required by *Taylor v. Stevens & Co.* must exist before the statute of limitation begins running. *See Dowdy v. Fieldcrest* at 706, 304 S.E. 2d at 218-219.

Having reviewed the entire record, we find that the Industrial Commission properly exercised jurisdiction over plaintiff's claim. Therefore, the Opinion and Award of the Commission is hereby

Affirmed.

Judges JOHNSON and EAGLES concur.

BRENDA HEILIG THOMASON, EMPLOYEE, PLAINTIFF v. FIBER INDUSTRIES, EMPLOYER; NORTHWESTERN NATIONAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8410IC1162

(Filed 3 December 1985)

1. **Master and Servant §§ 68, 65— costochondritis caused by lifting rolls of spun yarn—occupational disease**

The Industrial Commission did not err by awarding plaintiff permanent partial disability for costochondritis under N.C.G.S. 97-53(13) where the evidence tended to show that the disabling inflammation of the cartilaginous tissues between plaintiff's sternum and ribs was caused by the constant lifting of 50-pound cakes of yarn required by her employment; that the causes and conditions of her inflammation are peculiarly characteristic of her employment; and that her work as a repetitive lifter placed her at a greater risk of contracting the inflammatory disease process than the public at large.

2. **Master and Servant § 72— partial disability—no finding as to average wage after disablement—remanded**

The Industrial Commission erred by computing the compensation that is due plaintiff because of her partial disability from costochondritis where there was no finding as to the average weekly wage that plaintiff was able to earn after she became disabled and no finding as to the difference between that amount and her previous weekly wage. N.C.G.S. 97-30.

APPEAL by defendants from the Opinion and Award of the North Carolina Industrial Commission filed 4 September 1984. Heard in the Court of Appeals 15 May 1985.

The opinion and award defendants appeal from requires them to compensate plaintiff under the Workers' Compensation Act for a permanent partial disability resulting from costochondritis, an inflammation of the cartilage-like tissue between the ribs and breastbone or sternum, which the Commissioner concluded is "the result of an occupational disease . . . due to causes and conditions characteristic of and peculiar to her employment and which is not an ordinary disease of life to which the general public is equally exposed."

The evidence tending to support the Commission's award was to the following effect: In 1974 plaintiff, who is now only thirty-three years old, began working for defendant Fiber Industries as a doffer in the spinning room. Her job as a doffer required her to lift rolls or cakes of spun yarn from a spinning machine and hang

them on pegs, some higher than her head, affixed to a buggy. Each cake or roll of yarn weighed about 50 pounds; her machine spun 32 cakes of yarn every forty-five minutes; and during each regular eight hour work day the yarn that she doffed weighed about 20,000 pounds altogether. During the first four years of plaintiff's employment she was in good health, had no chest troubles, and did not miss a day of work. In October, 1978, because of a special problem in the plant, she had to help move some drums that weighed several hundred pounds. The lift truck she used did not work properly and a drum fell toward her and struck her in the chest, causing it to swell. After that plaintiff had constant difficulty with her chest, required much medical treatment and missed much work. On 14 July 1982 she was placed on long-term disability. Dr. Blount, a family practitioner who saw her the day the drums were moved and has treated her ever since, diagnosed her condition as costochondritis, which he attributed to the constant lifting required by her job. In his opinion the injury resulting from the drum did not cause her costochondritis, but only called attention to it. Dr. Patrick Box, a specialist in internal medicine and rheumatology who assisted in treating plaintiff, agreed with Dr. Blount's diagnosis, and testified that her work, constantly lifting cakes of yarn, exposed her to a greater risk of contracting costochondritis than the general public.

Corriher, Whitley & Busby, by James A. Corriher, for plaintiff appellee.

Brinkley, Walser, McGirt, Miller & Smith, by G. Thompson Miller, for defendant appellants.

PHILLIPS, Judge.

[1] The main question raised by this appeal is whether under the circumstances of this case plaintiff's established costochondritis is an occupational disease under our Workers' Compensation Act. Though several similar diseases and conditions that are sometimes caused by the wear and tear of employment—*blisters*, G.S. 97-53(16); *bursitis*, the inflammation of a bursa, a small soft tissue sac often lying between bones and muscles, G.S. 97-53(17); *synovitis*, the inflammation of any synovial membrane, G.S. 97-53(20); and *tenosynovitis*, the inflammation of a synovial membrane that protects a tendon, G.S. 97-53(21)—have been legisla-

tively designated as occupational diseases subject to the conditions stated in the respective statutes, costochondritis has not been so designated and can be an occupational disease only as and when G.S. 97-53(13) permits. Under G.S. 97-53(13), as its terms expressly provide and our Supreme Court has held on several occasions, "[a]ny disease" is an occupational disease *if* it is due to causes and conditions peculiarly characteristic of the worker's particular trade, occupation or employment, and *if* the disease is not one that the general public, outside of the particular employment, stands an equal risk of contracting. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981); *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). The statute contains no other conditions and excludes no particular diseases, including the ordinary diseases of life, though hearing loss is expressly covered by another provision. The only exclusion the statute makes is by its limiting conditions, which exclude such diseases as the public is exposed to equally with workers in the particular trade or occupation. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E. 2d 359, 365 (1983). Applying these principles to the record before us leads to the conclusion that the Commission's decision on this question is correct and we affirm it.

Dr. Blount, her primary treating physician, expressed the opinion that the probable cause of her disabling costochondritis is "repeated use of the chest wall in lifting, straining, pulling," and that her job with defendant placed her at greater risk of contracting or aggravating costochondritis than the general public. Dr. Patrick Box, a specialist in internal medicine and rheumatology, in his deposition testified that:

> Mrs. Thomason's employment at Fiber Industries involving the repetitive lifting exposed her to a greater risk of getting costochondritis than the public generally.
>
> * * *
>
> I think, as a matter of a medical determination, the repetitive lifting would cause her to have symptoms which would then become a medical problem to her. I believe in the absence of doing the sort of work she was doing, that she might have inflammation or pain which would last for a day or two and then resolve. Her chance, compared to another person with

another type of job developing a chronic problem, is much greater because of the type work that she is doing.

That this evidence and that of plaintiff as to the nature and extent of her work is support enough for the Commission's conclusion that plaintiff's disabling costochondritis is an occupational disease under G.S. 97-53(13) is clear, in our opinion. This evidence tends to show, as the Commission found, that the disabling inflammation of the cartilaginous tissues between her sternum and ribs was caused by her constant lifting of 50 pound cakes of yarn, as her employment required; and that the causes and conditions of her inflammation are peculiarly characteristic of her employment as, in effect, a repetitive lifter; and that her work as a repetitive lifter placed her at a greater risk of contracting the inflammatory disease process than the public at large, few of whom, it is safe to say, regularly and repeatedly lift anything weighing 50 pounds. That another medical expert testified that lifting cakes of yarn in her work did not cause her costochondritis is immaterial for our purposes, since conflicts and contradictions in the evidence are for the Commission to decide, not us. *Pardue v. Blackburn Bros. Oil & Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963). Since the findings of fact on this point are supported by competent evidence and they justify the legal conclusions and decision, it must be affirmed. *Brice v. Robertson House Moving, Wrecking and Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1958).

[2] But, as defendants contend, the Commission erred in computing the compensation that is due plaintiff because of her partial disability. Subject to the limitations and percentages stated in the statute in partial disability cases, the weekly benefit due is based on the difference between the employee's average weekly wage before the injury and average weekly wages which he is able to earn thereafter. Yet here no finding was made as to the average weekly wage that plaintiff was able to earn after she became disabled; nor was any finding made as to the difference between that amount and her previous average weekly wage of $293.88. Thus, the cause is remanded for the limited purpose of determining the weekly benefits due plaintiff in accord with G.S. 97-30.

Affirmed and remanded.

Judges BECTON and EAGLES concur.

LOUISE B. WARREN AND JESSE WARREN, JR. v. ROSSO AND MASTRACCO, INCORPORATED D/B/A GIANT OPEN AIR OF MURFREESBORO

No. 856SC795

(Filed 3 December 1985)

Negligence § 57.6— fall by store customer—foreign matter on floor—summary judgment improperly entered

Summary judgment was improperly entered in favor of defendant in plaintiff customer's action to recover for injuries received when she slipped and fell in human excrement on the floor of defendant's grocery store where there were disputed facts as to how long the excrement was on the floor before plaintiff stepped in it since a genuine issue of material fact was presented as to whether defendant knew or by the exercise of reasonable care should have known of its existence in time to remove it or to give proper warnings of its presence.

APPEAL by plaintiffs from *Bowen, Judge*. Summary Judgment entered 8 May 1985 in Superior Court, HERTFORD County. Heard in the Court of Appeals 22 November 1985.

Taylor & McLean by Donnie R. Taylor for plaintiff appellants.

Rodman, Holscher & Francisco by David C. Francisco for defendant appellee.

COZORT, Judge.

This is a civil action wherein the plaintiff-wife seeks approximately $25,000 in damages for injuries to her right shoulder and right foot which allegedly occurred when, after paying for her groceries, she slipped and fell in human excrement which was on the floor of defendant's business. Plaintiff-husband seeks $25,000 in damages for alleged loss of consortium. Plaintiffs allege defendant was negligent in failing to remove the "stream" of human waste from its floor or in failing to warn of the waste's presence.

Plaintiffs' verified complaint was filed on 15 May 1984 and served on defendant on 17 May 1984. On 19 June 1984, defendant filed its answer denying negligence. After both sides conducted discovery, defendant moved for summary judgment on 29 January 1985 which the trial court granted in an Order filed on 8 May 1985. Plaintiffs excepted to the order granting summary judgment and appealed. We reverse.

North Carolina Rules of Civil Procedure, Rule 56, provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56. In a negligence action summary judgment is rarely appropriate. *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979). In ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any genuine issue of material fact. If different material conclusions can be drawn from the evidence, then summary judgment should be denied. *Godwin Sprayers, Inc. v. Utica Mutual Ins. Co.*, 59 N.C. App. 497, 296 S.E. 2d 843 (1982), *disc. rev. denied*, 307 N.C. 576, 299 S.E. 2d 646 (1983). A material fact is one that would constitute or would irrevocably establish any material element of a claim or defense. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). Finally, summary judgment is a drastic remedy and should be granted only where the truth is quite clear. *Volkman v. DP Associates*, 48 N.C. App. 155, 268 S.E. 2d 265 (1980).

Here, like in any negligence action, plaintiffs must prove four essential elements: "(1) evidence of a standard of care owed by the reasonable prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach; and (4) loss because of the injury. [Citation omitted.]" *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980). Defendant argues that the undisputed facts show that it did not breach any duty of care it may have owed to the plaintiff-wife. Defendant has a duty "to use ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E. 2d 281, 283 (1963). " 'But when an unsafe condition is created by third parties or an independent agency it must be shown that it had existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or give proper warning of its presence.' " *Id.*, 259 N.C. at 203, 130

S.E. 2d at 284, *quoting Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E. 2d 56, 58 (1960).

In support of its motion for summary judgment the defendant submitted affidavits of three employees. In her affidavit, cashier Beverly Joan Pierce states, in substance, that she saw human excrement fall from an elderly woman who was approaching the exit and was immediately in front of plaintiff Louise B. Warren and that Mrs. Warren stepped and slid in the excrement. Supermarket employee Jeffrey B. Edwards states in his affidavit:

> 3. That at about 7:00 o'clock p.m. on October 2, 1982, I was working at the Giant Open Air Supermarket in Murfreesboro, North Carolina. At that time, I was next to the entrance and exit doors of the store, pushing empty grocery carts into the stack by the doors. I observed two elderly ladies walking from the checkout counters toward the exit door, and one of them suddenly stated, "Oh, God, I gotta get out of here," or words to like effect. I then heard a few noises and saw human excrement fall from the lady and land upon the floor. This was approximately four feet from the exit door. Another lady, known to me to be Louise B. Warren, was directly behind the lady who placed the human excrement upon the floor, perhaps five feet behind her.
>
> The lady who placed the excrement upon the floor immediately ran out of the store and Mrs. Warren apparently stepped in some of the excrement since I saw her foot slide. I did not see her fall to the floor. The excrement was visible on the floor, it being in several spots from the size of a hand to the size of a 50-cent piece. I was approximately twenty feet away and I heard the noises the lady made when she made the mess and I saw the excrement on the floor. I would estimate that Mrs. Warren was approximately five feet behind the lady who placed the excrement upon the floor.

Plaintiff submitted her own affidavit contradicting the defendant's evidence that the excrement had fallen onto the floor immediately prior to her stepping in it. In her affidavit Mrs. Warren states that the excrement she stepped in was dried and had footprints in it; and in plaintiffs' answers to defendant's second set of interrogatories, Mrs. Warren states that she was at the checkout counter for approximately 15 minutes and during that

time period saw no one enter or leave the store. Furthermore, in her affidavit plaintiff states that "Timothy Minton, an employee of defendant on said date and time did state 'he knew it [excrement] was on the floor but it wasn't his place to get it up; I was to put up stock.' " [Brackets in original.] In his affidavit, however, Timothy Minton seeks to explain his alleged statement to Mrs. Warren:

> Approximately one week after the accident, Mrs. Warren engaged me in a conversation at the store and asked me did I know about the accident. I told her that I had heard about the accident, but that I did not see it, and only knew what others had told me about it. I believe I told Mrs. Warren in this conversation that I was, at the time of the accident, working on one of the aisles and that therefore, it would not have been my job to clean up the excrement that was apparently upon the floor. I did not intend to imply to her that I had known about the excrement on the floor prior to her alleged fall, nor did I intend to imply to her that I had refused to clean it up. I did not even know about the accident until sometime after it had apparently occurred.

The above evidence shows it is undisputed that while in defendant's store Mrs. Warren slipped on human waste. This evidence also shows, however, that there are disputed facts as to how long the waste was on the floor before plaintiff stepped in it. These disputed facts are material facts because an essential element of plaintiff's claim is she must show that the waste was on the floor for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence in time to remove the waste or give proper warnings of its presence.

The question here is not whether plaintiff's version of the facts will be believed by the jury but whether there is a genuine issue of material fact. As the foregoing shows, there is a genuine issue of material fact.

Accordingly, the trial court's granting of summary judgment for the defendant is

Reversed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. PAMELA J. CATOE

No. 8518SC383

(Filed 3 December 1985)

Automobiles and Other Vehicles § 126.3— blood alcohol concentration—.09 two and a half hours after accident—expert testimony that level at time of accident .13—no error

The trial court did not err in a prosecution for manslaughter, DWI, and driving on the wrong side of an interstate highway by allowing an expert witness to testify that the average person displayed a certain rate of decline in blood alcohol concentration in the hours after the last consumption of alcohol and that defendant's BAC would have been approximately .13 at the time of the accident based on his BAC of .09 two and a half hours after the accident. The witness testified that he had done experiments to determine the average rate of elimination of alcohol from the blood, that he had arrived at a mean elimination rate which matched that observed by other nationally and internationally known scientists in the field, that his data were very consistent across the various subcategories of the population although there could be deviations from the mean in individual cases, and that the body eliminated alcohol essentially on a straight line basis, which established the general validity of his simple mathematical extrapolation. Moreover, there was evidence sufficient to go to the jury on the question of DWI regardless of the expert testimony because the officer smelled a moderate odor of alcohol on defendant's person at the accident scene and observed slurred speech and glassy eyes. N.C.G.S. 8C-1, Rules of Evidence 103(a), 702.

APPEAL by defendant from *Albright, Judge.* Judgment entered 7 December 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 October 1985.

Upon proper indictment defendant was tried for manslaughter, driving while impaired (DWI), and driving on the wrong side of an interstate highway. The charges arose out of an early morning accident in which defendant's car suddenly swerved across the highway median and ran head on into another car.

The State's evidence tended to show that defendant was removed from her car by emergency personnel. At the time a patrolman noticed that she had a moderate odor of alcohol about her, and that her eyes were glassed over and red and her speech slurred. She was taken to a hospital, where a blood sample was taken some 2½ hours later. The sample yielded a blood alcohol concentration (BAC) of .09. An expert witness, Dr. Ellis, testified for the State and estimated by extrapolation that defendant's BAC at the time of the accident would have been approximately 0.13.

Defendant testified that she had had three glasses of wine the night before, the last one seven hours before the accident. She did not drink anything in the morning. The accident occurred when she bent to pick something up off the floor of her car and lost control.

The jury found defendant guilty of DWI and driving on the wrong side. She received a single twelve month active sentence, work release recommended, on unsecured appearance bond pending this appeal.

Attorney General Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Assistant Public Defender Frederick G. Lind for defendant-appellant.

EAGLES, Judge.

The only assignment on appeal is whether the court erred in allowing the expert witness, Dr. Ellis, to testify that the average person displays a certain rate of decline in BAC in the hours after the last consumption of alcohol, and that based on that average rate of decline defendant's BAC would have been approximately 0.13 at the time of the accident. We find no error.

I

Defendant's objections to the contested testimony were only general. Error may not be argued on appeal where the underlying objection fails to present the nature of the alleged error to the trial court. This rule serves to facilitate proper rulings and to enable opposing counsel to take proper corrective measures to avoid retrial. G.S. 8C-1, R. Ev. 103(a); 1 H. Brandis, N.C. Evidence Section 27 at 107 (1982). The assignment is not properly before this Court.

II

Even assuming that the question is properly before us, we conclude that this evidence was properly admitted. A qualified expert (Dr. Ellis' qualifications are not contested) may give opinion testimony on scientific matters if it will assist the trier of fact to understand the evidence or determine a fact in issue. G.S. 8C-1, R. Ev. 702. The decision as to whether scientific opinion evidence is

sufficiently reliable and relevant remains largely with the discretion of the trial judge. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984).

Of particular importance here, and strongly emphasized by defendant, is the requirement that the scientific technique on which the expert bases the proffered opinion be recognized as reliable. *See id.* at 144-54, 322 S.E. 2d at 379-84. We note, however, that *absolute certainty* of result is not required. *See United States v. Baller*, 519 F. 2d 463 (4th Cir.), *cert. denied*, 423 U.S. 1019, 46 L.Ed. 2d 391, 96 S.Ct. 456 (1975). The technique must have achieved general acceptance in the relevant scientific community and provide scientific assurance of accuracy and reliability. *Bullard; United States v. Alexander*, 526 F. 2d 161 (8th Cir. 1975) (reliability one of most important factors).

Defendant's failure to object specifically at trial on this ground, now asserted as error, hinders our consideration since a full record was not developed. The record does show that Dr. Ellis testified that he had done experiments to determine the average rate of elimination of alcohol from the blood. He arrived at a mean elimination rate, which matched that observed by many other nationally and internationally known scientists in his field. Dr. Ellis admitted that there could be deviation from the mean in individual cases, but that his data were very consistent across the various subcategories of the population. He testified that the body eliminated alcohol essentially on a straight line basis, establishing the general validity of his simple mathematical extrapolation. On this record, we conclude that Dr. Ellis' testimony was sufficiently reliable and the court did not abuse its discretion in admitting it. The possibility of minor variations conceded by Dr. Ellis (which, if applied in defendant's favor, would still result in a BAC of .12), went to the weight, not the admissibility of his testimony.

III

We find only one other North Carolina case discussing the admissibility of extrapolation evidence and that was in *dicta*. *State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165 (1967). However, recent decisions of other states generally have recognized extrapolation as reliable. *See Bartel v. State*, 704 P. 2d 1067 (Mont. 1985) (range of BAC values based on blood samples drawn 2½

hours after accident admissible); *Ring v. Taylor*, 141 Ariz. 56, 685 P. 2d 121 (Ct. App. 1984) (retroactive extrapolation has achieved general acceptance); *State v. Armstrong*, 236 Kan. 290, 689 P. 2d 897 (1984) (delay of two hours in sampling for jury to consider; "lapse of time usually favors a defendant"). Of course, usual constraints of relevance continue to apply. *See People v. Leonora*, 133 Ill. App. 3d 74, 477 N.E. 2d 1277 (1985) (accident after drinking; State could not introduce extrapolation testimony when only test taken was six hours later, showing BAC of zero). We note that one court has suggested that legislative enactments establishing a certain BAC as presumptive of impairment or sufficient to establish the offense are simply a legislative recognition of the validity of extrapolation and its value in eliminating the need for expert testimony in every DWI case. *Erickson v. Municipality of Anchorage*, 662 P. 2d 963 (Alaska Ct. App. 1983).

IV

Although the primary value of Dr. Ellis' testimony was to establish that defendant's BAC was above the statutory .10 at the time of the accident, the State was not required to establish that BAC level to prove DWI. *State v. Sigmon*, 74 N.C. App. 479, 328 S.E. 2d 843 (1985) (defendant's BAC of .06 did not establish presumption that not impaired; other evidence, principally opinion of patrolman, sufficed to convict); *see State v. Shuping*, 312 N.C. 421, 323 S.E. 2d 350 (1984) (proof of .10 simply one of two methods of proving DWI). Here there was evidence that defendant had a BAC of .09 after the accident, and no evidence of drinking between the time of the accident and the sample. The officer smelled a moderate odor of alcohol on defendant's person at the accident scene, and observed slurred speech and glassy eyes. He gave his opinion that "she had consumed some controlled substance to an appreciable degree that would have affected both her mental and physical faculties." This evidence sufficed to go to the jury on the question of DWI regardless of Dr. Ellis' testimony. *Sigmon; see State v. Felts*, 5 N.C. App. 499, 168 S.E. 2d 483 (1969) (effect of alcohol must be recognizable) (new trial on unrelated grounds).

CONCLUSION

Accordingly, we conclude that defendant has failed to show prejudicial error. No other error appears on the face of the record.

No error.

Judges WHICHARD and COZORT concur.

MILDRED C. SHARP v. JESSE LEWIS WYSE

No. 8521SC244

(Filed 3 December 1985)

Negligence § 6.1— camper top becoming detached—applicability of res ipsa loquitur

In an action to recover for damages suffered when the camper top came off defendant's truck and struck plaintiff's vehicle while it was traveling on the highway, plaintiff's evidence was sufficient for the jury under the doctrine of res ipsa loquitur where it tended to show that the camper top was firmly attached to defendant's truck by a dealer; after that date, the truck was in defendant's exclusive possession and control; and seventeen months after the top was attached, it detached for some unexplained reason and struck plaintiff's automobile.

APPEAL by plaintiff from *Wood (William Z.), Judge.* Judgment entered 12 October 1984 in FORSYTH County Superior Court. Heard in the Court of Appeals 15 October 1985.

This is a civil action wherein plaintiff seeks to recover for personal injury and property damage allegedly caused by defendant's negligence. On 5 June 1982 plaintiff was driving her 1979 Ford Thunderbird in an easterly direction on Interstate 40 in Winston-Salem while defendant was driving his 1979 pickup truck, which was equipped with a camper top, in a westerly direction on that same highway. As the parties approached each other, the camper top came off defendant's truck and struck plaintiff's vehicle. Plaintiff alleged that the collision was caused by defendant's negligence in operating or maintaining his vehicle and resulted in injury to her and damage to her automobile. Defendant denied that he was negligent and that plaintiff was injured or damaged as alleged.

Plaintiff presented evidence at trial which tends to show the following, in pertinent part: Triangle Campers, Inc. sold the camper top to defendant and installed it on his truck in

November 1980. Triangle Campers had purchased the top from a company in Indiana. The camper top was attached to the truck by four clamps which were built into the top. Each clamp was attached to the truck by a set of metal fingers which were pulled together with a lever. Although the clamps were tight and hard to pull up once they were attached, they could be released by using a screwdriver. Sometimes clamps such as these are a little bit loose and can be released by using only one's fingers. From the back of the truck, one could see the clamps and whether they were loose or down in place. The camper top weighed 70 to 90 pounds and was as rigid as a boat hull when clamped down. The clamps were in place and pulled down tight firmly attaching the camper top to defendant's truck when defendant left Triangle Campers in November 1980.

Defendant, called by plaintiff as an adverse witness, testified that he used the pickup truck in his business every day except Sunday, that he carried sample kits in the back of it, and that he drove the truck several times on Sundays as well. He said that he had never removed or attempted to remove the camper top after it was installed and had never tried to loosen the clamps. He had driven the truck in windy weather, over bumps in the road, and had passed thousands of tractor/trailer trucks on highways since the camper top was attached yet the top never blew off and he never heard it rattle or saw it bounce up and down. He indicated that he had never actually checked the clamps that held the top to the truck to see that they were in place but that he had looked at them from time to time. He further indicated that each clamp had a bolt through it with a nut and that it was his belief that the top would not come off unless the bolts were unscrewed. The bolts apparently were located in the lever mechanism of the clamp and were not directly attached to the truck itself.

On the day of the accident, defendant passed a tractor/trailer truck, heard a "sipping like sound," and then saw the camper top floating across the highway. Defendant's examination of the camper top after the accident showed that the bolts that went through the clamps were still attached to the camper top. Defendant stated that the only way the accident could have happened was if the fingers of the clamps had somehow slipped. He testified that the pickup truck had been under his possession and control at all times during the 17 months after the camper top was at-

tached to it and before the date of the accident, and that he never saw and does not contend that anyone else tinkered with it while it was in his possession.

At the close of plaintiff's evidence, defendant moved for a directed verdict on the ground that the evidence taken in the light most favorable to plaintiff failed to disclose any actionable negligence on his part. The trial court allowed defendant's motion and plaintiff appealed.

Roy G. Hall, Jr. for plaintiff.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by W. Thompson Comerford, Jr., for defendant.

WELLS, Judge.

The question presented by this appeal is whether plaintiff presented sufficient evidence to withstand defendant's motion for a directed verdict. In considering a defendant's motion for a directed verdict, the court must view the evidence in the light most favorable to the plaintiff, resolving all conflicts in her favor and giving plaintiff the benefit of every inference that reasonably can be drawn in her favor. *Snow v. Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979). It is only when the evidence is insufficient as a matter of law to support a verdict for the plaintiff that the motion should be granted. *Id.*

Plaintiff argues that the evidence is sufficient to invoke the doctrine of *res ipsa loquitur* and therefore to require submission of the case to the jury. We agree. *Res ipsa loquitur* is an evidentiary rule grounded in the superior logic of ordinary human experience which operates to permit an inference of negligence from the very happening of the occurrence itself. *McPherson v. Hospital*, 43 N.C. App. 164, 258 S.E. 2d 410 (1979); 2 Brandis, *N.C. Evidence* § 227 (2d rev. ed. 1982). The rule is generally stated as follows:

> [W]hen a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

Snow v. Power Co., supra, quoting Newton v. Texas Co., 180 N.C. 561, 105 S.E. 433 (1920). The evidence need not preclude every inference other than that of defendant's negligence before the doctrine of *res ipsa* can apply. *Brandis, supra.* "If the inference that [defendant's] negligence caused the injury is more likely than other permissible inferences, the doctrine should apply." *Id.*

Res ipsa loquitur does not shift the burden of proof to the defendant or require him to come forward with evidence to explain what happened. Byrd, *Proof of Negligence in North Carolina: Part I. Res Ipsa Loquitur*, 48 N.C.L. Rev. 452 (1970). Rather, where the doctrine is applicable, "the nature of the occurrence itself and the inferences to be drawn therefrom are held to supply the requisite degree of proof to carry the case to the jury and to enable the plaintiff to make out a *prima facie* case without direct proof of negligence." *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785 (1954).

The evidence here viewed in the light most favorable to plaintiff tends to show: that the camper top was firmly attached to defendant's truck by an employee of Triangle Campers in November 1980; that after that date, the truck was in the exclusive possession and control of defendant; and that 17 months after the camper top was attached to the truck, it became detached for some reason not explained and collided with plaintiff's automobile, thereby injuring plaintiff and damaging her automobile. Common experience shows that a camper top properly attached to a pickup truck does not ordinarily detach itself from the truck in the absence of negligence. Although it could possibly be inferred that the camper top was negligently constructed by the manufacturer or negligently installed by Triangle Campers, these inferences are weakened by the evidence showing that defendant drove the truck for a period of 17 months after the camper top was attached in windy weather, over bumpy roads, and past thousands of tractor/trailer trucks without any problems. The more logical and likely inference to be drawn from the evidence is that defendant was negligent in some respect in maintaining his vehicle by failing to see that the camper top remained securely attached.

We conclude that *res ipsa loquitur* is applicable in this case and that plaintiff's evidence pursuant to that doctrine is sufficient

to go to the jury. Accordingly, we hold that it was error for the trial court to grant defendant's motion for a directed verdict and that the judgment entered must be reversed.

Reversed.

Judges ARNOLD and MARTIN concur.

STATE OF NORTH CAROLINA v. LONNIE R. HARDY

No. 8519SC643

(Filed 3 December 1985)

Constitutional Law § 49— waiver of counsel—statutory procedure not followed

The trial court erred in a prosecution for conspiracy to damage property by use of an explosive device by allowing defendant to represent himself without determining whether he had voluntarily and freely waived his right to counsel where, although the court signed a certification indicating that the procedure required by N.C.G.S. 15A-1242 had been followed, transcripts taken at the time the waiver was signed and at the time defendant entered his guilty plea show that the procedure was not followed.

ON writ of certiorari to review 6 December 1984 Judgment of *Cornelius, Judge.* Judgment entered 6 December 1984 in Superior Court, CABARRUS County. Heard in the Court of Appeals 7 November 1985.

On 16 January 1984 defendant was indicted for conspiracy to damage property by the use of an explosive device. On 23 May 1984 the defendant was arraigned and pleaded not guilty. He was represented by James Snow on that occasion.

On 30 July 1984 the following transpired in open court:

MR. SNOW: I have first appeared for Mr. Hardy and at that time we entered a plea of Not Guilty.

Mr. Hardy and I had discussions about the matters upon which I would be employed and the scope of my representation of him.

Since that time he wishes to substantially change the type of manner of his representation and get into some other

collateral matters, and I have advised him that I do not believe I am properly equipped to handle those matters, and he agrees with that.

Also, he has contacted apparently other Counsel here and Winston-Salem, and he is apparently discussing some portions of his projected defense with members of the Attorney General's Office in Raleigh; and at this particular time I would advise the Court that I do not believe that my withdrawal would be substantially critical to either the Defendant or the State.

As I say, I am not equipped to represent him in the manner in which he wants to be represented, and with respect to the State, it appears that the victim and Mr. Hardy live considerable distance apart and there has been no contact between the two of them.

He is under a very restricted bond and it required him practically daily to report to the SBI Office out of Greensboro, and the prime or principal Witness for the State is currently with the State through incarceration, and so I do not believe that the withdrawal would be critical at this point to the eventual disposition of this case.

As a final act for Mr. Hardy prior to withdrawing I would move the Court to continue the matter forward to an appropriate term.

I hear you have a term September 24th, and Mr. Hardy has been advised he will need speedy trial.

He is willing to do both of these in order to effectuate my withdrawal and to continue the matter to an appropriate date.

COURT: Is that correct, sir?

DEFENDANT: Yes, sir.

COURT: Sign the Waiver of Rights to an attorney and sign the form for the speedy trial.

Following this exchange the defendant signed a waiver of counsel and the court made certification of waiver. These documents read as follows:

The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully understands. The undersigned now states to the Court that he does not desire the assignment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

CERTIFICATE OF JUDGE

I hereby certify that the above named person has been fully informed in open Court of the nature of the proceeding or of the charges against him and of his right to have counsel assigned by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the assignment of counsel; and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

This the 30th day of July, 1984.

On 26 November 1984, defendant appeared in court representing himself. As defendant was preparing to enter a plea the following exchange occurred:

COURT: Have you discussed your case fully—You have waived the right to have an attorney; is that correct?

MR. HARDY: The original attorney I had was not hired by me. I did not pay him.

COURT: Did you at that time execute a waiver before the Court, did you not?

MR. HARDY: Yes. There was a reason behind it. This attorney represented me in a previous case, Mr. Snow, and at this time on the day I went to Court, he did not appear in Court.

MR. SPEAS: I believe you requested that he withdraw from the case?

MR. HARDY: Yes, sir, because I had not hired him. My fiancee had hired this gentlemen and the only way I could

> get an attorney he said, the only way I could get him off this case after he had been hired by her was to waive counsel. Since that time I have been in Court sessions three different times and I have lost a job every time I came to Cabarrus County and had to stay the entire week. I have not had gainful employment since I have been charged with this crime.

After these statements the court did not inquire any further concerning whether defendant was indigent and desired to have counsel appointed, but continued to ask defendant questions from the plea transcript form.

On 6 December 1984 the court entered judgment based upon the guilty plea tendered on 26 November 1984. In the judgment the court found factors in aggravation and factors in mitigation and found that the factors in aggravation outweighed the factors in mitigation. Based upon this finding the court sentenced defendant to eight years imprisonment, a term in excess of the presumptive term. From this judgment, defendant gave notice of appeal. On 25 February 1985 the Senior Resident Superior Court Judge appointed counsel to prosecute the appeal. As part of his review of the record counsel excepted to actions of the court which were not appealable pursuant to G.S. 7A-27(b). Counsel in a well written brief requested that we review these issues by way of certiorari. After reviewing the defendant's request and the State's response thereto the Court, in its discretion, allows defendant's request for a writ of certiorari to review the non-appealable issues.

Attorney General Lacy H. Thornburg, by Associate Attorney Angeline M. Maletto, for the State.

Steven A. Grossman for defendant appellant.

ARNOLD, Judge.

The issue dispositive of this action is whether the court erred by allowing the defendant to represent himself without determining whether he had voluntarily and freely waived his right to counsel. Believing the court erred we vacate the 6 December 1984 judgment.

The Sixth Amendment to the United States Constitution guarantees persons accused of serious crimes the right to counsel.

Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963). If those persons cannot afford counsel, the court must appoint one to represent them. *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). This right has been made applicable to the states by the Fourteenth Amendment. *Id.* A person may refuse counsel and conduct his or her own defense. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975). However, waiver of counsel must be voluntarily and knowingly made, and the record must show that the defendant was literate and competent, and that he voluntarily and of his own free will waived this right. *Id. See also State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980).

G.S. 15A-1242 provides the following test for determining whether a person will be allowed to represent himself:

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

Although the court signed a certification indicating that this procedure had been followed, the transcripts, taken at the time the waiver was signed and at the time when defendant entered his guilty plea, show that the proper procedure was not followed. Thus, the judgment entered must be vacated and the case remanded for a determination of whether the defendant is entitled to have counsel appointed to represent him in this action.

Vacated and remanded.

Judges MARTIN and COZORT concur.

STATE OF NORTH CAROLINA v. CURTIS LEE WINSTEAD

No. 859SC340

(Filed 3 December 1985)

Criminal Law § 141.1— habitual offender—trial within twenty days of last indictment—no error

There was no error in requiring defendant to stand trial as an habitual felon within twenty days of indictment where defendant was indicted on 4 September 1984 for attempted robbery with a dangerous weapon and with being an habitual felon in one indictment and with being an habitual felon in a separate indictment; a new bill of indictment was returned on 4 September for attempted armed robbery which described the weapon in more detail; both indictments for attempted armed robbery charged defendant with violation of the habitual felon statute and referred to the 4 September indictment which set forth the previous felony convictions; defendant moved for a continuance on December 3 on the grounds that counsel had been appointed only two days before trial; and the motion was denied and the trial held on 5 December. N.C.G.S. 14-7.3, 14-7.1.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 6 December 1984 in Superior Court, PERSON County. Heard in the Court of Appeals 16 October 1985.

Attorney General Lacy Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

BECTON, Judge.

The defendant, Curtis Lee Winstead, appeals from a conviction of attempted robbery with a dangerous weapon and being an habitual felon.

Defendant was indicted on 4 September 1984 for attempted armed robbery and for being an habitual felon as defined in N.C. Gen. Stat. Sec. 14-7.1 (1981). Also on 4 September 1984, a separate indictment was returned charging defendant with being an habitual felon. On 4 December 1984, a new bill of indictment for attempted armed robbery was returned by the grand jury. The new indictment was identical to the first attempted armed robbery indictment except that the weapon, which had been described as a "stick of wood" in the first indictment, was described in the new

indictment as a "stick of oak firewood, three (3) inches thick and twenty-one (21) inches long." Both indictments for attempted armed robbery charged defendant with violation of the habitual felon statute, and both referred to the separate 4 September 1984 indictment charging defendant with being an habitual felon which set forth the previous felony convictions. The habitual felon indictment was not resubmitted to the grand jury.

The attempted armed robbery and habitual felon charges were joined for trial. The defendant moved for a continuance on the ground that counsel had been appointed on 3 December 1984, only two days before trial. The trial court denied the motion, and the trial was held on 5 December 1984. Defendant was convicted on both charges. The only issue on appeal is whether the trial court erred in requiring defendant to stand trial on the habitual felon charge within twenty days of the second attempted armed robbery indictment. We believe the defendant waived his right to a twenty-day delay under this statute, and, in any event, the defendant can show no prejudicial error.

First we note that the defendant failed to raise this issue before the trial court. The defendant's motion for a continuance was based solely on the ground that counsel had been appointed only two days before trial. The statute specifically provides for a twenty-day delay before trial on an habitual felon charge, but then says: "provided, the defendant may waive this 20-day period." G.S. Sec. 14-7.3; *cf. State v. Davis*, 38 N.C. App. 672, 248 S.E. 2d 883 (1978) (discussing waiver of right under N.C. Gen. Stat. Sec. 15A-943(b) to one week between arraignment and trial); *State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977) (defendant properly asserted his right under G.S. Sec. 15A-943(b) and raised the issue at trial). Nevertheless, we address the merits of defendant's appeal, especially since defendant contends there is ambiguity in the statute.

The habitual felon indictment was returned on 4 September 1984, more than twenty days before the defendant was tried on that charge. Defendant contends that the twenty-day period runs from the date of the indictment charging the principal, or substantive, offense, attempted armed robbery. Because the attempted armed robbery indictment upon which trial proceeded was returned one day before trial, defendant argues the twenty-day

rule was violated. We disagree with defendant's reasoning and conclusion.

The defendant's suggestion that the statute should be read to allow twenty days from the indictment on the substantive felony is rejected. The statute reads:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. . . . No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge *within 20 days of the finding of a true bill by the grand jury*; provided, the defendant may waive this 20-day period.

G.S. Sec. 14-7.3 (emphasis added). Admittedly, the statute could be more clear, but we believe "true bill" refers to the separate indictment for the habitual felon charge. Therefore, the twenty-day period runs from the time the grand jury returns an indictment on the habitual felon charge.

We realize that an habitual felon indictment is ancillary to the indictment for the substantive felony and cannot stand on its own. *See State v. Allen*, 292 N.C. 431, 233 S.E. 2d 585 (1977). An habitual felon indictment must be supported by a valid indictment on a substantive charge. In the case at bar, the original indictment for attempted armed robbery was not fatally defective just because it failed to specify the type of wood of which the stick was made or the thickness or length of the stick. Indeed, it is not clear why the State saw fit to amend the language in the original indictment in light of the Supreme Court's holding in *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1977) (indictment sufficiently alleges deadly weapon if it (1) names the weapon, and (2) either states that it was a "deadly weapon" *or* alleges facts that necessarily show its deadly character). The first indictment alleged that defendant used a "deadly weapon." The second attempted armed robbery indictment was not necessary to make the habitual felon indictment valid. Thus, the habitual felon indict-

ment was supported by a valid indictment for a substantive felony from 4 September 1984 through the time of the trial, and the trial on the habitual felon charge was held more than twenty days after the grand jury returned a valid indictment on that charge.

Finally, it is important to keep in mind the purpose behind the twenty-day delay:

> One basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist.* Failure to provide such notice where the state accepts a guilty plea on the substantive felony charge may well vitiate the plea itself as not being knowingly entered with full understanding of the consequences. . . . Since the statute makes no distinction between guilty pleas and jury verdicts of guilt the same notice requirement prevails in either event.

Allen, 292 N.C. at 436, 233 S.E. 2d at 588 (citation omitted); *see State v. Keyes*, 56 N.C. App. 75, 78, 286 S.E. 2d 861, 863 (1982). Clearly, defendant in our case had notice that he was being tried as a recidivist and that he should orient his strategy accordingly. The defendant had more than twenty days from the time he was indicted as an habitual offender, and each indictment on the attempted armed robbery charge clearly charged defendant with being an habitual offender and referred to the separate indictment for that crime as required by statute.

For the reasons set forth above, we find

No error.

Chief Judge HEDRICK and Judge PARKER concur.

MYRTLE S. WEBB, EMPLOYEE, PLAINTIFF v. PAULINE KNITTING INDUSTRIES (FORMERLY KNOWN AS MACANAL SPINNING MILLS), EMPLOYER, THE TRAVELERS INSURANCE COMPANY, CARRIER, AND/OR AETNA CASUALTY & SURETY INSURANCE COMPANY, CARRIER, AND/OR FEDERAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC579

(Filed 3 December 1985)

Master and Servant § 69— chronic obstructive lung disease—ability to earn wages in any employment—findings insufficient

A chronic obstructive lung disease case was remanded for further consideration of whether plaintiff was entitled to compensation for permanent and total disability under N.C.G.S. 97-29 (Cum. Supp. 1983) where the Industrial Commission found that plaintiff has chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust in her employment; plaintiff has a respiratory impairment of a moderate nature; plaintiff, as a result of her chronic obstructive lung disease, has sustained permanent damage to each of her lungs; this impairment is not sufficient to render plaintiff incapable of performing types of employment which do not require very strenuous activity or exposure to cotton dust; and plaintiff had not proven that her exposure to respirable cotton dust had resulted in any incapacity to earn wages in her employment with defendant or any other employment. The Commission's findings do not address the evidence that plaintiff's education, age and experience suggest that she is probably not capable of earning wages in any employment which does not require substantial physical exertion; the Commission's findings fly directly in the face of the medical evidence which consistently showed plaintiff incapable of performing physically exertive labors; and findings that plaintiff was not prevented from working because of lung disease at the time she left work because of an accident in 1979 and that plaintiff had sought employment since her accident have little, if any, bearing on the question of plaintiff's present ability to earn wages in employment for which she is qualified. N.C.G.S. 97-52, N.C.G.S. 97-31(24).

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award entered 10 December 1984. Heard in the Court of Appeals 21 November 1985.

Plaintiff, a 63-year-old textile worker with a seventh grade education, began working in the textile industry in 1940, at age 19, and continued in that employment for 39 years until she was injured in an on-the-job accident in 1979. Following her work interruption due to her accident, plaintiff was diagnosed as having work-related chronic obstructive lung disease with probable byssinosis.

One physician, Dr. Robert A. Rostand, a member of the North Carolina Textile Occupational Disease Panel, testified as to plaintiff's history of exposure to cotton dust in her employment and her long history of cigarette smoking. Dr. Rostand found plaintiff to be suffering from severe respiratory impairment, contributed to by plaintiff's long term exposure to cotton dust and cigarette smoking. Dr. Rostand found plaintiff's impairment to be permanent but was unable to distinguish to what degree her impairment was caused by either her occupational cotton dust exposure or cigarette smoking alone. Dr. Rostand found plaintiff to have very little exercise tolerance, able to carry out only the slightest physical activity. Her last exposure to cotton dust was during her employment with defendant Pauline Knitting Industries.

Dr. Charles D. Williams, another member of the Textile Occupational Disease Panel, testified that plaintiff had chronic obstructive pulmonary disease of moderate severity contributed to by plaintiff's occupational exposure to cotton dust. While Dr. Williams found that plaintiff might benefit from appropriate treatment, he also testified that plaintiff could not engage in strenuous exertion over an eight-hour work shift in the cotton textile industry.

Both Dr. Rostand and Dr. Williams found that plaintiff also suffered from heart disease which contributed to her disability.

Plaintiff testified as to her age, education and work experience. She had no training and experience except textiles, except for two years of employment at a meat packing plant. Following her recovery from her 1979 work injury, plaintiff sought to be re-employed by defendant Pauline Knitting, another knitting mill, and White Packing Company, but was not successful.

The Deputy Commissioner who heard plaintiff's claim denied her compensation. On appeal a majority of the Full Commission modified the Deputy Commissioner's award by finding and concluding that plaintiff was entitled to an award of $6,000.00 for permanent injury to her lungs. The Commission also concluded that under N.C. Gen. Stat. § 97-25 (1979) plaintiff was entitled to payment of all medical bills incurred for treatment which may lessen the lung impairment caused by her occupational disease.

Lore & McClearen, by R. James Lore, for plaintiff.

Boyle, Alexander, Hord and Smith, by B. Irvin Boyle, for defendants appellees Pauline Knitting Industries and The Travelers Insurance Company.

Underwood, Kinsey & Warren, P.A., by John H. Northey III, for defendant appellee The Aetna Casualty and Surety Insurance Company.

Hedrick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr., for defendant appellee Federal Insurance Company.

WELLS, Judge.

Plaintiff contends that the Commission's award was entered under misapprehension of law and that this case should be remanded for further consideration as to whether plaintiff is entitled to compensation for permanent and total disability under N.C. Gen. Stat. § 97-29 (Cum. Supp. 1983). We agree and reverse and remand.

In summary, the Commission found that plaintiff has chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment; that plaintiff has a respiratory impairment of a moderate nature; that as a result of her chronic obstructive lung disease, plaintiff has sustained permanent damage to each of her lungs; that this impairment *is not sufficient to render plaintiff incapable of performing types of employment which do not require very strenuous activity or exposure to cotton dust* (emphasis supplied); and that plaintiff had not proven that her exposure to respirable cotton dust had resulted in any incapacity to earn wages in her employment with defendant Pauline Knitting Industries or any other employment. The Commission's findings do not address the evidence that plaintiff's education, age and experience suggest that she is probably not capable of earning wages in any employment which does not require substantial physical exertion. These findings also fly directly in the face of the medical evidence which consistently showed plaintiff to be incapable of performing physically exertive labor.

Under *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978) and its progeny, this case must be remanded for appropriate findings and conclusions of plaintiff's capacity to earn

wages in employment for which she may be qualified in the light of her age, education and experience.

Upon necessary and appropriate findings and conclusions, plaintiff may be awarded either disability compensation under G.S. 97-29 and 97-52 or compensation for permanent injury to her lungs under G.S. 97-31(24). *See Harrell v. Harriett & Henderson Yarns*, slip op. no. 198PA83 (N.C., filed 5 November 1985).

Before leaving the issue of plaintiff's disability, we deem it appropriate to note that in considering that issue, the Commission was apparently influenced by its findings that at the time of her leaving work because of an accident in 1979, plaintiff was not prevented from working because of lung disease and that plaintiff had sought employment since her accident. We conclude that these findings have little, if any, bearing on the question of plaintiff's *present* ability to earn wages in employment for which she is qualified.

Plaintiff also contends that the Commission erred in the award of her medical expenses. We perceive that this question will be appropriately resolved on remand.

Plaintiff's other arguments are without merit and are overruled.

Defendants Aetna Casualty and Insurance Company and Federal Insurance Company have moved to dismiss on the grounds that they were not the carriers during plaintiff's last injurious exposure. We agree and the appeal is dismissed as to these defendants.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

ELLAVENE M. FOY v. HOWARD J. FOY

No. 8526DC370

(Filed 3 December 1985)

Execution § 1; Husband and Wife § 14— installment land contract—creation of tenancy by the entirety—execution by creditor of one spouse precluded

An installment land contract executed by the record owners to defendant and his present wife created a tenancy by the entirety so as to preclude a judgment creditor of one spouse from subjecting the property to execution and sale.

APPEAL by plaintiff from *Lanning, Judge.* Order entered 8 January 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 23 October 1985.

Curtis and Millsaps by Joe T. Millsaps for plaintiff appellant.

Newitt & Bruny by John G. Newitt, Jr., and Roger H. Bruny for intervenor appellee.

COZORT, Judge.

Plaintiff Ellavene M. Foy, former wife of the defendant Howard J. Foy, appeals from the stay of execution granted in favor of defendant's present wife, Diane F. Foy, the intervenor in this action. The stay was issued to enjoin the execution sale of real property held under an installment land contract in the name of the defendant and his present wife. Plaintiff contends that the trial court erred in granting the stay because an installment land contract does not create a tenancy by the entirety in the defendant and his wife and is therefore subject to execution of plaintiff's judgment against the defendant. We disagree.

The essential facts are the following:

In April of 1977 the District Court of Mecklenburg County entered an order finding the defendant Howard J. Foy indebted to the plaintiff for support payments in the sum of $13,940.00. The order was docketed on 27 April 1983 in Mecklenburg County. On 6 May 1983 execution was issued against defendant's property. The Sheriff of Mecklenburg County, pursuant to the execution, issued a notice of sale of defendant's one-half interest in real property located in Berryhill Township, Mecklenburg County. De-

fendant's interest in the property consisted of an installment land contract originally granted to him on 16 July 1976 by the record owners of the property. In May of 1981 another installment land contract was executed by the record owners to defendant and his present wife, Diane F. Foy, which superseded the original installment land contract. The defendant's present wife intervened in the action seeking to stay the execution of plaintiff's judgment against the property in question and to relieve the property from the operation of the judgment. A stay was granted on 8 January 1985. The trial court found that the property in question is not subject to execution because it is held as a tenancy by the entirety.

The sole question argued on appeal is whether an installment land contract creates a tenancy by the entirety so as to exclude a judgment creditor of one spouse from subjecting the property to execution and sale. We find that it does.

When land is conveyed to a husband and wife as such, they take the estate as tenants by the entirety and not as joint tenants or tenants in common. *Davis v. Bass*, 188 N.C. 200, 203, 124 S.E. 566, 567 (1924). The husband and wife, by virtue of their marital relationship, are each seized of the whole estate, not a portion of the estate. This is true because at common law the husband and wife were considered one person. *Id.* As a consequence of the tenancy by the entirety concept, "[l]ands held by husband and wife as tenants by the entirety are not subject to levy under execution on a judgment rendered against either the husband or the wife alone, . . . but a judgment rendered against the husband and wife jointly, upon a joint obligation, may be satisfied out of an estate in lands held by them as tenants by the entirety." *Id.* at 205, 124 S.E. 566, 569. *See also Boyce v. Boyce*, 60 N.C. App. 685, 689, 299 S.E. 2d 805, 808 (1983).

We are constrained by the North Carolina Supreme Court's opinion in *Stamper v. Stamper*, 121 N.C. 251, 28 S.E. 20 (1897) to find that an installment land contract, a contract to convey, creates a tenancy by the entirety. In *Stamper*, the North Carolina Supreme Court stated: "[W]e do not see why the right to the conveyance of a fee simple cannot be held in the same manner [as a tenancy by the entirety]." *Id.* at 254, 28 S.E. 20, 21. Subsequent cases have recognized, in dicta, that a contract to convey to hus-

band and wife creates a tenancy by the entirety. *Davis v. Bass*, 188 N.C. 200, 209, 124 S.E. 566, 571 (1924); *Moore v. Trust Co.*, 178 N.C. 118, 124, 100 S.E. 269, 273 (1919). An installment land contract is a contract to convey property upon the payment of all required installments. Narron, *Installment Land Contracts in North Carolina*, 3 Campbell L. Rev. 29, 30-31 (1981). Under the facts of this case the installment land contract executed by the defendant and his present wife creates a tenancy by the entirety in the property in question. As a tenancy by the entirety this property is not subject to levy and sale under execution of the plaintiff's judgment which was rendered solely against the defendant-husband.

Affirmed.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL DOCKERY

No. 8520SC624

(Filed 3 December 1985)

Constitutional Law § 48— effective assistance of counsel—failure to adequately present a defense—no error

Defendant was not denied the effective assistance of counsel in a prosecution for larceny of a firearm where defendant claimed that his counsel failed to subject the State's case to a meaningful adversarial testing and that he failed to present defendant's claimed alibi defense adequately. There was a lack of evidence before the Court of Appeals showing that a credible alibi defense could have been developed by a defense attorney acting in a reasonably competent manner; moreover, the accepted practice is to raise claims of ineffective assistance of counsel in post-conviction hearings rather than on direct appeal. Sixth Amendment to the United States Constitution, Art. I, § 23 of the North Carolina Constitution.

APPEAL by defendant from *Helms, Judge*. Judgment entered 30 October 1984 in Superior Court, MOORE County. Heard in the Court of Appeals 29 October 1985.

Defendant was charged in a proper bill of indictment with larceny of a firearm. He was convicted after a jury trial and sentenced to five years imprisonment. Defendant appeals.

Attorney General Thornburg by Associate Attorney General, D. David Steinbock, Jr., for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Louis D. Bilionis, for defendant appellant.

PARKER, Judge.

Defendant's only assignment of error is that he was denied the effective assistance of counsel guaranteed to all criminal defendants by the Sixth Amendment to the Federal Constitution and Article 1, Section 23 of our State Constitution. The standard for evaluating the effectiveness of appointed counsel in a criminal trial is that of "reasonably effective assistance." *Strickland v. Washington*, --- U.S. ---, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982). In *Strickland*, the United States Supreme Court, for the first time, elaborated on the meaning of the constitutional requirement of effective assistance. Justice O'Connor, writing for the Court, said that the focus of any inquiry into attorney effectiveness must be on the trial, as the purpose of requiring effective assistance of counsel is to ensure a fair trial. *Strickland* at ---, 104 S.Ct. at 2064, 80 L.Ed. 2d at 692. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* The test under the State Constitution for evaluating the effectiveness of counsel is identical. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985). The duties of an attorney representing a criminal defendant include the duty of loyalty, a duty to advocate the defendant's cause and duties to consult with the client, investigate the client's case and keep the client informed. *See* ABA Standards for Criminal Justice 4-1.10-4-8.6 (2d ed. 1980). However, a breach of one of these duties does not automatically require reversal of a defendant's conviction. The defendant must also demonstrate that the professionally unreasonable conduct of his counsel resulted in prejudice to the defendant. *Strickland* at ---, 104 S.Ct. at 2067, 80 L.Ed. 2d at 696.

In this case, defendant claims counsel was ineffective in that, first, he failed to subject the State's case to "meaningful adver-

sarial testing," and, second, that he failed to present defendant's claimed alibi defense adequately. Both contentions revolve around defendant's claim that he was elsewhere on the night of the larceny and that the complainant had a motive in bringing a false charge against defendant.

In bringing an ineffective assistance claim based on the failure to adequately present a defense, the central question is whether a supportable defense could have been developed. *State v. Martin*, 68 N.C. App. 272, 314 S.E. 2d 805 (1984). The burden of showing the probability that this defense existed is on the defendant. *Id. See also McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970). We have no evidence before us, other than what occurred at trial and defendant's bare assertions in his brief, which shows that a credible alibi defense could have been developed by a defense attorney acting in a reasonably competent manner. The U.S. Supreme Court in *Strickland* carefully observed that the two prongs of an ineffective assistance claim (attorney error and prejudice) need not be considered in any particular order. In fact, the Court intimated that disposing of an ineffective assistance claim on the ground of lack of sufficient prejudice, if possible, is preferable. "The object of an ineffectiveness claim is not to grade counsel's performance." *Strickland* at ---, 104 S.Ct. at 2070, 80 L.Ed. 2d at 699. Because of the lack of any evidence available to us concerning the validity of defendant's alibi defense, we cannot say that defendant suffered any prejudice as a result of his attorney's failure to present it effectively to the jury.

The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal. *E.g., State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982). While there are exceptions, *see United States v. Cronic*, --- U.S. ---, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984); *State v. McEntire*, 71 N.C. App. 721, 323 S.E. 2d 439 (1984), this case is not one of them. In order to evaluate whatever prejudice to defendant resulted from his counsel's errors, evidence needs to be presented at a post-conviction hearing as to the viability of defendant's alibi claim. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E. 2d 665, 669 (1985). As the record appears on this direct appeal, we are constrained to find

No error.

Judges ARNOLD and WELLS concur.

WILLIAM A. DAVIDSON v. VOLKSWAGENWERK, A.G., A WEST GERMAN CORPORATION AND VOLKSWAGEN OF AMERICA, INC., A NEW JERSEY CORPORATION AND JORDAN VOLKSWAGEN, INC.

No. 8526SC498

(Filed 3 December 1985)

Limitation of Actions § 4.2; Negligence § 20— product liability—statute of repose—constitutionality and applicability

The six-year statute of repose of N.C.G.S. 1-50(6) is constitutional and barred plaintiff's action instituted in 1984 against the manufacturer and dealer of a vehicle initially purchased by another in 1974 to recover for injuries sustained in a 1983 accident although plaintiff did not purchase the vehicle until 1980. There is no merit in plaintiff's contention that an extraordinary post-manufacture duty arises under certain circumstances and that a claim arising from the breach of this duty is beyond the purview of N.C.G.S. 1-50(6).

APPEAL by plaintiff from *Burroughs, Judge*. Judgment entered 10 December 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 November 1985.

This action was instituted on 5 April 1984. The complaint alleged in substance: On 24 March 1983 plaintiff, while driving south on Rural Paved Road 1525 in freezing weather and snow, was struck head on by a vehicle traveling north, driven by Debrah C. Perry; Ms. Perry's vehicle lost control and crossed the center line, striking plaintiff's vehicle; plaintiff's vehicle was a 1974 Volkswagen Bus manufactured and distributed by defendants Volkswagenwerk, A.G. and Volkswagon of America; plaintiff purchased the vehicle from defendant Jordan Volkswagen, Inc. in 1980; plaintiff was the second owner; the impact of the accident caused the forward wall of the vehicle to collapse into the driving compartment, crushing plaintiff's legs and body; plaintiff was pinned in the vehicle and exposed to severe weather for over an hour before rescue equipment arrived on the scene; plaintiff received injuries to his legs which rendered him permanently disabled. The complaint alleged that the force of the impact of the

vehicle was not great and that plaintiff's injuries were proximately caused by the defective design and lack of crashworthiness of the vehicle. Plaintiff further alleged that the defendants had knowledge of these defects at the time of manufacture, as well as notice thereafter from test and road results. Plaintiff stated seven separate claims for relief as to each defendant: (1) negligence, (2) breach of implied warranty, (3) breach of express warranty, (4) tortious concealment, (5) negligent failure to warn, (6) strict liability and (7) unfair trade practices in violation of G.S. 75-1.1. Each of the defendants answered, asserting, among other things, the defenses that (1) plaintiff's complaint failed to state a claim upon which relief could be granted, requiring dismissal under Rule 12(b)(6), N.C. Rules Civ. P., and (2) plaintiff's claims were barred by the statute of repose, G.S. 1-50(6). Each defendant applied for a preliminary hearing on its motion for dismissal under Rule 12(b)(6). Defendant Jordan Volkswagen cross-claimed against codefendants for indemnification based upon (a) breach of implied and express warranties and (b) a theory of primary or active negligence. Subsequently, each defendant moved for partial summary judgment as to him, supported by affidavits. On 10 December 1984 a preliminary hearing was conducted. The court granted each defendant's motion to dismiss the complaint and each defendant's motion for summary judgment. Plaintiff appeals.

Hamel, Hamel & Pearce, P.A., by Hugo A. Pearce, III, and Lewis, Babcock, Gregory & Pleicones of Columbia, South Carolina, by A. Camden Lewis and Daryl G. Hawkins, for plaintiff appellant.

Jones, Hewson & Woolard, by Harry C. Hewson and Hunter M. Jones, for defendant appellees Volkswagenwerk, A.G. and Volkswagon of America, Inc.

Caudle & Spears, P.A., by Lloyd C. Caudle and Thad A. Throneburg, for defendant appellee Jordan Volkswagen, Inc.

JOHNSON, Judge.

The statute of repose, G.S. 1-50(6) provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be

brought more than six years after the date of initial purchase for use or consumption.

G.S. 1-50(6) (1983).

The date of the initial purchase of the Volkswagen Bus was on or about 4 September 1974. By its clear language, the North Carolina statute of repose precludes this action.

Plaintiff does not contest the applicability of this statute as to four of his claims, rather he contends that this statute is unconstitutional. The constitutionality of this statute was unresolved at one time. *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E. 2d 188 (1981), *aff'd and mod.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). *See also Tetterton v. Long Mfg. Co.*, 67 N.C. App. 628, 631, 313 S.E. 2d 250, 251 (1984) (Becton concurring in the result). However, recent case law puts this issue to rest. G.S. 1-50(6) is constitutional. *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 320 S.E. 2d 273 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E. 2d 485 (1985); *Davis v. Mobilift Equipment Co.*, 70 N.C. App. 621, 320 S.E. 2d 406 (1984), *disc. rev. denied*, 313 N.C. 328, 329 S.E. 2d 385 (1985); *Walker v. Santos*, 70 N.C. App. 623, 320 S.E. 2d 407 (1984).

Plaintiff contends that certain of his claims against defendant are viable even if our statute of repose is held to be constitutional. Plaintiff bases this contention upon the theory that an extraordinary, post-manufacture duty arises under certain circumstances and that a claim arising from the breach of this duty is beyond the purview of G.S. 1-50(6). We disagree. The language of the statute is clear. "*No* action for the recovery of damages for personal injury . . . *shall* be brought. . . ." G.S. 1-50(6) (emphasis added). G.S. 1-50(6) is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable. *Bolick, supra.* To accept plaintiff's theory would defeat the purpose of the statute. Therefore, we

Affirm.

Chief Judge HEDRICK and Judge WHICHARD concur.

IN RE: DENISE RENEE LESSARD

No. 8526SC492

(Filed 3 December 1985)

Executors and Administrators § 37— administrator's fee—awarded from wrongful death benefits—no error

The trial judge did not err by awarding fees and expenses to a successor administrator from wrongful death proceeds where there were no other funds in the estate from which he could be paid, the administrator neither initiated nor handled in any way the wrongful death claim, and the record disclosed that the administrator expended considerable time in determining the correct distribution of the wrongful death proceeds. Those services are all compensable and may fairly be paid from wrongful death proceeds. N.C.G.S. 28A-23-4, N.C.G.S. 28A-18-2.

APPEAL by respondent Elizabeth C. Lessard from *Burroughs, Judge*. Order entered 6 December 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 November 1985.

This is a proceeding wherein the successor-administrator of the estate of Denise Renee Lessard seeks to have the clerk of superior court order that he be paid a fee for his services, and further that the fee be paid from the wrongful death proceeds which comprised the entire estate. In apt time, the mother of the deceased objected to any payment to the successor-administrator. On 15 October 1984 the clerk of superior court entered an order directing that the successor-administrator be paid $4,275.00 for his services and $40.50 for expenses, the total to be paid from the wrongful death proceeds which had been received. Respondent mother appealed to superior court.

After a hearing the judge made findings of fact which, except where quoted, are summarized as follows: Denise Renee Lessard died intestate in February 1982 and her mother was appointed administrator of her estate. Because of complex litigation pending between the mother and the father of the deceased, respondent mother was removed as administrator of the estate, and petitioner Leslie Miller was appointed successor-administrator. The court further found:

6. That Leslie H. Miller, Successor-Administrator, has expended sixty-one (61) hours of his and his office's time in handling this particular estate.

7. That Leslie H. Miller's normal hourly rate is Seventy-Five and 00/100 Dollars ($75.00) an hour.

8. That Leslie H. Miller, as Successor-Administrator, was not acting gratuitously, and is entitled to reasonable compensation for his services.

9. That a reasonable fee for the services rendered by Leslie H. Miller, Successor-Administrator, is Four Thousand Two Hundred, Seventy-Five and 00/100 Dollars ($4,275.00), which fee LOUIS RAYMOND LESSARD and ELIZABETH C. LESSARD should each be one-half (1/2) responsible for.

Leslie H. Miller, as Successor-Administrator, has incurred expenses in the amount of Forty Dollars and Fifty Cents ($40.50), and those expenses are reasonable, and further, ELIZABETH C. LESSARD and LOUIS RAYMOND LESSARD are responsible each for one-half (1/2) of those expenses.

Based on the foregoing findings of fact the judge awarded the successor-administrator $4,315.50 in fees and expenses. Respondent appealed.

Leslie H. Miller, petitioner-appellee, pro se.

Erwin, Beddow and Reese, P.A., by Fenton T. Erwin, Jr., for respondent, appellant.

HEDRICK, Chief Judge.

The sole issue presented by this appeal is whether the administrator of an estate may be paid for his services from wrongful death proceeds when there are no other funds in the estate from which he may be paid. The resolution of this issue depends upon a careful reading of the applicable statutory authority.

G.S. 28A-18-2 provides that the amount recovered in a wrongful death action "is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses. . . ." The question of whether an attorney's services in pursuit of the

wrongful death claim are compensable from any recovery was apparently ambiguous, for our legislature amended the section by adding the following two sentences, effective 5 July 1985:

> The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorney's fees, incurred in pursuing this action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section.

The amendment thus provides that an attorney who litigates a wrongful death claim may be paid for his services from the wrongful death proceeds.

In the present case, Mr. Miller neither initiated nor handled in any way the wrongful death claim. He was appointed successor-administrator only after the wrongful death award had been made. Nevertheless, the record discloses that Mr. Miller expended considerable time in determining the correct distribution of the wrongful death proceeds. His time sheet shows numerous phone calls and conferences with both the mother's counsel and the father's counsel, as well as considerable time spent on research, court appearances, drafting, and study of the case during an eight-month period. These services are all compensable and may fairly be paid from the wrongful death proceeds.

Additional authority for the payment of Mr. Miller's fee is found in G.S. 28A-23-4 which provides in pertinent part:

> The clerk of superior court, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as a . . . public administrator . . . where such attorney in behalf of the estate he represents renders professional services, as an attorney, which are beyond the ordinary routine of administration. . . .

Mr. Miller's professional services in this complex case were thus clearly compensable, and the trial court correctly awarded the payment of his fees and expenses.

We note finally that the case of *In re Below*, 12 N.C. App. 657, 184 S.E. 2d 378 (1971), is inapplicable to the instant appeal, as that case dealt only with the issue of whether "costs" of an estate are payable from wrongful death proceeds. Even under the recent amendment to G.S. 28A-18-3 such an assessment would not be payable from wrongful death proceeds.

For the foregoing reasons, the order appealed from is affirmed.

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. GEORGE RICHARD THRIFT

No. 8529SC256

(Filed 3 December 1985)

1. **Narcotics § 4.3— sufficient evidence of constructive delivery**

There was sufficient evidence of constructive delivery to support defendant's conviction of trafficking by delivery of cocaine where it tended to show that defendant allowed an undercover agent to pick up a bag of cocaine from scales and place it under a bed for security purposes and that the agent later retrieved the cocaine from beneath the bed.

2. **Criminal Law § 26.5— sentences for trafficking by possession and by delivery —no double jeopardy**

Defendant's constitutional right against double jeopardy was not violated by the entry of judgments and imposition of sentences against defendant for offenses of trafficking by possession and trafficking by delivery based on the same transaction.

3. **Narcotics § 2— indictment—reference to "cocoa" leaves**

Indictments alleging trafficking in "a compound obtained from cocoa leaves" rather than from "coca" leaves was not so defective as to deprive the trial court of jurisdiction where the evidence showed over 637 grams of a 35% cocaine mixture, since defendant could not have realistically thought that he was charged with trafficking in chocolate.

APPEAL by defendant from *Owens, Jr., Judge*. Judgment entered 25 October 1985 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 14 October 1985.

Defendant was convicted of (i) trafficking by delivery of 400 or more grams of a mixture containing cocaine and (ii) trafficking by possession of 400 or more grams of a mixture containing cocaine. From judgment imposing two consecutive thirty-five year sentences, defendant appealed.

Attorney General Thornburg by Associate Attorney General J. Michael Smith for the State.

Appellate Defender Stein by Geoffrey C. Mangum, Assistant Appellate Defender for defendant-appellant.

PARKER, Judge.

In his first assignment of error, defendant contends the court erred in failing to dismiss the charge of trafficking by delivering cocaine because the State failed to offer evidence that defendant "delivered" cocaine. We disagree.

The State's evidence showed that on 25 April 1984, S.B.I. Agent David Ramsey told defendant that he wanted to arrange a transaction for a quantity of cocaine for potential buyers in the near future. Defendant subsequently indicated to Ramsey that he had cocaine available for sale, and Ramsey drove to defendant's house on 2 May 1984 to complete the sale. After his arrival, two men emerged from the woods and one man handed defendant a paper bag. Ramsey and defendant then went into defendant's bedroom where defendant removed a plastic bag containing white powder from the paper bag, showed it to Ramsey, and weighed it, revealing a weight of approximately 500 grams. Ramsey put the plastic bag back into the paper bag and placed the bag "under the bed for security purposes."

Ramsey then left, telling defendant he was going to get his buyer and the money and then return to exchange the money and drugs. Ramsey thereafter picked up Agent Ingram and drove back to defendant's house. Ramsey and Ingram entered defendant's house with Ingram posing as the buyer. The three men went into defendant's bedroom and defendant received a telephone call. While defendant was talking, Ramsey retrieved the bag of powder from where he had left it under the bed, and he and Ingram arrested defendant.

[1] Defendant contends on appeal that while the evidence may have been sufficient to show an intent to deliver, no actual delivery occurred as defined by G.S. 90-87(7) because defendant was arrested before any exchange took place. "In the context of controlled substance statutes, 'deliver' means the actual, constructive, or attempted *transfer* from one person to another of a controlled substance." *State v. Creason*, 313 N.C. 122, 129, 326 S.E. 2d 24, 28 (1985); G.S. 90-87(7). The sale and delivery of narcotics are separate offenses. *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). To prove delivery, the State is not required "to prove that defendant received remuneration for the transfer." *State v. Pevia*, 56 N.C. App. 384, 387, 289 S.E. 2d 135, 137, *cert. denied*, 306 N.C. 391, 294 S.E. 2d 218 (1982).

At trial the State proceeded, and the judge instructed on the delivery of cocaine, not the sale of cocaine. We hold that the evidence that defendant allowed Agent Ramsey to pick up the bag of cocaine from the scales and place it "under the bed for security purposes" from where Agent Ramsey later retrieved it was sufficient evidence of constructive delivery to go to the jury for its evaluation and determination as to whether defendant "[k]nowingly delivered" "400 grams or more of a mixture containing cocaine." The assignment of error is overruled.

[2] Next, defendant contends the court erred in entering judgment and sentencing defendant for both offenses of trafficking by possession and trafficking by delivery based on the same transaction as being in violation of the constitutional prohibition against double jeopardy. This argument has been resolved against defendant in *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982).

[3] Finally, defendant contends the court erred in entering judgment upon the trafficking by possession and by delivery counts because both counts alleged trafficking in "a compound obtained from cocoa leaves," which is not a controlled substance. The 1983 amendment inserting "cocoa" into G.S. 90-95(h)(3) rather than "coca" appears to be a typographical error as the term "cocoa" only appears in the 1983 cumulative supplement to Volume 2C. We hold that because the purpose of an indictment is to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, *State*

v. Sturdivant, 304 N.C. 293, 283 S.E. 2d 719 (1981), the indictment as written was not so defective as to deprive the trial court of subject matter jurisdiction under the facts of this particular case. The trial evidence showed over 637 grams of a 35% cocaine mixture. At no time could defendant realistically have thought that he was charged with trafficking in chocolate.

Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge BECTON concur.

IN THE MATTER OF: RALPH CLAPP ROGERS, RESPONDENT

No. 859DC699

(Filed 3 December 1985)

Insane Persons § 11 — commitment of criminal defendant — removal of requirement of hearing before release — error

The trial court erred by concluding that the provisions of House Bill 95 should no longer be applicable to respondent where respondent had been charged with murder and a crime against nature in 1975, found incapable of proceeding to trial and involuntarily committed to Umstead Hospital, a court in 1982 had ordered respondent committed for an additional 365 days or until such time as he was discharged according to law, the court ruled in an amended order that respondent was subject to the provisions of House Bill 95 as codified in N.C.G.S. 122-58.8 *et seq.* (1981) (Supp. 1983), the court in 1984 dismissed all criminal charges against respondent on the grounds that he lacked capacity to proceed to trial and would never regain capacity to proceed, and a court in 1985 removed the House Bill 95 designation. The provisions of N.C.G.S. 122-58.13(b) (Supp. 1983) requiring notice and hearing prior to release from involuntary commitment apply in every case where respondent was initially committed after a judicial determination of not guilty by reason of insanity or incapacity to proceed to trial; furthermore, these provisions remain in effect throughout a respondent's commitment. N.C.G.S. 15A-1001 *et seq.* (1983).

WRIT of Certiorari and Supersedeas granted to the State 3 May 1985 from *Allen (C. W.), Judge*. Order entered 17 March 1985 in District Court, GRANVILLE County. Heard in the Court of Appeals 18 November 1985.

This is a proceeding instituted by respondent to remove the "House Bill 95" designation under which he was committed as a patient to John Umstead Hospital.

In 1975, respondent was charged with murder and a crime against nature. Subsequently, he was found incapable of proceeding to trial, and he was, thereafter, involuntarily committed to John Umstead Hospital. He remained so committed until 1982, at which time the trial court ordered that respondent be committed for an additional "365 days or until such time as he is discharged according to law." In an amended order, the trial court ruled that respondent was subject to provisions of "House Bill 95" as codified in G.S. 122-58.8 *et seq.* (1981 and Supp. 1983). On appeal, this Court affirmed the order of the trial court. *In re Rogers*, 63 N.C. App. 705, 306 S.E. 2d 510, *disc. rev. denied and appeal dismissed*, 309 N.C. 633, 308 S.E. 2d 716 (1983), *appeal dismissed*, --- U.S. ---, 104 S.Ct. 1583, 80 L.Ed. 2d 117 (1984).

On 10 August 1984, the trial court dismissed all criminal charges against respondent on the grounds that he lacked capacity to proceed to trial, and that he would never regain capacity to proceed. Thereafter, on 22 February 1985, respondent instituted this action. After a hearing, the trial court removed respondent's "House Bill 95" designation. This Court allowed the State's petition for a Writ of Certiorari and Supersedeas.

Attorney General Lacy H. Thornburg, by Associate Attorney General Augusta B. Turner, for the State.

Special Counsel Stephen D. Kaylor for respondent, appellee.

HEDRICK, Chief Judge.

In its sole assignment of error, the State contends that the trial court erred in removing respondent's "House Bill 95" designation and thereby contravened the requirements of G.S. 122-58.13(b). The State contends that the trial court's order was based on irrelevant considerations. The State argues, more specifically, that the dismissal of the criminal charges against respondent did not affect his "House Bill 95" status. The State argues, also, that the requirements of G.S. 122-58.13(b) may not be sacrificed based upon mere administrative convenience. The thrust of the State's arguments on appeal is that the provisions of

"House Bill 95" and, more specifically, G.S. 122-58.13(b) are mandatory and should not be contravened. We agree.

G.S. 122-58.13(b) (Supp. 1983) (repealed 1985) provides:

> If the respondent was initially committed as the result of conduct resulting in his being charged with a violent crime, including a crime involving an assault with a deadly weapon, and respondent was found not guilty by reason of insanity or incapable of proceeding, 15 days before the respondent's discharge or conditional release the chief of medical services of a public or private mental health facility shall notify the clerk of superior court of the county in which the facility is located of his determination that the respondent is no longer in need of hospitalization. The clerk must then schedule a rehearing to determine the appropriateness of respondent's release under the standards of commitment set forth in G.S. 122-58.8. The clerk shall give notice as provided in G.S. 122-58.11(a). The district attorney of the district where respondent was found not guilty by reason of insanity or incapable of proceeding may represent the State's interest at the hearing.

This section is structured to provide for notice and hearing prior to the release of a respondent who was initially committed after being charged with a violent crime and was found not guilty by reason of insanity or incapable of standing trial. When read *in pari materia* with G.S. 15A-1001 *et seq.* (1983) and with reference to the legislative scheme and purpose of G.S. 122-58.8 *et seq.* (1981 and Supp. 1983) (repealed 1985) this section simply creates an additional procedural safeguard for the public while, simultaneously, providing the respondent the opportunity for release afforded others similarly committed. In other words, by providing for notice and hearing, G.S. 122-58.13(b) (Supp. 1983) (repealed 1985) balances society's right to be protected from violent crimes against respondent's right to be released when he no longer needs hospitalization. *In re Rogers*, 63 N.C. App. 705, 306 S.E. 2d 510, *disc. rev. denied and appeal dismissed*, 309 N.C. 633, 308 S.E. 2d 716 (1983), *appeal dismissed*, --- U.S. ---, 104 S.Ct. 1583, 80 L.Ed. 2d 117 (1984).

The statutory provisions requiring notice and hearing prior to release from involuntary commitment are mandatory and not

merely directive. *Id.* at 708, 306 S.E. 2d at 513. The provisions apply in every case where a respondent was initially committed after a judicial determination of not guilty by reason of insanity or incapacity to stand trial. Further, these provisions remain applicable throughout a respondent's commitment. There is nothing in G.S. 122-58.8 *et seq.* (1981 and Supp. 1983) (repealed 1985) which can reasonably be construed to permit waiver of the provisions of G.S. 122-58.13(b) (Supp. 1983) (repealed 1985). Nor should that section be construed to permit waiver or non-compliance with its procedural mandates.

It is presumed that had the legislature intended that the provisions of "House Bill 95" and, more particularly, G.S. 122-58.13(b) (Supp. 1983) (repealed 1985) be limited under certain circumstances, it would have expressed such intent. We, therefore, hold that the trial court erred in ruling that the provisions of "House Bill 95" should no longer be applicable to respondent. The order of the trial court is hereby

Vacated.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. ROBERT ERY LOCKWOOD

No. 8521SC734

(Filed 3 December 1985)

1. **Automobiles and Other Vehicles § 126.3— breathalyzer test—proper procedure followed**

The record established that a chemical analyst followed the required operational procedure when he collected two breath samples from defendant with a breathalyzer where the analyst's affidavit indicated that he observed defendant for more than thirty minutes before collecting the first breath sample, that he had a valid permit to operate the breathalyzer, and that he followed the regulations of the Commission for Health Services for sequential breath testing in performing the tests.

2. **Automobiles and Other Vehicles § 126.3— regulation for time between breathalyzer tests**

A regulation of the Commission for Health Services instructing a breathalyzer operator to collect a second breath sample when the words "blow

sample" reappear on the machine complied with the requirement of N.C.G.S. 20-139.1(b3)(1) that the Commission designate the time requirement between the first and second breath test.

3. Criminal Law § 138— driving while impaired—reckless driving as aggravating factor—insufficient evidence

The trial court erred in finding as an aggravating factor for driving while impaired that defendant's driving was especially reckless based upon the prosecutor's statement that defendant had been charged with passing through a red light on the same citation as the driving while impaired charge where there was no evidence before the court to support this assertion.

APPEAL by defendant from *Morgan, Judge*. Judgment entered 16 April 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 18 November 1985.

This is a proceeding wherein defendant was charged with driving while impaired, a violation of G.S. 20-138.1. Defendant moved to suppress evidence regarding the results of a breathalyzer test, which motion was denied. Preserving his exception to the denial of the motion, defendant pleaded guilty and appealed from the judgment entered.

Attorney General Lacy H. Thornburg, by Associate Attorney General Mabel Y. Bullock, for the State.

Alexander, Wright, Parrish, Hinshaw, Tash and Newton, by Carl F. Parrish, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant contends that the trial court erred in denying his motion to suppress the results of the test taken with the Breathalyzer Model 2000. He argues that the chemical analyst who administered the test did not follow the regulations of the Commission for Health Services for sequential breath testing and that the Commission failed to set out the time requirements for sequential breath testing as required by G.S. 20-139.1. We disagree with both of defendant's arguments.

G.S. 20-139.1 provides, in pertinent part, as follows:

(b3) Sequential Breath Test Required.—By January 1, 1985, the regulations of the Commission for Health Services governing the administration of chemical analyses of the

breath must require the testing of at least duplicate sequential breath samples. Those regulations must provide:

(1) A specification as to the minimum observation period before collection of the first breath sample and the time requirements as to collection of second and subsequent samples.

The Commission for Health Services provided in 10 N.C. Admin. Code 7B .0102(18) that the observation period prior to the collection of a breath sample is fifteen minutes. The procedure for administering a test with the Model 2000 Breathalyzer after the observation period is set out in 10 N.C. Admin. Code 7B .0346. This regulation instructs the operator to collect the first breath sample when "blow sample" appears on the machine and to collect the second sample when these words reappear, indicating that the machine is ready for a second analysis. The regulation further provides that if the alcohol concentration of these two samples differs by more than .02, a third or subsequent test shall be administered "as soon as feasible" by repeating the enumerated steps.

[1] In this case the record clearly establishes that the chemical analyst followed the required operational procedure when he collected two breath samples from defendant with the Model 2000 Breathalyzer. The affidavit of the chemical analyst indicates that he observed defendant for more than thirty minutes before collecting the first breath sample. The affidavit further shows that the analyst held a valid permit to operate this breathalyzer and that he performed the test "in accordance with the methods approved by the Commission for Health Services as set forth in 10 NCAC 7B .0300." This evidence satisfies the requirements of G.S. 20-139.1 and entitled the test results to be admitted into evidence. *State v. Hurley*, 28 N.C. App. 478, 221 S.E. 2d 743, *disc. rev. denied*, 289 N.C. 617, 223 S.E. 2d 394 (1976). Thus, defendant's argument that the chemical analyst did not follow the proper operational procedures is without merit.

[2] We also find no merit in defendant's argument that the Commission of Health Services failed to set out time requirements between the first and second breath tests as required by G.S. 20-139.1. The operational procedure in 10 N.C. Admin. Code 7B .0346 designates a specific time, which is at the reappearance of

the words "blow sample," for the collection of the second breath sample.

[3] Defendant also contends that the trial court erred in finding as an aggravating factor that "defendant's driving was especially reckless because the only evidence in front of the court was the assistant district attorney's recital in open court that the defendant was charged with running a flashing red light on the same citation as the driving while impaired charge." We agree.

There was no evidence presented at the sentencing hearing in the present case which indicated that defendant had been driving recklessly when he was charged with driving while impaired. Although the assistant district attorney stated that defendant had been charged with passing through a red light without stopping, the record shows that there was no evidence before the court to support this assertion. This statement, standing alone, is not evidence that defendant had been driving recklessly. *State v. Harris*, 65 N.C. App. 816, 310 S.E. 2d 120 (1984). Therefore, we hold that the court erred in finding as an aggravating factor that defendant's driving had been especially reckless, and the case is remanded for resentencing.

No error on the motion; remanded for resentencing.

Judges WHICHARD and JOHNSON concur.

BRENDA GAY GRIMES v. JOHN HENRY GRIMES

No. 8525DC770

(Filed 3 December 1985)

1. Divorce and Alimony § 22— appeal of Uniform Reciprocal Enforcement of Support Act award—service of brief

It was noted in an action pursuant to the Uniform Reciprocal Enforcement of Support Act that the Attorney General is the attorney of record for the petitioner obligee for purposes of appeal, but the better practice in such cases would be for the appellant's brief to be served upon both the Attorney General and the district attorney, who is required to represent the plaintiff at the trial later. N.C.G.S. 52A-10.1 (1984).

2. Divorce and Alimony § 24.9— Uniform Reciprocal Enforcement of Support Act —children's needs and parties' ability to pay—findings insufficient

The trial court's findings were not sufficient in an action under the Uniform Reciprocal Enforcement of Support Act where the court did not make the necessary findings of fact and conclusions of law regarding the needs of the child and the ability of the parties to provide that amount. N.C.G.S. 50-13.4(c) (1984), N.C.G.S. 52A-19.

APPEAL by defendant from *Green (Daniel R., Jr.), Judge.* Judgment entered 20 February 1985 in CALDWELL County District Court. Heard in the Court of Appeals 7 November 1985.

Plaintiff, a resident of the State of Idaho, initiated this action in Caldwell County pursuant to the Uniform Reciprocal Enforcement of Support Act, N.C. Gen. Stat. §§ 52A-1 *et seq.* (1984). Following a hearing, the trial court entered an order requiring defendant to pay the sum of $650.00 per month for the support of his three minor children.

No brief for plaintiff appellee.

Wilson and Palmer, P.A., by W. C. Palmer, for defendant appellant.

WELLS, Judge.

[1] We first note the absence of counsel for plaintiff in this appeal. N.C. Gen. Stat. § 52A-10.1 (1984) requires that the District Attorney represent plaintiff in the proceedings at the trial court level and apparently the Assistant District Attorney was present at the time of the hearing in this case. The statute also requires that the Attorney General represent plaintiff in this appeal. Appellant's brief was served on the Assistant District Attorney, but not upon the Attorney General. Our interpretation of the statute is that the Attorney General is the attorney of record for the petitioner obligee for purposes of appeal, but we suggest that the better practice in such cases would be for the appellant's brief to be served upon *both* the District Attorney and the Attorney General.

[2] Turning to the merits, defendant contends that the trial court's findings and conclusions do not support its judgment. We agree and reverse and remand.

The entire order of the trial court is as follows:

This is an action for the support of the dependents of the defendant, commenced in the state listed below and forwarded to this court for appropriate action under the Uniform Reciprocal Enforcement of Support Act. The record shows that Summons and Notice of Motion for Support Pendente Lite were issued by the clerk and served on the defendant more than five (5) days prior to this date.

The Court finds, from the documents filed by the plaintiff and from the evidence presented in Court, that the defendant owes a duty of support to the person named in the complaint, and further, that the defendant is able-bodied and has sufficient earning capacity or estate to enable him to support his dependents.

Upon motion of the prosecuting attorney, it is ORDERED that the defendant pay to the Clerk of Superior Court the sum listed below beginning on the date stated and continuing until further order of this Court. The sums are to be disbursed by said Clerk to the Court of the State in which this action was commenced.

It is further ORDERED that the defendant pay the costs of this Court.

State in which action commenced: Canyon County, Idaho

Date payments to commence: March 1, 1985

Amount of support to be paid: $650.00 per month

Date: February 20, 1985
Signature of Presiding Judge
s/DANIEL R. GREEN, JR.

INSTRUCTION TO DEFENDANT

All payments under this Order when paid by money order or official bank check must be payable to the Clerk of Superior Court, and must be made on or before the date due. Any delinquency in payment will constitute grounds to issue an order to show cause for Contempt of Court.

Through *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980) and its progeny, our appellate courts have time after time instructed the trial courts as to the requirement that child support orders under N.C. Gen. Stat. § 50-13.4(c) (1984) 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; and that these conclusions must themselves be based upon factual findings specific enough to indicate to the appellate court that the trial judge took due regard of the particular estates, earnings, conditions, and accustomed standards of living of the child and the parents.

In actions initiated under the Uniform Reciprocal Enforcement of Support Act, G.S. 52A-19 provides, in pertinent part, as follows:

> G.S. 52A-19. Rules of evidence. In any hearing under this law wherein the defendant has been served with notice and summons . . ., the verified complaint of the plaintiff shall be admissible as prima facie evidence of the facts therein stated . . . .

In her verified complaint in this action, plaintiff alleged that her monthly expenditures for the support of the parties' three minor children totaled $778.00. She also alleged that in his usual occupation as a plant manager, defendant earned $3800.00 per month, while plaintiff, in her occupation as a bookkeeper, earned $599.00 per month. While this evidence established *prima facie* that the reasonable needs of the parties' children were in the amount of $778.00 per month and that defendant had the relative ability to pay $650.00 per month support for his children, it remains for the trial court to make the necessary findings of fact and the conclusions of law.

Upon remand, we note for the benefit of the District Attorney our suggestions with respect to representation set out in *Thelen v. Thelen*, 53 N.C. App. 684, 281 S.E. 2d 737 (1981).

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

AMBROSE A. SAWYER, SR., EMPLOYEE, PLAINTIFF v. FEREBEE & SON, INC., EMPLOYER; GREAT AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC556

(Filed 3 December 1985)

Master and Servant § 77.1— workers' compensation—scar tissue not change of condition

Plaintiff was not entitled to additional compensation for a back injury based on a change of condition where the evidence showed that the intensifying of plaintiff's physical problems is due to scar tissue from an operation performed prior to the original award and that plaintiff's continued incapacity is, therefore, of the same kind and character as his incapacity at the time of the original award.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission dated 25 January 1985. Heard in the Court of Appeals 20 November 1985.

This is a proceeding under the North Carolina Workers' Compensation Act wherein plaintiff seeks to recover compensation for injuries received while working for defendant Ferebee & Son, Inc. The record discloses the following pertinent facts: On 2 November 1979 plaintiff suffered a ruptured disk when he fell off a railroad hopper car. He was seen by a neurosurgeon, Dr. James Dillon, in February 1980, and was operated on by Dr. Dillon in March 1980. Dr. Dillon continued to treat plaintiff until December 1980 at which time Dr. Dillon took a sabbatical from private practice. Plaintiff's care was transferred to a Dr. Rish who was a member of Dr. Dillon's firm of neurosurgeons. Dr. Rish discharged plaintiff in July 1981, after giving him a 40 percent permanent partial disability rating of the back.

On 29 September 1981 the Industrial Commission awarded plaintiff compensation based upon Dr. Rish's 40 percent disability rating. The award was later amended to provide that plaintiff had reached maximum medical improvement on 14 August 1981.

Dr. Dillon returned to private practice in November 1983 and resumed plaintiff's care. He found "weakness of the dorsiflexor muscles of the right foot . . ., loss of sensation [in the back]," and "[t]he range of motion in his back was remarkably less than it was during the pre-operative evaluation that we did on him. . . . [H]e was unable to sit, or stand or bend comfortably even to a minimal degree."

Based on these findings, plaintiff made a claim under G.S. 97-47 for additional compensation due to an alleged change of condition. The Commission concluded that "plaintiff's physical condition has changed for the worse since he was awarded compensation for a 40 percent permanent partial disability rating of the back in September, 1981." The Commission then awarded plaintiff compensation based on a finding of total permanent disability "for as long as he remains totally incapable of earning any wages." The Chairman of the Industrial Commission dissented, and defendants appealed.

Russell E. Twiford for plaintiff, appellee.

Leroy, Wells, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr., for defendants, appellants.

HEDRICK, Chief Judge.

The sole issue on appeal is whether the evidence in the record is sufficient to support the Industrial Commission's finding that plaintiff has suffered a change of condition so as to entitle him to compensation for 100 percent total permanent disability based on that change.

Our Supreme Court has defined "change of condition" in the following manner:

> Change of condition 'refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition.' . . . Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn. . . .

Pratt v. Upholstery Co., 252 N.C. 716, 722, 115 S.E. 2d 27, 33-34 (1960), quoting 101 C.J.S., Workmen's Compensation, Sec. 854(c), pp. 211-12.

We do not question that plaintiff's condition may have worsened after his surgery in March 1980. We find no evidence in the record, however, that there has been a change of condition, as that term is defined, since the September 1981 award.

According to Dr. Dillon's own testimony, plaintiff's condition has remained "essentially unchanged." In his opinion, the intensifying of plaintiff's physical problems was due to "the scar tissue that always infiltrates any area where an operation has been done." Plaintiff's "continued incapacity," therefore, is of the same kind and character as his incapacity at the time of the September 1981 award, and is not a change of condition within the meaning of the statute. Additionally, the record discloses that Dr. Dillon did not examine plaintiff from December 1980 until September 1981 (the date of the original award), and so he would thus be unable to testify as to plaintiff's amount of disability at the time of the award. If he did not have first-hand knowledge of plaintiff's condition at the time of the original award, his testimony is certainly incompetent as to whether plaintiff has suffered a change of condition since that time.

Accordingly, the Industrial Commission's award granting plaintiff compensation based on a rating of 100 percent total permanent disability must be reversed.

Reversed.

Judges WHICHARD and JOHNSON concur.

DEBRA ANNE KARP v. UNIVERSITY OF NORTH CAROLINA

No. 8510IC380

(Filed 3 December 1985)

Evidence § 36— interrogatories signed by attorney—admissions of party opponent

The Industrial Commission erred in a tort claim action pursuant to N.C. G.S. 143-291 *et seq.* by excluding answers to interrogatories which were not verified but which were signed by the Assistant Attorney General representing defendant. Admissions of attorneys are binding on their clients. N.C.G.S. 1A-1, Rule 33(b).

APPEAL by plaintiff from a decision and order of the North Carolina Industrial Commission. Order entered 6 February 1985. Heard in the Court of Appeals 23 October 1985.

This is a tort claim action pursuant to G.S. 143-291 *et seq.* wherein the plaintiff seeks to recover for injuries suffered during a fall at the art lab building owned and operated by the defendant. In November 1980, the plaintiff was enrolled as a student at the University of North Carolina at Chapel Hill. While walking across the art lab building patio to her art class she fell through a wooden platform which had been built to cover a foundry pit. During the fall she suffered puncture wounds to her face.

Plaintiff filed a claim alleging that her fall was caused by the negligent construction of the platform. During discovery the plaintiff sent interrogatories to defendant with questions regarding the construction of the platform. In its answers the defendant described the construction of the platform and indicated that it was designed to hold 20 pounds per square foot. The answers to the interrogatories were not verified but they were signed by the Assistant Attorney General who was representing the defendant. Prior to a hearing on the claim the parties stipulated that "all pleadings in this action may be admitted into evidence by either party."

At the hearing, plaintiff presented evidence regarding the fall. She also presented evidence from an expert witness in building design and architecture who testified that under the regulations of the North Carolina Building Code the platform should have been constructed to bear between 100 or 125 pounds per square foot. Plaintiff then attempted to offer the defendant's answers to interrogatories into evidence pursuant to the stipulations. When this attempt failed plaintiff sought to offer the answers as an admission of a party opponent. The Deputy Commissioner again refused to admit the answers into evidence. Defendant offered no evidence.

The Deputy Commissioner found that the plaintiff had failed to prove her case and denied recovery. The plaintiff appealed to the Full Commission which adopted the opinion of the Deputy Commissioner. From this order, plaintiff appealed.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Roger B. Bernholz and G. Nicholas Herman, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Associate Attorney Randy Meares, for defendant appellee.

ARNOLD, Judge.

The issue dispositive of this appeal is whether it was error to refuse to admit into evidence the defendant's answers to the interrogatories. We hold that it was error, and remand the case for further proceedings.

Rule 33(b) of the Rules of Civil Procedure in pertinent part provides: "Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence." Statements of a party to an action, spoken or written, have long been admissible against that party as an admission if it is relevant to the issues and not subject to some specific exclusionary statute or rule. *Stone v. Guion*, 222 N.C. 548, 23 S.E. 2d 907 (1943); 2 *Brandis on North Carolina Evidence* § 167 (1982). This is still the case under the new Rules of Evidence. *See* Rule 801(d) of the North Carolina Rules of Evidence. In North Carolina admissions of attorneys are binding upon their clients, and are generally conclusive. *Reynolds v. Reynolds*, 208 N.C. 578, 182 S.E. 341 (1935).

Thus, it appears that the answers to the interrogatories, duly signed by defendant's attorney, were admissions of a party opponent, and as such should have been admitted into evidence. The order appealed from is, therefore, reversed, and this cause is remanded to the Industrial Commission for the proper admission into evidence of the answers to the interrogatories and for the consideration of plaintiff's claim based upon all the properly presented evidence.

Reversed and remanded.

Judges WELLS and MARTIN concur.

BENJAMIN A. WHITLEY, EMPLOYEE v. COLUMBIA LUMBER MFG. CO., EMPLOYER, AND INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, INSURER

No. 8510IC575

(Filed 3 December 1985)

Master and Servant § 69— total and permanent disability—injury included in N.C.G.S. 97-31—compensation exclusively under N.C.G.S. 97-31

The Industrial Commission erred by awarding permanent total disability under N.C.G.S. 97-29 to a plaintiff who was permanently and totally disabled due to a 30% permanent partial disability of the left hand and a 75% permanent partial disability of the right hand because all of plaintiff's injuries were scheduled in N.C.G.S. 97-31(12). An injured employee is entitled to compensation exclusively under N.C.G.S. 97-31 regardless of his ability or inability to work when all of his injuries are included in the schedule set out in that section.

APPEAL by defendants from the Industrial Commission opinion and award of the Full Commission entered 23 April 1985. Heard in the Court of Appeals 20 November 1985.

This is a workers' compensation action wherein plaintiff seeks compensation for injuries to his left hand and right forearm. The facts found by the deputy commissioner and adopted by the Full Commission are summarized as follows:

1. Plaintiff was born in 1924. He has a fourth grade education but can neither read nor write.

2. On 24 May 1982 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant, employer when he sustained injuries to his right forearm and left hand while operating a bench saw.

3. As a result of his injury, plaintiff has sustained a 75% permanent partial disability to his right hand and a 30% permanent partial disability of his left hand.

4. In light of plaintiff's age and his inability to read or write, and as a result of his injury, plaintiff is totally and permanently disabled.

From the opinion and award granting plaintiff permanent and total disability compensation, defendants appealed.

Charles M. Welling for plaintiff, appellee.

George C. Collie for defendants, appellants.

HEDRICK, Chief Judge.

The sole question on this appeal is whether a plaintiff who is totally and permanently disabled due to a 30% permanent partial disability of the left hand and a 75% permanent partial disability of the right hand is entitled to permanent total disability compensation under G.S. 97-29 or to permanent partial disability compensation under G.S. 97-31(12).

The plaintiff cites *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985) and *West v. Bladenboro Cotton Mills*, 62 N.C. App. 267, 302 S.E. 2d 645 (1983) in support of his contention that he is entitled to permanent total disability compensation under G.S. 97-29. *West* is a chronic obstructive lung disease case and is clearly distinguishable from the case at hand. *Fleming* is contrary to appellee's contention:

> If [plaintiff] is unable to work and earn *any* wages, she is totally disabled. G.S. 97-2(9). In that event, unless all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to an award for permanent total disability under G.S. 97-29. If all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to compensation exclusively under G.S. 97-31. This is true from the language of the statute itself.

Fleming v. K-Mart Corp., 312 N.C. 538, 545, 324 S.E. 2d 214, 218 (1985) (citations omitted).

All of plaintiff's injuries are scheduled in G.S. 97-31(12). When all of plaintiff's injuries are included in the schedule set out in G.S. 97-31, the injured employee is entitled to compensation exclusively under G.S. 97-31 regardless of his ability or inability to work. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978).

We are bound by the decisions of our Supreme Court to hold that the Industrial Commission erred in awarding compensation under G.S. 97-29 rather than G.S. 97-31. Therefore, the opinion and award of the Industrial Commission is reversed.

Reversed and remanded.

Judges EAGLES and MARTIN concur.

SHIRLEY CRAWFORD, WIDOW, THEODORE CRAWFORD, DECEASED, EMPLOYEE-PLAINTIFF v. McLAURIN TRUCKING COMPANY, EMPLOYER-DEFENDANT, AND SELF/ALEXSIS, INC., CARRIER-DEFENDANT

No. 8510IC730

(Filed 3 December 1985)

Master and Servant § 94.3— workers' compensation—time of appeal to Full Commission—plaintiff misled by Commission's erroneous notice

Where an opinion and award of a deputy commissioner of the Industrial Commission was mailed to the parties with an attached notice of appeal rights erroneously indicating that the opinion was the decision of the Full Commission and that the parties could appeal to the Court of Appeals within thirty days, the Industrial Commission properly ruled that plaintiff was excusably misled by the Commission's error and properly denied defendants' motion to dismiss plaintiff's appeal to the Full Commission because plaintiff failed to give notice of appeal within fifteen days from the date of notification of the deputy commissioner's opinion and award as required by N.C.G.S. 97-85.

APPEAL by defendants from an order of the North Carolina Industrial Commission filed 7 March 1985. Heard in the Court of Appeals 2 December 1985.

This claim for workers' compensation was heard before a Deputy Commissioner on 24 May 1984. On 11 January 1985 the Deputy Commissioner filed an opinion and award denying benefits and mailed it to the parties. Attached to the opinion and award was a Notice of Appeal Rights indicating that the opinion and award was the decision of the Full Commission and that the parties could appeal to the Court of Appeals within 30 days. On 31 January 1985 plaintiff's counsel wrote the Commission, stating that he was not aware that the Full Commission had heard the claim and requesting clarification of the information received, and he attached thereto a Notice of Appeal to the Full Commission. On 11 February 1985 the Commission notified both parties that the appeal had been docketed for hearing by the Full Commission. Defendants moved to dismiss the appeal because it was not taken within 15 days of notice of the Deputy Commissioner's opinion and award as required by G.S. 97-85. The Commission ruled that plaintiff had been excusably misled by the Commission's error and denied the motion.

Linwood O. Foust and Donnie Hoover for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Thomas E. Williams, for defendant appellants.

PHILLIPS, Judge.

The decision of the Industrial Commission is correct and we affirm it. Though G.S. 97-85 requires that appeal from an opinion and award of a Deputy Commissioner be taken within 15 days from the date a party is notified of the Deputy Commissioner's opinion and award, this requirement is based on the presumption that the notice given was correct. G.S. 97-84 requires that when the Commission or one of its deputies determines a dispute before it that a copy of the opinion and award be sent to the parties; this necessarily means a true copy. Since the law permits appeals only from actual rather than supposed decisions, the incorrect notice of a decision that had not been made had no effect on plaintiff's right to appeal from the decision that was made.

Affirmed.

Judges WELLS and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 DECEMBER 1985

BERGER v. BERGER No. 851DC529	Dare (82CVD287)	Dismissed
COCKMAN v. PROTECTIVE LIFE INS. No. 8510SC311	Wake (82CVS2681)	No Error
CRANE v. CRANE No. 8510DC119	Wake (81CVD4200)	Affirmed
CURTIS v. BATA No. 8530SC803	Cherokee (84CVS278)	Reversed and Remanded
DELP v. DELP No. 8523SC853	Wilkes (84CVS1)	Affirmed
FIRST UNION NATIONAL BANK v. STATE OF N. C. BD. OF ALCOHOLIC CONTROL No. 8529SC189	Transylvania (83CVS370)	Affirmed
IN RE BRANNAN No. 8521DC491	Forsyth (84SP1289)	Vacated
IN RE BULLARD No. 8520SC764	Moore (85CR1508) (84CRS764)	Vacated and Remanded
IN RE DAVIS No. 8521DC501	Forsyth (82J131) (82J202)	Affirmed
IN RE JORDAN No. 8514DC208	Durham (84SP104)	Affirmed
IN RE ROWELL No. 8512DC794	Cumberland (83J36)	Vacated and Remanded
LAWRENCE v. WAYNE COUNTY MEM. HOS. No. 858SC92	Wayne (82CVS1877)	No Error
LEMMOND v. RAY No. 8520DC597	Union (82CVD0658)	Affirmed
LOVE v. MEWBORN No. 8515DC466	Alamance (82CVD591)	Vacated and Remanded
LOWE v. BYNUM No. 8522SC706	Iredell (84CVS1250)	Affirmed

MOORE v. LAWRENCE INDUSTRIES No. 8515SC867	Alamance (85CVS495)	Affirmed
MURPHY v. MURPHY No. 8511DC749	Johnston (84CVD1598)	Reversed and Remanded
PARKER v. MEDLIN No. 8520DC778	Union (84CVD0073)	Affirmed
PATTERSON v. MARLOW No. 8527SC245	Cleveland (83CVS715)	No Error
POFF v. BOLEN No. 8525DC735	Caldwell (84CVD1089)	Reversed and Remanded
PRICE v. MARIMONT FURNITURE No. 8510IC150	Ind. Comm. (I-2095)	Affirmed
STATE v. CAMPANIELLO No. 8519SC621	Rowan (84CRS12758)	No Error
STATE v. CORRIHER No. 8519SC775	Rowan (84CRS8517)	Remanded for Resentencing
STATE v. DAVIS No. 855SC561	New Hanover (84CRS11390)	New Trial
STATE v. DUCKWORTH No. 8525SC719	Burke (84CRS7182) (84CRS7183)	No Error
STATE v. EVANS No. 856SC636	Northampton (84CRS2497) (84CRS2498) (84CRS2499)	Case No. 84CRS2497 —No Error. Cases Nos. 84CRS2498 and 84CRS2499— As to the convictions of felonious breaking or entering and felonious larceny, No Error. As to the convictions of felonious possession, vacated and remanded for dismissal of those charges.
STATE v. GILL No. 8519SC235	Rowan (84CRS6149)	No Error
STATE v. HINES No. 8512SC725	Cumberland (83CRS10889)	Affirmed

STATE v. HOLLOWAY No. 8526SC661	Mecklenburg (84CRS58794)	No Error
STATE v. HOWELL No. 8515SC710	Orange (84CRS6410)	No Error
STATE v. HUNT No. 8512SC757	Cumberland (84CRS31160)	No Error
STATE v. MARTIN No. 8514SC785	Durham (82CRS6654)	No Error
STATE v. SCHLER No. 8519SC882	Cabarrus (85CR329)	Affirmed
STATE v. SHAKELFORD No. 8519SC765	Cabarrus (84CRS19855) (85CRS4)	Affirmed
STATE v. SMITH No. 8528SC799	Buncombe (84CRS13236) (84CRS13237)	No Error
STATE EX REL. DEPT. NATURAL RESOURCES v. RUBIN No. 8529SC519	Henderson (84CVS834)	Dismissed
SWINSON v. WANDA ASSOCIATES No. 851SC515	Dare (83CVS128)	Dismissed
VARNADORE v. COLLINS & AIKMAN CORP. No. 8510IC514	Ind. Comm. (I-4482) (I-4513)	Affirmed
WILSON v. GLATZ No. 8518DC526	Guilford (83CVD4744)	Affirmed
YURKO v. YURKO No. 853DC789	Carteret (85CVD18)	Affirmed

MOUNT OLIVE HOME HEALTH CARE AGENCY, INC., PETITIONER/APPELLANT v. N.C. DEPARTMENT OF HUMAN RESOURCES, RESPONDENT/APPELLEE AND TAR HEEL HEALTH CARE SERVICES, RESPONDENT/APPELLEE

No. 8510DHR379

(Filed 3 December 1985)

1. **Bills of Discovery § 6; Administrative Law § 4— administrative hearing—failure to comply with discovery order—evidence excluded—no error**

A hearing officer in a contested certificate of need case did not err by excluding the testimony of petitioner's expert witnesses where the assignment of error was based on petitioner's exception to the entry of the order, not specific findings of fact, and the facts found by the hearing officer supported his order and showed no abuse of discretion. N.C. Rule of Civil Procedure 37(b)(2)(b), Rules 10 NCAC 3R .0413, 22 NCAC 2C .0307.

2. **Hospitals § 2.1— home health agency—application for new agency approved—evidence sufficient**

There was substantial evidence to support the approval of respondent's application for a certificate of need for a new home health agency where, although no financial statement was submitted, respondent stated in its application that a $10,000 checking account and a $30,000 cash equivalent fund were available to cover initial costs, respondent provided information showing a breakeven point in seven months, a projected net income of $6,407.57 after its first year of operations, a projection of revenues and expenses showing an increase in profitability, and there was no contradictory evidence in the record; there was evidence that the proposal was consistent with the applicable State Medical Facilities Plan and 10 NCAC 3R .2004(c); although petitioner was never unable to serve a patient and provided services to all patients within twenty-four hours of referral, respondent offered a wider range of services and offered services that would delay or prevent hospitalization while petitioner basically provided services to patients receiving care under a post-hospitalization plan; there was a low utilization rate of home health services in the area; there was no factual basis in the record to support petitioner's contention that it could expand to meet the projected need for home health care services; respondent's application provided assurances that it would comply with the conditions of participation under Medicaid and Medicare as required by 10 NCAC 3R .2005(a); there was no evidence that respondent would be unable to comply with the conditions of participation; and the requirements of 10 NCAC 3R .0305(h) regarding the timing of the review of the application were complied with. N.C.G.S. 150A-51, 10 NCAC 3R .2009, 10 NCAC 3R .2004(c).

APPEAL by petitioner from Department of Human Resources Division of Facility Services. Decision entered 18 October 1984. Heard in the Court of Appeals 23 October 1985.

Respondent Tar Heel Health Care Services (Tar Heel) filed an application with Respondent Certificate of Need Section, Department of Human Resources (the Section) for approval of a new home health agency. The Section approved the application on 28 October 1983. Petitioner, Mount Olive Home Health Care Agency, Inc. (Mount Olive), requested a contested case hearing which was granted on 21 December 1983 and Tar Heel was allowed to intervene as respondent on 12 January 1984.

After being permitted to intervene, Tar Heel served interrogatories on Mount Olive requesting, *inter alia*, that Mount Olive identify the expert witnesses it intended to present at the hearing. Mount Olive answered the interrogatories on 27 February 1984 but did not identify any expert witnesses. Thereafter the contested case hearing was scheduled for 30 May 1984. On 2 May 1984, the hearing officer issued an order providing that responses to all discovery be exchanged on or before 21 May 1984. On 9 May 1984, the hearing officer issued another order specifically providing that all expert witnesses be identified before 21 May. By agreement of counsel, it was arranged that the discovery responses would be exchanged at the Section's offices in Raleigh on 21 May. When counsel for Mount Olive arrived, he was informed that Tar Heel's responses were available, but the final draft of the Section's responses would not be completed until later in the afternoon. Mount Olive's counsel left without picking up either set of responses and did not return before the Section's office closed for the day. The Section mailed its responses to Mount Olive's counsel, but neglected to enclose Tar Heel's responses. Mount Olive's responses, left at the Section's office on 21 May, did not identify its expert witnesses. On 24 May, Mount Olive attempted to supplement its responses by providing the names of four expert witnesses. Tar Heel moved to preclude Mount Olive from introducing expert testimony based on its failure to comply with discovery, and, on 29 May 1984, the hearing officer allowed Tar Heel's motion.

A recommendation for approval of Tar Heel's application was issued 6 September 1984. The Director of Division of Facility Services approved the recommendation on 18 October 1984. Petitioner appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Barbara P. Riley, for respondent appellee, N.C. Department of Human Resources.

Jordan, Brown, Price & Wall, by William R. Shenton, for intervenor appellee, Tar Heel Health Care Services.

Smiley, Olson, Gilman & Pangia, by William P. Harper, Jr., for petitioner appellant.

MARTIN, Judge.

The two main issues on this appeal are whether the hearing officer erred in excluding the testimony of Mount Olive's expert witnesses, and whether the Agency's decision was supported by substantial evidence. We find no error in the exclusion of the expert testimony and conclude that the final decision of the Agency was supported by substantial evidence. Therefore, we affirm the decision of the Agency.

[1] Petitioner first assigns error to the preclusion of the testimony of its expert witnesses by the hearing officer. This assignment of error is based on petitioner's exception to the entry of the order and not specific findings of fact. Therefore, the question for review is whether the facts found support the conclusions of law and judgment and not the sufficiency of the evidence to support the findings of fact. *Routh v. Weaver*, 67 N.C. App. 426, 313 S.E. 2d 793 (1984).

Pursuant to Rules 10 NCAC 3R .0413 and 22 NCAC 2C .0307, a hearing officer may allow any or all the methods of discovery provided in North Carolina Rules of Civil Procedure. In addition, unless the pretrial order specifies otherwise, 10 NCAC 2C .0307(a) provides that "the procedure for discovery and the sanctions for failure to make discovery set forth in the Rules of Civil Procedure apply to the administrative hearing procedure." Thus, a hearing officer has the same authority as a judge in a civil action in controlling the discovery process.

"The Sanction provision, Rule 37(b)(2)(b), N.C. Rules Civ. Proc., allows the court to make such orders as are 'just' when a party fails to obey an order to provide or permit discovery, including refusing to allow the disobedient party to introduce the designated matters into evidence." *Shepherd v. Oliver*, 57 N.C. App. 188, 189-90, 290 S.E. 2d 761, 763, *disc. rev. denied*, 306 N.C. 387, 294 S.E. 2d 212 (1982). The choice of sanctions under Rule 37

cannot be overturned absent a showing of abuse of that discretion. *Routh v. Weaver, supra.* We find that the petitioner has failed to show abuse.

The hearing officer made these relevant Findings of Fact:

> 1. On January 18, 1984 Respondent-Intervenor filed Interrogatories on Petitioner requesting in part that Petitioner identify the expert witnesses it intended to use at the hearing herein. Petitioner did not identify any expert witnesses in its Answers filed February 27, 1984.
>
> 2. With permission of the Hearing Officer, Petitioner filed Interrogatories and a Request for Production of Documents on Respondent CON on May 3, 1984 and Interrogatories and a Request for Production of Documents on Respondent-Intervenor on May 3, 1984.
>
> 3. By conference call on May 9, 1984, the Hearing Officer herein ordered that "all parties will exchange full responses to discovery on or before May 21, 1984. In particular, expert witnesses as requested by all discovery will be identified . . . ."
>
> . . . .
>
> 7. Petitioner did not identify any expert witnesses herein on or before May 21, 1984.
>
> . . . .
>
> 9. On May 24, 1984, four days prior to the hearing date scheduled in this matter, Petitioner identified five expert witnesses to be called at the hearing.
>
> . . . .
>
> 11. Petitioner's failure to identify its expert witnesses as ordered by the Hearing Officer on May 9, 1984 was without legal justification and to allow testimony from the expert witnesses identified would cause prejudice to the trial preparation of Respondent-Intervenor. Continuing the hearing of this matter would also unduly prejudice the rights of the Respondent-Intervenor in that Respondent-Intervenor may not begin operation, if at all, until Petitioner's appeal is resolved.

These facts support the hearing officer's order precluding petitioner's expert witnesses and show no abuse of discretion.

[2] Petitioner next assigns error to the decision of the Section and Division of Facility Services approving Tar Heel's application, claiming that it was not supported by substantial evidence. The decision of an administrative agency must be supported by substantial evidence. G.S. 150A-51. The evidence is substantial if it is such that a reasonable person might accept it as adequate to support a conclusion. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The applicable scope of review is the "whole record" test. *Id.* In applying the whole record test, the court must consider all the evidence, including that which supports the findings and contradictory evidence. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982). Applying these standards to the present case, we find substantial evidence to support the decision.

Petitioner first contends that the finding by the Agency that Tar Heel's proposal is consistent with 10 NCAC 3R .2009 is not supported by substantial evidence. 10 NCAC 3R .2009 requires a proposal for new home health services to demonstrate that the project to be undertaken is financially feasible. The record reveals that no financial statement was submitted, however, Tar Heel stated in its application that a $10,000 checking account and a $30,000 cash equivalent fund were available to cover initial costs. In addition, Tar Heel provided information showing a breakeven point in seven months, a projected net income in the amount of $6,407.57 after its first year of operations, and a projection of revenues and expenses showing an increase in profitability. There is no contradictory evidence in the record. We find this evidence adequately supports the Agency's finding that Tar Heel's proposed project is financially feasible.

Next, petitioner contends that the finding that Tar Heel's proposal is consistent with 10 NCAC 3R .2004(a) and (c) is not supported by substantial evidence. 10 NCAC 3R .2004(a) states that a proposal for new home health services must be consistent with the applicable State Medical Facilities Plan. The applicable plan provided that a new proposal must show that the existing home health service provider cannot accommodate the projected need in the area. 10 NCAC 3R .2004(c) requires a proposal for new home health services to show an unmet need for home health services and a demand for such services.

The record reveals that petitioner provided testimony showing that Mount Olive was never unable to serve a patient and provided services to all patients within twenty-four hours of referral. The record also reveals, however, that, at the time Tar Heel submitted its application, Tar Heel's proposal offered to provide a wider range of services than provided by petitioner. In addition, petitioner basically provided services to patients receiving care under a post-hospitalization plan, while Tar Heel's proposal offered to provide services that would delay or prevent hospitalization. Finally, the record reveals a low-utilization rate of home health care services in the area provided for by petitioner. We find this evidence adequately supports the Agency's finding that there was an unmet need for home health care services and a demand for such services.

Petitioner argues that Tar Heel failed to show that Mount Olive would not be able to expand to meet the projected need provided by the applicable State Medical Facilities Plan. Respondents argue that the language of 10 NCAC 3R .2004(a) should not be interpreted in such a fashion to allow an existing provider to defeat a competitor's application by showing the ability to expand to meet the needs. We do not address this issue because we find no factual basis in the record to support petitioner's contention that it could expand to meet the projected need for home health care services.

Finally, petitioner contends that the finding that Tar Heel's proposal is consistent with 10 NCAC 3R .2005(a) is unsupported by the evidence. 10 NCAC 3R .2005(a) requires a proponent to propose to offer services in a manner consistent with conditions of participation under Medicare and Medicaid. This rule requires the applicant to provide adequate assurances that these licensing requirements will be met and that the applicant show that the proposed offering is not inconsistent with these rules. A review of the record reveals that Tar Heel provided assurances that it will comply with these requirements and that Tar Heel's proposed offering is not inconsistent with these requirements. There is no evidence showing that Tar Heel will be unable to comply with the conditions of participation. Therefore, we find substantial evidence to support the Agency's finding that Tar Heel's proposal is consistent with the conditions of participation under Medicare and Medicaid.

Petitioner last assigns error to the Section's acceptance of Tar Heel's application, claiming the Section violated its own regulation 10 NCAC 3R .0305(h). This regulation states that an application will not be included in a batch for review unless it is delivered to the Agency more than 15 days before the day of the review schedule. The record discloses that the regulation was complied with, hence we find no merit to this assignment.

Finding no error in petitioner's assignments of error, we do not address respondent's cross-assignment of error. Therefore, we conclude that there was no error in petitioner's contested case hearing and affirm.

Judges ARNOLD and WELLS concur.

CONNIE WOODELL AND JAMES WOODELL, III v. PINEHURST SURGICAL CLINIC, P.A., MICHAEL T. PISHKO, M.D., W. K. KILPATRICK, M.D., CLIFFORD J. LONG, M.D., AND JERRY E. SMITH, M.D.

No. 8420SC1249

(Filed 3 December 1985)

Physicians, Surgeons and Allied Professions § 24.1— negligent diagnosis of twins— summary judgment for defendant proper

Summary judgment for defendant was proper in an action in which plaintiffs alleged that defendants' negligent diagnosis of twins resulted in physical pain and suffering, mental anguish and emotional distress, and expended sums for duplicate clothing and other items, but plaintiffs' forecast of evidence showed only non-permanent discomfort (pain and suffering, mental anguish and emotional distress) with no physical injury. The hurt, emotional upset and embarrassment suffered by plaintiff upon her healthy delivery after the negligent misdiagnosis of twins was not a sufficient basis for recovery when there was no evidence of physical injury; a stipulation that all facts alleged in plaintiffs' complaint were true did not admit that plaintiffs suffered physical injury because some of plaintiffs' contentions involved conclusions.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from *Helms, Judge*. Order entered 5 September 1984 in Superior Court, MOORE County. Heard in the Court of Appeals 5 June 1985.

Staton, Perkinson, West & Doster, by Stanley W. West, for plaintiff appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, Jodee Sparkman King and William H. Moss, for defendant appellees.

BECTON, Judge.

Plaintiff Connie Woodell sued the defendant physicians and the clinic with which they were then associated for injuries and damage allegedly resulting from their negligent diagnosis that she was pregnant with twins, when in fact she was carrying only a single fetus. Her husband's action is for consortium allegedly lost because of her injuries. After discovery, the trial court granted defendants' motion for summary judgment on the ground that the evidence raised no genuine issue of material fact against any of them. Rule 56, N.C. Rules of Civil Procedure. We affirm.

Summary judgment was granted for the defendants in this case because the forecast of evidence failed to show that the defendants' negligence, if any, caused any injury or damage to plaintiff, Connie Woodell, that our law regards as actionable. Plaintiff alleged that she underwent physical pain and suffering, mental anguish and emotional distress and expended sums of money for duplicate baby clothing and other items. She, therefore, takes comfort in the following stipulation: "For purposes of this [summary judgment] motion, all facts alleged in the plaintiff's Complaint were deemed to be true." Based on this stipulation, plaintiff contends summary judgment was inappropriate because the evidence suggests: (1) that between the fifth and eighth months of her pregnancy, defendants examined plaintiff four times with an ultrasound device operated by their employee and agent, who was not qualified to use the device; (2) that the ultrasound operator interpreted each of the examinations as showing that plaintiff was carrying twins, whereas a competent operator would have readily recognized that the examinations show a single fetus; (3) that defendants knew the operator was not qualified to conduct and interpret an ultrasound examination; (4) that defendants based their diagnosis and treatment of plaintiff's condition on the operator's interpretations; (5) that after the first examination defendants advised plaintiff to eat more food and

gain more weight because she was carrying twins; (6) that later, when her gain was less than recommended, defendants advised her that problems were developing with the pregnancy which could result in the stillbirth of both children; and (7) that defendants did not tell her until shortly before her due date that she was carrying only a single fetus.

First, because some of plaintiff's contentions involve "conclusions," it is important to note that the stipulation refers to "facts alleged," not "conclusions." Thus, the defendants did not admit that plaintiff suffered physical injuries. Second, our Court has repeatedly observed that:

> For a plaintiff to recover for emotional or mental distress in an ordinary negligence case, [s]he must prove that the mental distress was the proximate result of some physical impact with or physical injury to [her]self also resulting from the defendant's negligence. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E. 2d 48 (1960).

McDowell v. Davis, 33 N.C. App. 529, 537, 235 S.E. 2d 896, 901, disc. rev. denied and appeal dismissed, 293 N.C. 360, 237 S.E. 2d 848 (1977); *Wyatt v. Gilmore*, 57 N.C. App. 57, 290 S.E. 2d 790 (1982). As defendants note in their brief, the requirement of "physical injury" resulting from mental anguish has been stated as being "simply a vehicle used by the court to distinguish harm of this magnitude from less serious interference, which, if a multitude of suits are to be avoided, everyone must be left to absorb to some degree." Byrd, "Recovery for Mental Anguish in North Carolina," 58 N.C. L. Rev. 435, 458 (1980).

Contrary to the suggestion in plaintiff's brief, the law of North Carolina does not equate physical pain with physical injury. Pain is but one symptom of injury. There may be pain without injury just as there may be injury without pain. On the facts of this case, even with the stipulation, plaintiff's forecast of evidence shows only non-permanent discomfort (physical pain and suffering, mental anguish and emotional distress) with no physical injury. The pregnancy went full term and resulted in the safe delivery of a healthy baby. Since "mere hurt or embarrassment are not compensable," *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *McDowell v. Davis*, the hurt, emotional upset and embarrassment suffered by plaintiff upon her healthy deliv-

ery after the negligently-arrived-at misdiagnosis of twins, is not a sufficient basis for recovery when there is no evidence of physical injury.

We have not, by referring to Byrd, "Recovery for Mental Anguish," *supra*, cavalierly disposed of plaintiff's cause of action. We realize that the physical condition, as well as the emotional and mental status of a pregnant woman, is likely to be adversely affected by incorrect, alarming, and contradictory information provided to her about her pregnancy. For example, our appellate courts lessened the "physical injury" requirement in cases involving the wilful and intentional, as opposed to the negligent, infliction of emotional distress. *See Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *see also Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981) (distinguishing and limiting *Stanback* to intentional infliction of mental anguish cases). By way of further example, our courts have allowed, upon a proper forecast of evidence, new or heretofore unrecognized causes of action to go to the jury. *See, e.g., Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E. 2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983) (right of action against dram shop operators). And, when the opportunity arises, this Court will not shirk its duty to fully consider new causes of action when they are properly presented.

In this emotional or mental distress case based on ordinary negligence, plaintiff simply has failed to state a cognizable claim, and summary judgment was appropriate. We therefore

Affirm.

Judge PHILLIPS dissents.

Judge EAGLES concurs.

Judge PHILLIPS dissenting.

In my opinion, the statements of fact in the complaint, accepted as evidence and deemed to be true for the purposes of this appeal, that as a result of defendants' negligence "the plaintiff, Connie Woodell, underwent physical pain and suffering, mental anguish and emotional distress" and "expended sums of money for duplicate baby clothing and other items" raises a damages

issue that a jury should decide. "[G]iven the broad interpretation of 'physical injury' in our case law," *Stanback v. Stanback*, 297 N.C. 181, 198-99, 254 S.E. 2d 611, 623 (1979), it seems plain to me that physical pain and suffering, when inflicted by another, is not only evidence of physical injury—it is physical injury. Nor was the injury either unforeseeable or too trivial to warrant the law's concern. The mind does not exist in a vacuum, and anxiety is not necessarily harmless, as some of the old cases suggest; pregnant women do sometimes worry themselves into harmful states because of problems that their pregnancies are believed to involve and obstetricians spend a goodly part of their time attempting to allay such anxieties; and being advised by her doctor that her child may be born dead can be profoundly injurious to any woman. The stipulated evidence as to her extra expenditures for unneeded clothing and other items also tends to show that defendants' negligence was actionable in another respect. That the *damages* are not large neither eliminates their existence not nullifies the principle of law that authorizes their recovery.

Furthermore, expert medical testimony and other evidence presented by plaintiffs raised an issue of fact as to whether the defendants were recklessly indifferent to her well being and are therefore subject to punitive damages. That improperly conducted diagnostic examinations by unqualified operators is evidence of professional negligence requires no discussion, and is why this issue was not argued on appeal. But the evidence shows more, in my opinion. It tends to show that though the defendants knew that the ultrasound operator was incompetent and had misread other examinations, they nevertheless chose to base their diagnosis of plaintiff's condition on the operator's examinations and interpretations. This indicates more than mere inadvertence and oversight; it indicates an "intentional disregard of and indifference to the rights and safety of" the plaintiff, which plaintiffs alleged and for which punitive damages are authorized. *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 397 (1956). Since the evidence tends to show a conscious and persistent willingness by apparently skilled, experienced professionals to expose plaintiff to the harm inherent in a false diagnosis, it supports a cause of action, whether any physical injury is deemed to have been suffered or not.

STATE OF NORTH CAROLINA v. STEVE BUFORD HARVEY

No. 8517SC49

(Filed 3 December 1985)

1. **Criminal Law § 76.4— motion to suppress confession—inadequate legal basis—summary denial—discretion of court**

The decision to deny summarily a motion to suppress inculpatory statements because the motion failed to set forth adequate legal grounds is vested in the sound discretion of the trial court. N.C.G.S. 15A-977(c).

2. **Criminal Law § 75.7— custodial interrogation—necessity for Miranda warnings**

Defendant was subjected to custodial interrogation although officers never planned to arrest him that day and returned him to his home after he signed a confession, and defendant's oral confession made before the *Miranda* warnings were given to him was inadmissible, where the police initiated contact with defendant; defendant was taken to the police station and questioned behind closed doors about two break-ins at the home of defendant's uncle; defendant denied all involvement in the crimes for at least one hour of interrogation; defendant was never expressly told that he was not under arrest or that he was free to leave and could end the questioning at any time; and defendant was only 17 years old and had an IQ of only 78.

3. **Criminal Law § 75.11— absence of Miranda warnings—oral confession inadmissible—subsequent written confession also inadmissible**

Where defendant's oral confession was inadmissible because defendant was subjected to custodial interrogation without being given the *Miranda* warnings, a written confession prepared by an officer and signed by defendant after he had been given the *Miranda* warnings was also inadmissible since the giving of *Miranda* warnings prior to asking defendant to sign the prepared statement did not cure the coercive atmosphere of the interrogation or mean that defendant knowingly and intelligently waived his rights.

4. **Criminal Law § 76.8— admissibility of confession—ruling against State based on witness credibility**

Because the State bears the burden of proving that defendant was aware of his rights and knowingly, intelligently and voluntarily waived them in order for defendant's confession to be admissible, the trial court could properly rule against the State based on a negative finding as to the credibility and demeanor of the State's only witness at the suppression hearing.

APPEAL by the State from *Morgan, Judge*. Order entered in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 18 September 1985.

Defendant was charged in two separate bills of indictment with two counts each of felonious breaking and entering, felonious

larceny and felonious possession of stolen goods. Prior to trial, defendant made a motion to suppress certain inculpatory statements made by him to the police prior to his arrest. Pursuant to G.S. 15A-977(d), the trial court held an evidentiary hearing on the motion.

Evidence presented at this hearing showed that on 13 June 1984, two detectives from the Rockingham County Sheriff's Department went to defendant's home at 9:00 a.m. and asked defendant's mother if she minded if her son, then 17 years old and of limited mental capacity, "rode around with them." The detectives then drove defendant directly to the police department in the town of Stoneville, where they escorted him into the office of the Chief of Police. There, behind closed doors, the officers subjected defendant to about an hour of questioning concerning two breakins of the home of defendant's uncle. At first, defendant denied any involvement in the crimes. The officers repeatedly went over their "investigative report" despite continued denials by defendant. At no time during this interview was defendant advised of his rights to remain silent or to the presence of an attorney. Finally, at approximately 10:50 a.m., defendant responded to the assertion by one of the officers that they knew defendant had spent $50 on beer, wine and marijuana by hanging his head and saying, "I did it." Thereupon, defendant was, for the first time, given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). He was then asked to sign a written statement which had been prepared by one of the officers based on their "investigative report."

Defendant's motion to suppress asked that the oral and written statements be excluded from evidence as they were not given voluntarily after a knowing and intelligent waiver of defendant's rights. The trial court granted the motion, primarily on the ground that the statements had been obtained in violation of the requirements of *Miranda*. The State appeals pursuant to G.S. 15A-1445(b).

Attorney General Thornburg by Assistant Attorney General Robert R. Reilly for the State.

Joe L. Webster for defendant appellee.

PARKER, Judge.

The threshold question presented by this appeal is whether the trial judge properly considered grounds for the suppression motion which were not contained in the motion itself.

General Statute 15A-977(a) dictates that all motions to suppress evidence must contain the grounds which defendant asserts as the basis of the motion. The motion presented by defendant in this case focused on the involuntary nature of defendant's statements. The trial judge, on the other hand, based his decision granting the motion on the failure of the police to give the warnings required by *Miranda* for custodial interrogations.

[1] General Statute 15A-977(c) states "The judge *may* summarily deny the motion to suppress evidence if: (1) the motion does not allege a legal basis for the motion . . ." (Emphasis added.) Thus, the decision to deny summarily a motion which fails to set forth adequate legal grounds is vested in the sound discretion of the trial court. *See State v. Smith*, 50 N.C. App. 188, 272 S.E. 2d 621 (1980). The alternative is to hold a hearing on the motion, despite the facial insufficiency of the motion itself. Once the discretionary decision is made not to deny the motion summarily, a hearing must be held, G.S. 15A-977(d), and "the burden is on the state to demonstrate the admissibility of the challenged evidence; and in the case of a confession, the state must affirmatively show (1) the confession was voluntarily made, (2) the defendant was fully informed of his rights and (3) the defendant voluntarily waived his rights." *State v. Cheek*, 307 N.C. 552, 557, 299 S.E. 2d 633, 636 (1983). The judge's decision in this case was merely one that the State did not meet its burden of persuasion on the second point above—that the defendant was fully informed of his rights.

[2] A person must be fully informed of his rights whenever he is "in custody" of the police and before any interrogation of that person begins. *Miranda, supra.* The State contends that defendant here was not "in custody" within the meaning of *Miranda* when he was questioned by the officers, relying on *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed. 2d 1275 (1983) and *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed. 2d 1 (1976). Those cases, however, present key factual differences from the case at hand. In *Beckwith*, the defendant was an educated, experienced businessman who was interviewed in a

"relaxed" atmosphere in his home by two IRS agents who had informed him of his rights not to answer questions and to the presence of an attorney. *Beckwith* at 343, 96 S.Ct. at 1614-15, 48 L.Ed. 2d at 5. Here, the defendant is a 17-year-old boy with a tested IQ of 78 who was questioned by two officers far from home in a closed office, isolated in a police station. He was not advised of any of his constitutional rights until after he had made incriminating statements. In *Beheler*, the defendant was a participant in a robbery which resulted in the murder of the victim. Defendant Beheler, not wanting to be an accessory to murder, immediately phoned the police to report the crime and cooperated with the police fully throughout their investigation. *Beheler* at 1125, 103 S.Ct. at 3520, 77 L.Ed. 2d at 1280. In this case the police, not the defendant, initiated contact and defendant denied all involvement in the crimes for at least one hour of interrogation.

Custodial interrogation, requiring the *Miranda* warnings, is "questioning initiated by law enforcement officers after the person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d at 706. The State contends that defendant was not in custody because the officers never planned to arrest him that day and, in fact, returned him home after he signed the confession prepared by the officers. However, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, --- U.S. ---, ---, 104 S.Ct. 3138, 3152, 82 L.Ed. 2d 317, 336 (1984). Defendant here was taken far from his home, placed in a closed office with two officers, subjected to lengthy questioning and was never expressly told that he was not under arrest or that he was free to leave and could end the questioning at anytime. These factors, added to the defendant's age and mental capacity, demonstrate the coercive nature of the interrogation and indicate that the *Miranda* warnings should have been given prior to any interrogation of defendant.

[3] Because the warnings were required prior to any questioning of defendant at the station, the incriminating oral statements made by defendant are inadmissible. By the same reasoning, the

written statement was also properly excluded. The giving of the *Miranda* warnings prior to asking defendant to sign the prepared statement did not "cure" the coercive atmosphere, nor does it mean that by signing the statement defendant knowingly and intelligently waived his rights. *See, e.g., Miranda* at 479, 86 S.Ct. at 1630, 16 L.Ed. 2d at 726; *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966).

[4] The State's final assignment of error is that the findings of fact found by the trial judge are not supported by competent evidence. Specifically, the State asserts that the judge erred in basing his decision on an evaluation of the demeanor and credibility of one of the interrogating detectives, who was the only witness to testify at the suppression hearing. This contention is totally without merit. The principle is well-settled that evaluating the credibility and demeanor of a witness is a matter peculiarly reserved to the trier of fact. *E.g., Brinkley v. Nationwide Mutual Insurance Co.*, 271 N.C. 301, 156 S.E. 2d 225 (1967). Because the State bears the burden of proving defendant was aware of his rights and knowingly, intelligently and voluntarily waived them, *Cheek, supra*, the trial court could properly rule against the State based on a negative finding as to the credibility and demeanor of the State's only witness.

We find no error in the decision of the trial judge to grant defendant's motion to suppress his oral and written statements given to the police on 13 June 1984, and the decision is hereby

Affirmed.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. MARQUIS DELANO BRIGHT

No. 858SC502

(Filed 3 December 1985)

1. Criminal Law § 163— failure to object to instructions—appellate review

Where defendant failed to object to the jury instructions at trial, the appellate court may review the jury instructions only if the error is deemed ex-

cepted to as a matter of law or the error constitutes plain error. App. Rule 10(b)(2).

2. **Narcotics § 1.3— maintaining vehicle for use of marijuana—misdemeanor crime**

A misdemeanor of maintaining a motor vehicle with knowledge that it is resorted to by persons for the use, keeping or selling of marijuana exists under N.C.G.S. 90-108(a)(7) since the knowledge required for the misdemeanor is not the equivalent of the criminal intent required for the felony under subsection (b).

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 15 January 1985 in LENOIR County Superior Court. Heard in the Court of Appeals 23 October 1985.

Defendant was charged with possession with intent to sell and deliver a controlled substance and keeping and maintaining a motor vehicle for the use of controlled substances.

The State's evidence tended to show that shortly after 3:00 p.m. on 24 July 1984, Detective Sergeant Bennett Simms of the Kinston Police Department stopped the defendant on information that defendant was in possession of marijuana. Defendant was driving a white Plymouth that was owned by his brother. Officer Simms had seen defendant operating the Plymouth on several occasions. Officer Simms searched defendant's person, finding $435 in cash, and then searched the automobile, finding a brownish-red pouch which held twelve manila envelopes containing marijuana. After defendant was advised of his *Miranda* rights, he told the officer that the marijuana belonged to him and that he was selling it to make money.

Defendant testified that he consented to the search of his person and his automobile. He told Officer Simms that there were no drugs in the car to his knowledge and that he had never seen the pouch before. The cash on his person was for the purpose of paying some bills and had come from odd jobs he had done the week before. Defendant denied ever telling Officer Simms that the drugs were his. Defendant also presented a witness that provided corroborating evidence.

The jury returned a verdict of guilty of the Class I felony of possession of marijuana with intent to sell and deliver and guilty of a misdemeanor charge of "maintaining a motor [vehicle] to which persons resorted to for the keeping or sale of marijuana." Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sarah C. Young, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant.

WELLS, Judge.

Defendant argues one assignment of error that may be broken down into two separate contentions, both asserting defects in the trial court's jury charge: First, that the court submitted to the jury instructions on a misdemeanor crime that does not exist and second, that, if there does exist such a crime, the trial court's instructions to the jury erroneously omitted the essential element of the defendant's *mens rea* to commit the crime.

[1] Defendant failed to object to the jury instructions at trial; therefore, we may review the jury instructions only if the error is deemed excepted to as a matter of law or the error constitutes "plain error." Rule 10(b)(2) of the Rules of Appellate Procedure; N.C. Gen. Stat. § 1A-1, Rule 46 of the Rules of Civil Procedure; *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

> Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error.
>
> In so doing, a party must, prior to arguing the alleged error in his brief, (a) alert the appellate court that no action was taken at trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court.

State v. Oliver, 309 N.C. 326, 307 S.E. 2d 304 (1983). The defendant has not taken these threshold steps to obtain review; therefore, we may not consider the alleged defects in the jury instructions.

[2] There still remains the question of whether a misdemeanor crime of "maintaining a motor [vehicle] to which persons resorted

to for the keeping or sale of marijuana" exists. A defendant cannot be convicted of a crime which does not exist. *State v. Church*, 73 N.C. App. 645, 327 S.E. 2d 33 (1985).

The relevant statutory provisions are as follows:

> (a) It shall be unlawful for any person:
>
> . . .
>
> (7) To knowingly keep or maintain any . . . vehicle . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same . . . .
>
> . . .
>
> (b) Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the criminal pleading alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violation shall be a Class I felony.

N.C. Gen. Stat. § 90-108 (Cum. Supp. 1983). Though the statute is poorly written, we interpret it as below:

> (1) Maintaining a vehicle with knowledge that it is resorted to by persons for the use, keeping or selling of controlled substances shall be a misdemeanor,
>
> (2) Maintaining a vehicle with the intent that it be so used shall be a Class I felony.

Defendant contends that "knowingly" is equivalent to "intentionally" and therefore only one crime, the felony, exists. For this proposition he cites *State v. Church, supra.* In *Church*, the subsection of this statute challenged was G.S. 90-108(a)(10), which makes it a crime "[t]o acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." The legal definitions of these statutory terms all require that the conduct be done intentionally, mandating that this crime could only be a felony, not a misdemeanor. *Id.*

The statute applicable in the case at bar is distinguishable. The required conduct need not be done intentionally, only know-

ingly, in order for the misdemeanor crime to be charged. A person knows of an activity if he is aware of a high probability of its existence. *See* Black's Law Dictionary (5th ed. 1979). A person acts intentionally if he desires to *cause* the consequences of his act or that he believes the consequences are substantially certain to result. *Id.* Intent is more difficult to prove and, as shown by the statute, is the standard of greater culpability.

No error.

Judges ARNOLD and MARTIN concur.

W. W. YEARGIN v. HARVEY SPURR, JR.

No. 859DC563

(Filed 3 December 1985)

1. **Trover and Conversion § 4— conversion of cows—verdict supported by evidence**

The evidence was sufficient to support the jury verdict awarding defendant $1,000 for plaintiff's conversion of two of defendant's cows. N.C.G.S. 1A-1, Rule 59(a)(7).

2. **Rules of Civil Procedure § 50— sufficiency of evidence—waiver of right to challenge**

Plaintiff waived his right to challenge the sufficiency of the evidence to support defendant's counterclaim for punitive damages where he did not move for a directed verdict or judgment notwithstanding the verdict. N.C.G.S. 1A-1, Rule 50.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 30 November 1984 in District Court, GRANVILLE County. Heard in the Court of Appeals 20 November 1985.

This is a civil action wherein plaintiff seeks to recover damages for intentional infliction of emotional distress, lost profits, and punitive damages. Defendant filed a counterclaim wherein he seeks actual and punitive damages for plaintiff's conversion of two of his cows.

At trial plaintiff presented evidence tending to show the following: In June 1981 he moved his herd, consisting of about 170

cows and calves, into a pasture adjacent to defendant's herd. On 3 July 1981 plaintiff saw that defendant's bull was in his pasture. Subsequently, plaintiff's cows stampeded, and several cows mixed in with defendant's herd. Defendant accused plaintiff of stealing his bull, and told plaintiff that he had plaintiff's cow and calf. Plaintiff believed that defendant had taken his cow and calf as "ransom" for the bull. Plaintiff took back his cow and calf pursuant to a claim and delivery action.

Ten days later, defendant told plaintiff that two of his cows were missing. Plaintiff testified that he was sure that all the cows in his herd were his own, and he did not have defendant's cows. Plaintiff gave defendant back his bull.

At the close of plaintiff's evidence the court ruled that plaintiff could recover damages only for the weight loss suffered by his feeder calf herd due to moving them to a different pasture.

Defendant presented the following evidence: On 4 July 1981 he discovered that two of his cows and his bull were missing, and he had four cows and four calves that did not belong to him. He thought that the extra cows and calves belonged to plaintiff because the fence between their pastures was broken. Defendant told him about the extra cows, and when he arrived home that evening someone had taken the cows and calves and opened the fence to the adjoining pasture. Later that week, defendant's son saw their two missing cows in plaintiff's herd. On 11 July 1981 defendant saw plaintiff's cow and calf trying to get into his pasture. He let them in his corral. On 21 July defendant told plaintiff that plaintiff still had his two cows. Plaintiff told defendant that defendant had his cow and calf. On 11 August the sheriff took plaintiff's cow and calf from defendant's pasture. The next day defendant and his son met the sheriff in plaintiff's pasture, and they marked defendant's two cows. Defendant testified that his two cows were worth $1,000.00.

The following issues were submitted to and answered by the jury:

> 1. Did Mr. Spurr perform any act or acts consisting of extreme and outrageous conduct which were intended by him to cause emotional distress or did Mr. Spurr act with a

reckless indifference to likelihood that his acts could cause severe emotional distress to Mr. Yeargin?

ANSWER: No.

2. Did Mr. Yeargin suffer severe emotional distress as a result of Mr. Spurr's conduct?

ANSWER:

3. If you answered each of the above questions Yes, what amount, if any, is Mr. Yeargin entitled to recover from Mr. Spurr as a result thereof?

ANSWER:

4. If you awarded some amount of actual damages to Mr. Yeargin, in your discretion what amount of punitive damages, if any, should be awarded to Mr. Yeargin?

ANSWER:

5. Did Mr. Yeargin convert one or more of Mr. Spurr's cows?

ANSWER: Yes.

6. If you answered the above question Yes what amount of damage, if any, is Mr. Spurr entitled to recover of Mr. Yeargin?

ANSWER: $1000.00.

7. If you awarded some amount of damages to Mr. Spurr, in your discretion what amount of punitive damages, if any, should be awarded to Mr. Spurr?

ANSWER: $6500.00

From the judgment entered on the verdict, plaintiff appealed.

Edmundson & Catherwood, by R. Gene Edmundson, and John W. Watson, Jr., for plaintiff, appellant.

Thomas L. Currin for defendant, appellee.

HEDRICK, Chief Judge.

[1] Plaintiff first argues that the trial court erred in denying his motion to set aside the verdict of actual damages because such damages were not supported by the greater weight of the evidence. Plaintiff is not contending that the evidence was insufficient to go to the jury, such challenge must be made through a motion for a directed verdict. Instead, he is contending that the evidence did not support the verdict of $1,000.00 because no evidence of the fair market value of the cows was presented at trial, and his motion under G.S. 1A-1, Rule 59 should have been granted.

G.S. 1A-1, Rule 59(a)(7) provides that a new trial may be granted on the grounds of insufficiency of the evidence to justify the verdict. A motion under this rule is addressed to the sound discretion of the trial judge, whose ruling, absent abuse of discretion, shall not be disturbed on appeal. *Goble v. Helms*, 64 N.C. App. 439, 307 S.E. 2d 807 (1983), *disc. rev. denied*, 310 N.C. 625, 315 S.E. 2d 690 (1984). "[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982). There was evidence at trial that the cows were worth $1,000.00. Plaintiff has not shown any abuse of discretion in Judge Allen's denial of his motion.

In his next assignment of error plaintiff argues that the trial court erred in denying his motion to set aside the award of punitive damages.

[2] In general, punitive damages are allowed in a tort action where the tortious conduct is accompanied by an element of aggravation, such as fraud, malice, recklessness, oppression, insult, rudeness, caprice or willfulness. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Plaintiff contends that there was no evidence of any of these elements of aggravation introduced at trial. The only procedure by which the adverse party can challenge the sufficiency of the evidence to go to the jury is by a motion for directed verdict under G.S. 1A-1, Rule 50. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). Plaintiff did not move for a

directed verdict or judgment notwithstanding the verdict; therefore, he has waived his right to challenge the sufficiency of the evidence to support defendant's counterclaim for punitive damages. This assignment of error is overruled.

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

Affirmed.

Judges WHICHARD and JOHNSON concur.

SHIRLEY PATTON v. DAVID E. PATTON

No. 8514DC153

(Filed 17 December 1985)

1. Divorce and Alimony § 8— abandonment—no justification—wife did not consent

The trial court did not err in an action for alimony by concluding that defendant had abandoned his wife. There was no dispute that defendant husband did not intend to return to the marital home after 8 March 1981; there was no justification for defendant's departure because the wife throughout the marriage was a capable homemaker and good mother, the couple enjoyed recreational activities with family and mutual friends, and the wife sought counseling for the couple when problems arose in the relationship; and the wife did not consent to the separation as a legal matter where she gave defendant an ultimatum to either faithfully commit to the marriage or to make a clean break because she continued her efforts to preserve the marriage even after the separation. N.C.G.S. 50-16.2(4) (1984).

2. Divorce and Alimony § 16.8— alimony—husband's income at date of hearing—no specific finding

The trial court did not err by not making a specific finding as to defendant's income at the date of the hearing in 1984 in setting child support and alimony where the court made findings as to the defendant's gross income in the years 1978 through 1982; money received from the defendant's profit-sharing plan in 1982; the amount of money deposited in defendant's personal checking account in 1983; the perquisites defendant enjoyed from his company, such as an entertainment budget and the use of a car; the financial prospects of defendant's company, which were excellent; the stability of the number of employees of the defendant's company; and the $1,000 per month salary his present wife was receiving from his company.

3. Divorce and Alimony § 30— alimony—value of husband's business—findings sufficient

The trial court did not err in an action for equitable distribution by finding that the value of defendant husband's interest in his business was $85,000 and that he was the sole or 96% owner of that business where the trial court specifically indicated that it took into account the value placed by the husband himself on his business interests in valuing the company; the record contained an insurance proposal prepared by the husband in July 1980, wherein he valued his business interests at $215,000 and stated there were no liabilities; the court did not limit itself to the figure contained in the insurance proposal, but took other relevant facts and circumstances into consideration; and the court stated that it was valuing the husband's interests in the business "at the relevant time for valuation for equitable distribution." Although specifying the exact date of valuation might have been preferable, this finding does not demonstrate and the husband did not show that the trial court used an incorrect date in valuation.

4. Divorce and Alimony § 30— equitable distribution—unequal distribution of marital property—no abuse of discretion

The trial court did not abuse its discretion by ordering an unequal distribution of marital property where the court's order stated that the court "attempted to consider all of the factors included" in N.C.G.S. 50-20(c); the court enumerated seven of the twelve factors to which it paid particular attention; and the court made reference to factual findings in the order which contained information relevant to that particular statutory factor for each of the seven factors.

5. Divorce and Alimony § 27— alimony and child support—second award of attorney fees—not double award

The trial court did not err in an action for alimony, child support, equitable distribution, and attorney fees by awarding counsel fees of $3,000 to one of the wife's attorneys for services rendered in connection with the child support and alimony aspects of the hearing. A $4,000 counsel fee awarded to the wife at an earlier hearing did not make the second award an impermissible "double award" because N.C.G.S. 50-13.6 (1984) authorizes recovery of counsel fees in child support actions and N.C.G.S. 50-16.4 (1984) makes counsel fees recoverable in actions for permanent alimony. The fee awarded to the wife at the earlier hearing did not cover and was not intended to cover any legal fees the wife might subsequently incur, and the court specifically termed the earlier $4,000 award "attorneys' fees *pendente lite.*"

6. Divorce and Alimony § 27— award of attorney fees—findings inadequate

The trial court erred by awarding attorney fees in an action for alimony, child support, equitable distribution, and attorney fees where there was no finding that the supporting spouse refused to provide adequate support under circumstances existing at the time the action was initiated; there was no indication of whether support provided after the separation was adequate, especially in light of the husband's unilateral reduction of that support from time to time; and there were no factual findings upon which a determination of

the reasonableness of the award could be based other than the trial court's statement that the expended time was "reasonably necessary."

Chief Judge HEDRICK concurring in part and dissenting in part.

APPEAL by defendant from *LaBarre, Judge.* Judgment entered 28 August 1984 in District Court, DURHAM County. Heard in the Court of Appeals 23 September 1985.

James B. Maxwell, for plaintiff appellee.

Clayton, Myrick & McClanahan, by Robert W. Myrick and Robert D. McClanahan, for defendant appellant.

BECTON, Judge.

I

Plaintiff-wife, Shirley Patton, filed her complaint against defendant-husband, David Patton, on 5 February 1982, seeking a *pendente lite* award of alimony, custody, child support, and attorney's fees. The trial court entered an order awarding the wife custody of the children, possession of the marital residence, $500 per month child support, $500 per month alimony *pendente lite*, and $4,000 in attorney's fees. The husband filed an answer and counterclaim in which he sought an absolute divorce. The wife filed a reply and cross-action, wherein an equitable distribution of marital property was sought. A judgment of absolute divorce was entered on 1 December 1983, reserving the issues of child support, alimony, attorney's fees, and equitable distribution.

The reserved issues came on for hearing in May and June of 1984, and by judgment entered 28 August 1984, the wife was awarded $1,000 per month permanent alimony on grounds of abandonment, $500 per month child support, the marital residence and personalty contained therein, and $3,000 attorney's fees. The husband was awarded his interest in two businesses, any retirement money taken from these businesses, and any personalty already removed from the marital residence. Husband filed a post-hearing motion to alter, amend or modify this judgment, which was denied. From the order entered on the reserved issues and from the order denying his post-hearing motion, husband appeals, alleging that the trial court committed reversible error in (1) concluding the wife was abandoned by the husband; (2) failing

to specifically find the husband's income at the time of the hearing; (3) making certain findings relating to the equitable distribution of marital assets; (4) awarding attorney's fees; and (5) denying the husband's post-hearing motion. We find no merit in any of these arguments with the exception of the award of attorney's fees. We remand this cause so that proper findings of fact can be made on the attorney's fees issue.

II

The parties were married in Pennsylvania in 1959. They had four children, one of whom was still a minor at the time of the hearing. When they married, husband had received his college degree and had begun his career as a teacher. Shortly thereafter, the wife received her degree in elementary education, and for the first few years of the marriage was employed in that field. From about 1963 until she took a part-time job in the year before their separation, the wife worked as a homemaker. In 1962, the family moved to Durham, North Carolina, where the husband took a job selling industrial products. In 1966, the husband started an industrial equipment supply company called Patco, Inc., along with his brother Richard. The husband's involvement with Patco as both vice-president and sales representative constituted both his primary business interest and the primary source of income for the parties throughout the marriage.

Although the parties described the history of their marital relationship somewhat differently, they generally agreed that there had been some good and happy times interspersed with unhappy ones and crises; that they had discussed separation on several occasions before 1981; and that from about 1980 on, the relationship began to seriously deteriorate. This deterioration culminated on 8 March 1981 when, upon husband's return from the ACC Basketball Tournament, the wife confronted him with her suspicions that he was involved with another woman. Husband left the marital home that night and has not resided there since.

III

[1] The husband first contends that the trial court erred in concluding that he abandoned his wife. N.C. Gen. Stat. Sec. 50-16.2(4) (1984) provides that a dependent spouse is entitled to alimony

when the supporting spouse abandons the dependent spouse. Abandonment is a legal conclusion which must be based upon factual findings supported by competent evidence. *See Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978). Although there is no statutory definition of abandonment, it has been judicially defined thus:

> One spouse abandons the other, within the meaning of the statute, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it.

Panhorst v. Panhorst, 277 N.C. 664, 670-71, 178 S.E. 2d 387, 392 (1971). The burden of proof as to each of the elements of abandonment is on the party seeking alimony. *Heilman v. Heilman*, 24 N.C. App. 11, 210 S.E. 2d 69 (1974). Each case must be determined in large measure upon its own particular circumstances. *Tan v. Tan*, 49 N.C. App. 516, 272 S.E. 2d 11 (1980), *disc. rev. denied*, 302 N.C. 402, 279 S.E. 2d 356 (1981).

Although there is no dispute that the husband had no intent to return to the marital home after 8 March 1981, he contends that the evidence conclusively shows justification for his departure and his wife's consent thereto. Conceding that an "all-embracing" definition cannot be formulated, our Supreme Court has made the following comments on justification:

> Ordinarily, . . . the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect . . . .

Caddell v. Caddell, 236 N.C. 686, 691, 73 S.E. 2d 923, 926 (1953). The evidence in this case at most discloses a marital relationship that was sometimes rocky and a sexual relationship which, in the husband's estimation, left something to be desired. It does not reveal a situation which the husband was compelled to leave for reasons of "safety, health, and self-respect."

By way of contrast, in *Heilman*, the evidence showed a nonexistent sex life, a wife deeply hypercritical of her mate, and a husband whose stomach ailments and insomnia disappeared when he left the marital home. According to this Court, "all of the

evidence [depicted] a marriage totally lacking in conjugal harmony," 24 N.C. App. at 16, 210 S.E. 2d at 72, and supported a finding of justification. At bar, the trial court's findings, based upon competent evidence, were that throughout the marriage the wife was a capable homemaker and good mother; that the couple enjoyed recreational activities with family and mutual friends; and that when problems arose in the relationship, the wife sought counseling for the couple. Thus, the wife met her burden of proof for lack of justification for the husband's departure.

On the issue of the wife's consent to her husband's departure, the following findings of fact made by the trial court are pertinent:

> Sensing there were difficulties in the marriage and beginning in May of 1980, the [wife] sought counselling. . . . At the request of his wife, the [husband] attended a couple of the sessions, but no more [, w]hile the [wife] continued, both prior to and subsequent to the separation that occurred, to seek counselling in efforts to try to determine if there were methods by which she could take steps so that the marriage could be improved or saved.
>
> * * *
>
> After being confronted by the [wife] with the jewelry [men's jewelry that wife had never seen before, including a gold bracelet engraved with initials other than her own] and other matters upon his return from the ACC Basketball Tournament, the [husband] left the family home on or about March 8, 1981, and moved to an apartment.
>
> * * *
>
> The [wife] wanted to avoid the separation and to seek methods by which the marriage could be improved or saved. She did indicate to the [husband] that they were either going to "be married" or "not be married" during their discussions immediately prior to and subsequent to the separation of the parties. She wanted the [husband] to either choose to commit to the marriage, his wife and family, and work at establishing their former relationship, or to make a complete and clean separation with the family. To this end, the wife continued

her counselling to try and preserve the marriage even after the separation had occurred.

These findings receive support from evidence in the record and are, in our opinion, sufficient to support a conclusion that the husband abandoned the wife without just cause or provocation. The fact that the record contained evidence that would have supported a contrary conclusion is irrelevant. Nor are we persuaded by the husband's argument that because the wife had, in effect, given him an ultimatum to either faithfully commit to the marriage or to "make a clean break," that as a legal matter she consented to the termination of their cohabitation. In this regard we emphasize the findings that the wife continued her attempts to preserve the marriage even after the separation.

IV

[2] The husband next contends that it was reversible error for the trial court not to have made a specific finding as to his income at the date of the hearing in setting child support and alimony. It is true that the income of the supporting spouse is one among a number of factors that is required to be given "due regard" by the trial court in setting both alimony and child support. N.C. Gen. Stat. Sec. 50-16.5(a) (1984) (alimony); N.C. Gen. Stat. Sec. 50-13.4(c) (1984) (child support). "Due regard" has been interpreted to require specific findings on the statutorily enumerated factors. *See Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978) (alimony); *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) (child support). The finding pertaining to the income of the supporting spouse must be based on that spouse's "present income," *Holt v. Holt*, 29 N.C. App. 124, 223 S.E. 2d 542 (1976) (child support), his or her income "at the time the award is made." *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976) (alimony). Although it is clear that a proper finding must be based on present, as opposed to past, income, we are aware of no rule that requires a specific finding as to the income of the supporting spouse on the precise date of the hearing.

At bar, the trial court made findings of fact as to husband's gross income in the years 1978 through 1982; money received from a Patco profit-sharing plan in 1982; the amount of money deposited in his personal checking account in 1983; and per-

quisites he enjoys from Patco, such as an entertainment budget and use of a car. The court also found that the financial prospects of Patco were excellent, that the number of employees had remained stable in 1984, and that husband's present wife is currently employed by Patco at a salary of $1,000 per month. In our opinion, these findings amply fulfilled the trial court's obligation to determine the husband's "present" income. The trial court took careful regard not only of the husband's salary, but of the various financial benefits he enjoyed as a result of his ownership interest in Patco.

Furthermore, the only evidence bearing upon the husband's income that the trial court did not incorporate into the factual findings is evidence introduced by the husband of his net income in March and April of 1984. The March figure is comparable to the average monthly income for the previous years; the April figure shows only a slight decline.[1] Although we do not feel the trial court was bound to include this evidence, the husband was not prejudiced by its omission, as it tended only to show that his income remained relatively stable. This assignment of error is overruled.

V

[3] The husband next contends that the trial court erred in finding that the value of his interest in Patco was $85,000 and that he was the sole, or 96%, owner of that business. This contention is without merit.

The husband's business interest in Patco was one of two major marital assets subject to equitable distribution in this case, the other being the marital residence. While the value of the home was stipulated to, the value of Patco was contested. The trial court's finding on the value of Patco reads as follows:

> 34. That in evaluating the defendant's/husband's share of Patco, Inc., the Court has considered the estimate of the defendant himself as given in an insurance application approximately six months prior to the separation of the parties (plaintiff's Exhibit 10), the book value of the business in 1980

1. We note that an affidavit filed with husband's post-hearing motion reflects a net income for the month of April 1984 greater than the figure before the trial court during the hearing, and comparable to monthly income from previous years.

through November, 1984, the relative ownerships of the stock in the company in 1980 through 1984 (it being noted that the defendant is the sole (or 96%) stockholder of the company, having purchased the interest of his brother with the company redeeming his stock by treasury stock), has considered the capitalization of earnings of the company, has considered the earning capacity of the company as demonstrated in the last four-to-five year period of time, the present economic outlook for the business and industry, the good will which has been accumulated to the business through the hard work and competent efforts of the defendant, and the financial position of Patco, Inc., as demonstrated by its unaudited statements for 1980 through April 30, 1984. The value of the defendant's interest in Patco, after consideration of all these factors, at the relevant time for evaluation for equitable distribution in this matter was at least $85,000.

When a divorce is granted on the ground of a year's separation, the trial court is to determine the net market value of the marital assets as of the date of separation in order to effect an equitable distribution of these assets. N.C. Gen. Stat. Sec. 50-21(b) (1984); *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). The trial court's findings concerning valuation, as are all factual findings in an equitable distribution order, are binding on appellate courts when supported by competent evidence. *See Alexander*. Therefore, we must determine whether any competent evidence supported the finding that the net value of the husband's interest in Patco on 8 March 1981 was $85,000.

First, the trial court specifically indicated that it took into account the value placed by the husband himself on his business interests in valuing Patco. Notably, the record contains an insurance proposal prepared by the husband in July 1980, wherein he valued his business interests at $215,000 and stated there were no liabilities. The wife argues that even when the husband's interest in his only other business, Wick & Leather, is subtracted (which interest the parties stipulated at $8,200), this still leaves over $200,000 as husband's admitted interest in Patco. Furthermore, the trial court did not limit itself to the figure contained in the insurance proposal, but took other relevant facts and circumstances into consideration. *See Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266, *disc. rev. denied*, --- N.C. ---, 335 S.E. 2d 316 (1985) (good

will must be considered and valued in determining value of professional practice for equitable distribution); *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E. 2d 57 (1985) (examples of evidence useful in valuing closely-held corporation: gross sales, cost of goods sold, profit, operating expenses, income, retained earnings). It is true that evidence was introduced by the husband suggesting that his share of Patco was substantially less than $85,000. The trial court was not, however, bound to make its finding in accordance with the husband's evidence.

The husband makes two subsidiary arguments relating to the valuation of Patco: that the trial court incorrectly found he was the 96% owner of Patco, and that the trial court did not explicitly state it was making its valuation as of the date of separation. Since we have concluded that the trial court properly valued the husband's interest in Patco as of 8 March 1981 at $85,000, we fail to see how he may have been prejudiced by these alleged errors. In particular, the order stated that it was valuing husband's interest in Patco "at the relevant time for evaluation for equitable distribution." Although specifying the exact date of valuation might have been preferable, this finding does not demonstrate, nor has the husband otherwise shown, that the trial court used an incorrect date in valuation. *See Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967) (burden of showing error always on party asserting same).

VI

[4] The husband also contends that the trial court committed reversible error in its distribution of the marital assets because the basis for the unequal distribution was not shown. Our Supreme Court has held that

> a party desiring an unequal division of marital property bear[s] the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence than an equal distribution would not be equitable.

White v. White, 312 N.C. 770, 776, 324 S.E. 2d 829, 832 (1985). When a party has met its burden of proof and the court has concluded that an equal distribution would not be equitable, the court must make written findings, based upon relevant statutory

and nonstatutory factors, which support its conclusion that an equal distribution is not equitable. *See Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985); *Alexander*. It may then equitably divide the marital property. *White*. The weight to be assigned to any factor in a given case is within the discretion of the trial court. *Id.*

In the case at bar, the order recites that the trial court "attempted to consider all the factors included" in G.S. Sec. 50-20(c). The trial court enumerated seven of the twelve factors in G.S. Sec. 50-20(c) to which it paid particular attention, and for each of these seven factors, made reference to factual findings in the order which contained information relevant to that particular statutory factor. Based upon these findings, the court concluded that an equal division of the marital assets would not be equitable, and proceeded to award the wife 58% of the marital estate and the husband, 42%. Our review of equitable distribution awards is limited to a determination of whether there has been a clear abuse of discretion. *White*. We find none here. *See Appelbe v. Appelbe*, --- N.C. App. ---, 330 S.E. 2d 57 (1985) (approving unequal division).

VII

The husband's next contention is that the trial court committed reversible error in its award of attorney's fees. The record shows that the trial court awarded $3,000 in counsel fees to one of the wife's two attorneys for legal services rendered in connection with the child support and alimony aspects of the hearing. The wife made no claim for counsel fees for the other attorney, who had represented the wife at the earlier hearing on child support and alimony *pendente lite*, and to whom a prior order had awarded attorney's fees in the amount of $4,000.

A

[5] The husband first challenges the current award on the ground that the wife had already received a $4,000 counsel fee at the earlier hearing, which enabled her to meet her husband on equal terms, and thus the current fee constitutes an impermissible "double award." N.C. Gen. Stat. Sec. 50-13.6 (1984) authorizes the recovery for counsel fees in child support actions; N.C. Gen. Stat. Sec. 50-16.4 (1984) makes them recoverable in actions for

permanent alimony. The fee awarded to the wife at the earlier hearing did not cover, nor was it intended to cover, any legal fees the wife might subsequently incur; the trial court specifically termed the earlier $4,000 award, "attorneys' fees '*pendente lite.*' " Multiple awards of counsel fees in the same domestic action are, in the proper circumstances, within the court's discretion to allow. *See Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867 (1955); *see also Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E. 2d 787 (1981) (attorney's fees allowable for services performed on appeal).

B

[6] 1. The husband also attacks the award of counsel fees on the ground that it was not supported by proper factual findings. Here, we agree with the husband. In order to establish entitlement to counsel fees in an alimony action, the dependent spouse must show, and the trial court must find, that: (1) the spouse is in fact a dependent spouse, (2) the dependent spouse is entitled to the relief demanded, and (3) the dependent spouse does not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E. 2d 719, 724 (1980); *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E. 2d 701 (1977), *disc. rev. denied*, 294 N.C. 363, 242 S.E. 2d 634 (1978). To establish entitlement to counsel fees in a child support action, the following findings are required: (1) the interested party is acting in good faith, (2) the interested party has insufficient means to defray the expenses of the suit, and (3) the party ordered to pay support has refused to provide support adequate under the circumstances existing at the time of the institution of the action or proceeding. *Hudson*, 299 N.C. at 472-73, 263 S.E. 2d at 723-24; *Quick v. Quick*, 67 N.C. App. 528, 313 S.E. 2d 233 (1984). Lacking sufficient means to defray the expenses of the suit has been interpreted to mean that the dependent spouse is not able as litigant to meet the supporting spouse as litigant on substantially even terms because the dependent spouse is financially unable to employ adequate counsel. *Hudson*, 299 N.C. at 474, 263 S.E. 2d at 725.

If a party establishes entitlement to attorney's fees in a given case, it is then within the trial court's discretion to award a reasonable fee. A proper order awarding counsel fees in a child support or alimony action must contain a finding or findings upon

which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered and the time and skill required. *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971); *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) (attorney's skill, hourly rate, its reasonableness in comparison with that of other attorneys, amount of time spent, what attorney did). When an award of counsel fees is made, whether the statutory requirements have been met is a question of law, reviewable on appeal. When these requirements have been met, the amount of the award is reviewable only for an abuse of discretion. *Hudson.*

2. We apply the foregoing legal principles to the relevant factual findings in the case before us and find them deficient in the following specific regards. As to child support, there is no finding that the supporting spouse refused to provide adequate support under circumstances existing at the time the action was initiated. *See Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E. 2d 99 (1984) (remanding case for lack of such a finding). Although some findings were made concerning husband's provision of support after the separation, there is no indication whether such support was adequate, especially in light of husband's unilateral reduction of that support from time to time. As to both alimony and child support, there are no factual findings upon which a determination of the reasonableness of the award could be based, other than the trial court's statement the time expended was "reasonably necessary." *See Coleman v. Coleman*, 74 N.C. App. 494, 328 S.E. 2d 871 (1985) (portion of order awarding fee in alimony and child support case vacated; conclusory finding that attorney had rendered "valuable legal services" insufficient). The fact that the attorney's affidavit was received into evidence and examined by the trial court does not alter our result. *See Rogers v. Rogers*, 39 N.C. App. 635, 251 S.E. 2d 663 (1979) (vacating award of attorney's fees; court received detailed affidavit from attorney but failed to make findings as to reasonableness of attorney's fees incurred). For examples of findings sufficient upon which to base a determination of reasonableness, *see Fungaroli*, 53 N.C. App. at 274, 280 S.E. 2d at 790 (finding number 10); *Cornelison v. Cornelison*, 47 N.C. App. 91, 97, 266 S.E. 2d 707, 711 (1980).

VIII

Finally, the husband argues that the trial court erred in denying his post-hearing motion to amend, alter or modify its judgment. Each of the grounds asserted in the motion relates to a matter we have already treated in this opinion and found to be free from error. This assignment of error is overruled.

IX

Based on the foregoing, the judgment appealed from, except for that portion awarding attorney's fees, is affirmed. We remand this cause for proper findings of fact and entry of judgment on the issue of attorney's fees.

Affirmed in part and remanded.

Chief Judge HEDRICK concurs in part and dissents in part.

Judge PARKER concurs.

Chief Judge HEDRICK concurring in part and dissenting in part.

I concur in that part of the majority decision with respect to attorney's fees; however, I dissent from that part of the opinion that affirms the remainder of the trial court's judgment.

The majority states the question presented as whether the evidence supports the court's finding that the value of the husband's interest in Patco on 8 March 1981 was $85,000. In my opinion, the question presented is not only whether the evidence supports the valuation made but also whether the court made sufficient findings to support its valuation.

This Court has stated that the task of appellate courts in reviewing the value placed on a professional practice or business, or an interest therein, by a trial judge for purposes of equitable distribution, is to determine whether the approach used by the trial judge reasonably approximated the net value of the business, or the interest therein. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266 (1985); *disc. rev. denied*, --- N.C. ---, 335 S.E. 2d 316 (1985); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985). Various approaches or methods can be used to value such

businesses or interests; however, courts must value and consider the goodwill, if any, of the business in determining the value of the business or the interest therein. *Id.* To enable appellate courts to determine whether the trial judge properly or adequately valued the business or interest, the trial judge should make specific findings regarding the value of the business or the interest therein and the existence and value of the goodwill of the business, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. *Poore v. Poore, supra.* If it appears on appeal that the trial judge reasonably approximated the net value of the business or the interest therein and the value of the goodwill of the business, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed. *Id.*

I see no reason why the above propositions should not apply with equal force to the valuation of an interest in a closely-held corporation, such as the husband's interest here in Patco. In my opinion, the findings made by the trial court here regarding the value of the husband's interest in Patco are not sufficiently specific to enable us to determine whether the trial court reasonably approximated the value of that interest based on competent evidence and on a sound valuation method or methods. A mere finding, such as the one made by the trial court here, that the court has considered several relevant factors or acceptable valuation methods in determining the value of the interest without some greater specificity or indication of the particular evidence or valuation method or methods on which the court relied is not sufficient. While I realize that the requirement of specific findings of fact supporting the valuation of an interest such as the one concerned herein places a heavy burden on trial judges who are faced with the difficult task of valuing such interests, in my opinion such findings are essential to permit effective appellate review.

For these reasons, I conclude that the trial court did not make sufficient findings to support its valuation and that the judgment, insofar as it divides the marital property, should be vacated and the cause remanded for additional findings regarding the valuation of the husband's interest in Patco.

STATE OF NORTH CAROLINA v. F. BELLE HOWARD AND J. C. HOWARD

No. 8512SC654

(Filed 17 December 1985)

1. **Constitutional Law § 28; Physicians, Surgeons and Allied Professions § 1— practicing medicine without license—no unconstitutional selective prosecution**

The State's prosecution of two naturopathic practitioners for practicing medicine without a license by administering a Herbal Tumor Removal treatment to a cancer victim did not constitute selective prosecution in violation of their rights to equal protection under the Fourteenth Amendment since (1) evidence presented by defendants concerning merchants selling nonprescription drugs, herbal remedies and books on treatment and diets to cure cancer and testimony by a naturopathic physician licensed to practice in Oregon and a herbologist did not relate to others similarly situated and committing the same acts, and (2) defendants failed to show bad faith on the part of the prosecution but showed only a lack of knowledge of others subject to prosecution for the same offense.

2. **Physicians, Surgeons and Allied Professions § 1— practicing medicine without license—statute not unconstitutional on its face**

There is no merit to defendants' contention that the unlicensed practice of medicine statute, N.C.G.S. 90-18, is unconstitutional on its face on the ground that the terminally ill have a fundamental right to choose unorthodox treatment and that any statute which punishes those who provide such treatment unconstitutionally infringes upon this fundamental right.

3. **Criminal Law § 53; Physicians, Surgeons and Allied Professions § 1— practicing medicine without license—Herbal Tumor Removal treatment—competency of testimony by medical experts**

In a prosecution of two naturopathic practitioners for practicing medicine without a license, the trial court did not err in ruling that experts in the fields of medicine and forensic pathology were qualified to state opinions that the use of a counterirritant such as the Herbal Tumor Removal treatment was not an effective treatment for the disease of pancreatic cancer. Moreover, such testimony was not prejudicial since the standard of care employed by defendants was not at issue.

4. **Criminal Law § 73.2— deceased witness—statement admissible as exception to hearsay rule**

The written statement of deceased cancer victim was admissible against defendants under N.C.G.S. 8C-1, Rule 804(b)(5) in a prosecution for practicing medicine without a license because it dealt with material facts which were more probative on the points offered than other evidence which the proponent could procure through other means, the interests of justice were best served by its admission, and, although defendants received written notice of the prosecution's intent to offer the statement only on the morning of trial, they were granted a continuance until the following morning to prepare to meet the statement.

5. Physicians, Surgeons and Allied Professions § 1— practicing medicine without license—intent irrelevant

In a prosecution of two naturopathic practitioners for practicing medicine without a license, the trial court did not err in excluding evidence offered to show defendants' intent or in failing to instruct the jury on defendants' intent since the lack of criminal intent does not constitute a valid defense to the crime charged.

6. Physicians, Surgeons and Allied Professions § 1— practicing medicine without license—sufficiency of evidence

The State's evidence was sufficient to support the female defendant's conviction of practicing medicine without a license where it tended to show that she used the title "Dr."; she received patients in two treatment rooms in her home containing examining tables and other medical equipment and supplies; she received $2,000 for administering a Herbal Tumor Removal treatment to a cancer victim; she professed to the cancer victim that his cancer was gone when she removed a section of skin from his abdomen at the site of the treatment; and she had a privilege license but no license to practice medicine.

7. Physicians, Surgeons and Allied Professions § 1— practicing medicine without license—aiding and abetting—sufficiency of evidence

The State's evidence was sufficient to support the male defendant's conviction of practicing medicine without a license by aiding and abetting where it tended to show that defendant was present during Herbal Tumor Removal treatments administered to a cancer victim by the codefendant; he prepared the treatment salve on at least one occasion and cleaned the wound created by the salve; and defendant was totally responsible for the cancer victim when the codefendant went to Atlanta for a seminar.

8. Physicians, Surgeons and Allied Professions § 1— practicing medicine without license—naturopathy not exception to statute

The trial court in a prosecution for practicing medicine without a license did not err in instructing the jury that the practice of naturopathy was not one of the 14 exceptions listed in N.C.G.S. 90-18 where defendants presented no evidence that the practice of naturopathy falls within one of the areas expressly excluded from the licensing requirement of N.C.G.S. 90-18.

APPEAL by defendants from *Johnson, E. Lynn, Judge.* Judgment entered 7 December 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 30 October 1985.

Defendants were each charged on bills of indictment with (1) obtaining property by false pretenses, (2) assault on a handicapped person and (3) practicing medicine without a license. Defendant F. Belle Howard was convicted of practicing medicine without a license. From a judgment imposing a suspended sentence of five years and $100 fine plus restitution, defendant appeals. Defendant J. C. Howard was convicted of practicing

medicine without a license by aiding and abetting. From a judgment imposing a suspended sentence of five years and $100 fine plus restitution, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas B. Wood, for the State.

Nance, Collier, Herndon & Wheless, by James R. Nance, Jr., for defendant appellants.

JOHNSON, Judge.

Defendants present ten questions for review. These questions fall into the following broad categories: (1) whether the indictment should have been quashed and the charges dismissed prior to the jury trial on the grounds that the prosecution against defendants was based upon a statute that is unconstitutional; (2) whether the court erroneously allowed the admission of certain expert testimony; (3) whether the court erroneously allowed the admission of a written statement of the deceased "patient"; (4) whether the court committed reversible error when instructing the jury; (5) whether the evidence presented was sufficient to withstand the defendants' motion to dismiss at the close of all of the evidence.

The defendants were initially indicted for obtaining property by false pretenses, assault on a handicapped person and practicing medicine without a license. The State took a voluntary dismissal on the charges of assault on a handicapped person. The jury returned a verdict of guilty on the charge of practicing medicine without a license as to each defendant and verdicts of not guilty on the charges of obtaining property by false pretenses. Each of the alleged violations arose when the defendants rendered services to Wilbur Clough, then terminally ill with pancreatic cancer. We will address each question presented by the defendants following presentation of the factual background.

I

Prior to 30 April 1983 Wilbur Clough was diagnosed as having terminal pancreatic cancer. He received treatment at the Veterans' Administration Hospital in Oteen, North Carolina until he was told further treatment would be of no avail. Wilbur Clough contacted defendant Belle Howard, whom he had heard

treated cancers. Both defendants used the title "Dr." Both defendants received training in naturopathy and held themselves out as naturopathic practitioners. Dr. Belle Howard was known for using a treatment referred to as the Herbal Tumor Removal (HTR) treatment. On or about 30 April 1983, Wilbur Clough and his wife went to Fayetteville, North Carolina for the purpose of discussing the treatment. The treatment consisted of the applications of two salves to the skin in the vicinity of the cancer. After receiving an explanation of the treatment from Dr. Belle Howard and seeing photographs of the treatment, Mr. Clough paid defendant Belle Howard a $2000.00 fee to cover the treatment and room and board during the course of the treatment. Prior to receiving the treatment Mr. Clough was informed the treatment would be painful. From 30 April 1983 to 13 May 1983 defendant Belle Howard administered salves and vitamins to Mr. Clough. On 13 May 1983 Belle Howard went to Atlanta to attend a seminar, leaving Mr. Clough under the supervision of defendant J. C. Howard. That night Wilbur Clough insisted that J. C. Howard call an ambulance. He was taken to a hospital and treated for "chemical burns" at the site of the salve application. Wilbur Clough died of pancreatic cancer prior to the case being heard at trial.

II

Defendants filed a motion to dismiss on 18 April 1984 on the grounds that the statute upon which the indictments were based was unconstitutional both as applied to the defendants and on its face. Immediately preceding the jury trial on 26 November 1984, a full evidentiary hearing was conducted. The court denied defendants' motion to dismiss in open court. To this holding defendants assign error and reassert on appeal their objections on constitutional grounds.

A

[1] Defendants were indicted under G.S. 90-18 (1981). G.S. 90-18 provides in pertinent part:

> No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this Article. . . . The person so practicing without license shall be guilty of a misdemeanor. . . .

The statute defines the practice of medicine or surgery in the following manner:

> Any person shall be regarded as practicing medicine or surgery . . . who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: [unless such activity falls within one of fourteen exceptions].

Defendants contend that the State's prosecution against them constituted selective prosecution in violation of their rights to equal protection under the fourteenth amendment. We disagree.

It is well settled that the General Assembly has the right to require an examination and certificate as to competence of persons desiring to practice medicine. *State v. Call*, 121 N.C. 474, 28 S.E. 517 (1897). It is in no sense the creation of a monopoly or special privilege. *Id.* We recognize that "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L.Ed. 220, 227, 6 S.Ct. 1064, 1073 (1886). Even if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory; it is only when the selective enforcement is designed to discriminate against the persons prosecuted. *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 225 N.Y.S. 2d 128, 4 A.L.R. 3d 393 (1962). The burden is on the defendant to establish discrimination by a clear preponderance of the proof. *Id.* If he sustains his heavy burden he is entitled to dismissal. *Id.*

The generally recognized two-part test to show discriminatory selective prosecution is (1) the defendant must make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations

as race, religion, or the desire to prevent his exercise of constitutional rights. *State v. Rogers*, 68 N.C. App. 358, 315 S.E. 2d 492 (1984). *See also State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979).

At the voir dire hearing in the case *sub judice*, the trial court heard testimony, received evidence and heard counsels' arguments. Three witnesses were called by defendants. The first witness, a paralegal employed by defendants' attorney's law firm, presented items admitted into evidence. The witness had purchased these items at a local health food store, bookstore, and convenience store. The items purchased were, generally speaking, nonprescription medicines and books addressing self-cures for diseases, many specifically for cancer. Ostensibly, the purpose of this evidence was to show that these stores *provided treatment* for a fee and without a license to practice medicine.

The second witness was a practitioner of naturopathy, duly licensed to practice in Oregon. He testified that Oregon has a Board of Naturopathic Examiners which regulates the field and issues licenses. He stated his educational background, explained the theory of the HTR treatment for cancer and distinguished naturopaths from allopathic doctors, MD's.

The third witness was John DeCarter, a detective for the Cumberland County Sheriff's Department. He had participated in the investigation prior to arrest. He testified as to other arrests in Cumberland County under G.S. 90-18. He testified that he had received a complaint in the form of a letter from the hospital regarding Wilbur Clough's chemical burn.

Part one of the two-part test fails on the facts presented at the evidentiary hearing. The merchants selling nonprescription medicines, herbal remedies, and books addressing treatment and diets to cure cancer and other diseases are not within the same class as defendants. Foremost, these merchants do not offer diagnoses and do not administer a remedy directly to a particular person. The customer is merely buying a good; he is not paying a fee for a service.

The naturopathic physician licensed to practice in Oregon is also not similarly situated to defendants in that he is not governed by the law of North Carolina. By residing and practicing in

a state whose legislature has chosen to regulate the area of naturopathy, he is clearly outside the class. The herbologist who, according to the detective's testimony was arrested in Cumberland County with charges subsequently dismissed, is also not in the same class as defendants. By defendants' own testimony later in the guilt phase of the trial, herbologists use only herbs and are distinct from naturopaths. In conclusion, defendants failed to satisfy the heavy burden of showing that they were "singled out for prosecution while others similarly situated and committing the *same* acts [were] not." *Rogers, supra*, at 367, 315 S.E. 2d at 500, *quoting United States v. Greene*, 697 F. 2d 1229, 1234 (5th Cir.), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3542, 77 L.Ed. 2d 1391 (1983) (emphasis added).

Assuming *arguendo* defendants had met part one of the test, they would have failed to satisfy part two. Defendants failed to show they were prosecuted in bad faith. To show prosecution based upon an unjustifiable standard would "inevitably lead to having the district attorney take the stand to be cross-examined concerning his motive and purpose in prosecuting the case." *State v. Spicer*, 299 N.C. 309, 314, 261 S.E. 2d 893, 897 (1980). Only the motives of the prosecution as it relates to the prosecutorial decision to seek presentment and indictment is relevant. Failure to prosecute others because of a lack of knowledge that they were subject to prosecution for the same offense does not amount to an equal protection violation of the fourteenth amendment, *State v. Rogers, supra*, nor does evidence of prosecutorial laxity, delay or inefficiency, *Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382 (1971).

In the instant case, Investigator DeCarter testified that the Cumberland County Sheriff's Department had received no other complaints concerning naturopaths. At most this shows lack of knowledge of others subject to prosecution for the same offense, which is inadequate to show bad faith. Evidence presented by defendants for the purpose of showing bad faith as to the hospital or hospital physicians is not relevant to bad faith of the *prosecution*. The defendants did not call the district attorney to the stand. No evidence showed intentional, bad-faith discrimination by the prosecution.

B

[2] Next defendants contend that G.S. 90-18 is unconstitutional on its face on the grounds that the terminally ill have a fundamental right to choose unorthodox medical treatment and that any statute which punishes those who provide unorthodox treatment unconstitutionally infringes upon this fundamental right. We reject their argument.

Defendants' theory relies upon the basic assumption that persons have a fundamental right to refuse lifesaving medical treatment, as held in *In re Quinlan*, 70 N.J. 10, 355 A. 2d 647 (1976). Defendants infer from this fundamental right another fundamental right, that is, the right of the terminally ill to choose unorthodox medical treatment. Defendants syllogize that this fundamental right extends to protect the person who provides the unorthodox treatment—to conclude otherwise, they opine, would allow impermissible infringement upon the fundamental right of the terminally ill to choose unorthodox treatment. We find defendants' logic strained. North Carolina recognizes certain personal rights that are deemed fundamental and, as such, are protected by the due process and equal protection clauses of the fourteenth amendment. *In re Johnson*, 45 N.C. App. 649, 263 S.E. 2d 805 (1980). *See also Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967). For example, the rights of procreation and privacy within a marriage are deemed fundamental. *In re Johnson, supra.* That is not the case on these facts. North Carolina is not bound by the *Quinlan, supra*, case. Neither the United States Supreme Court nor any North Carolina court has recognized a fundamental right of the terminally ill to choose unorthodox medical treatment, let alone recognize protection extending to *anyone* willing to provide it. Such a result would undermine the purpose of the licensing statute, namely, to protect the safety and health of the public, *State v. Call, supra*, and encourage the unprincipled to abuse the terminally ill. Furthermore, G.S. 90-18 does not prohibit the terminally ill from *receiving* unorthodox treatment. The statute seeks only to assure that whatever medical treatment is administered is done so by one who has reached a certain level of skill and expertise. We conclude that all of defendants' assignments of error as to the voir dire hearing are without merit.

III

[3] Defendants next assign as two errors the admission of the opinion testimony of each of two medical doctors, claiming each was not qualified as an expert in the field of naturopathy. We will treat these assignments together. Dr. Roach was admitted as an expert in the field of medicine; Dr. Thompson was an expert in forensic pathology. Both doctors were asked to give an opinion as to whether the use of a counterirritant such as the HTR treatment was an effective treatment for the disease of pancreatic cancer. Both said it was not.

Ordinarily whether a witness qualifies as an expert is exclusively within the discretion of the trial judge and is not to be reversed on appeal absent a complete lack of evidence to support his ruling. *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931). To qualify, the expert need not have had experience in the very subject at issue. *See State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903). Rule 702 defines an expert witness as one who is qualified "by *knowledge*, skill, experience, training, or education." G.S. 8C-1, Rule 702 (Supp. 1983) (emphasis added). It is enough that through study or experience the expert is better qualified than the jury to render the opinion regarding the particular subject. *State v. Smith*, 221 N.C. 278, 20 S.E. 2d 313 (1942).

In the present case, Dr. Roach testified that he had knowledge regarding the use of counterirritants, indeed, that physicians used this type of treatment under certain circumstances. His area of expertise encompasses that of naturopathy. His knowledge of naturopathy plus his experience and education render him competent to offer an opinion as to the likely success of the HTR treatment. The jury could consider the differences between the two schools of thought when deciding what weight to give the evidence. The same analysis would apply to the opinion testimony of Dr. Thompson. Even though qualified as an expert in forensic pathology, he testified that his occupation is "a physician in the practice of forensic pathology." Furthermore, his own statement that he is not an expert in the area of counterirritants is not binding on the court. As stated earlier, it is in the sole province of the trial judge, not the witness, to decide if the witness satisfies the legal requirements.

Lastly, the evidence admitted was not prejudicial. The standard of care employed by the defendants was not at issue. The issue was whether they were practicing medicine as defined by G.S. 90-18. The opinions offered as to the likely effectiveness of the treatment were not relevant to the issue at hand.

IV

[4] Defendants next assign error to the admission of the written statement of the deceased victim Wilbur Clough. The written statement was offered during the direct examination of Lieutenant John DeCarter of the Cumberland County Sheriff's Department. Lieutenant DeCarter headed the investigation of the charges prior to the arrest of defendants. The lieutenant recorded Mr. Clough's response to questions presented by Lieutenant DeCarter when Mr. Clough was hospitalized for chemical burns. According to DeCarter's testimony, Wilbur Clough was given the opportunity to read the four page document but he declined to do so, saying he was aware of what he had said. He signed the top page of the document.

The North Carolina Rules of Evidence provide that a hearsay statement is admissible when the declarant is unavailable as a witness if the court determines the statement is (1) offered as evidence of material fact, (2) more probative on the point for which it is offered than any other evidence which the proponent can reasonably procure and (3) the interests of justice are best served by admission of the statement. G.S. 8C-1, Rule 804(a) and 804(b)(5) (Supp. 1983). The rules condition the admission under this exception upon the proponent's written notice of his intention to offer the statement to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to meet the statement. *Id.* In defendants' assignment of error they challenge whether the conditions of adequate notice and fair opportunity to meet the statement were satisfied. We hold they were.

The facts in the instant case come within the purview of Rule 804(b)(5). The declarant was unavailable as a witness as defined by Rule 804(a)(4), having died of cancer before the case came to trial. Moreover, his statement did concern material facts which were more probative on the points offered than other evidence which the proponent could procure through other means and the interests of justice were best served by its admission. Defendants

contend this evidence could have come through the testimony of Era Clough, the wife of Wilbur Clough. This is not so. Wilbur Clough described events in his written statement that occurred when Era Clough was not present, specifically statements concerning the role played by defendant J. C. Howard. This evidence could be procured by no other means.

Defendants did not receive written notice of the prosecution's intention to offer the written statement of the deceased until the morning of the trial. They contend they did not have adequate time to meet the statement. Upon defendants' objection, the jury was excused and the court allowed cross-examination of Lieutenant DeCarter regarding the apparent state of mind of Mr. Clough at the time the statement was taken. In addition the court questioned Lieutenant DeCarter in an effort to ascertain whether Mr. Clough's statement was made knowingly and voluntarily. The court held that the statement was admissible, and, since the notice was served only that morning, granted a continuance until the following morning. The court also directed Dr. Roach, the physician who treated Mr. Clough's burns, to be present with "any further [medical] documents" to allow defendants an opportunity for further cross-examination. Some of the medical records were not available until the third day of trial, at which time defendants examined Dr. Roach extensively as to what medication Wilbur Clough had taken prior to the time the written statement was taken, as well as the possible effects of the medication. In conclusion, defendants were given a continuance to prepare to meet the prosecution's proffer of the deceased's written statement. The trustworthiness of the statement was well litigated by (a) cross-examination of the person who took the statement and by (b) approximately fifty pages of direct examination of the attending physician in the presence of the jury and with access to all medical records requested by defendants. It was not error for the court to admit the statement.

V

[5] Defendants assign error to the exclusion of evidence offered to show the intent of defendants. Defendant Belle Howard and Dr. Gil Alvarado, a naturopath practicing in Charlotte, were prepared to testify that they had researched North Carolina law to determine the licensing requirements for naturopaths. Defendants also

assign error to the exclusion of a jury instruction on the recitation of this excluded evidence. We will treat these assignments of error together.

It is within the power of the General Assembly to declare an act criminal regardless of the intent of the doer of the act. *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961) (violation of shoplifting statute). "The doing of the act expressly inhibited by the statute constitutes the crime." *Id.* at 30, 122 S.E. 2d at 771. When the crimes are related to the public welfare or safety, courts have held there is no due process violation even when the person is without knowledge of the facts making the act criminal. *Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 220 S.E. 2d 536 (1975). The punishments for such violations are usually a fine. *Id.* Examples of laws that fall within the scope of this rule are violations of motor vehicle and traffic laws. *Id.* at 13-14, 220 S.E. 2d at 541. Statutes in this category "place upon the individual the burden to know whether his conduct is within the statutory prohibition." *Id.* at 15, 122 S.E. 2d at 542.

G.S. 90-18 is a statute enacted by the General Assembly to protect the safety and health of the public. The statute does not contain language indicating a level of intent, such as "willfully." Violation of G.S. 90-18 constitutes a misdemeanor punishable by at most a $100 fine or imprisonment, at the court's discretion. Both defendants received a $100 fine and a suspended sentence. It is irrelevant what information defendant Belle Howard encountered in her efforts to research the law. Dr. Gil Alvarado's intent has no bearing whatsoever on the case. The burden rests upon defendants to know whether their conduct is prohibited by G.S. 90-18. Because a lack of criminal intent does not constitute a valid defense, the court was under no duty to instruct the jury on the defendants' intent.

VI

Defendants assign error to the court's denial of their motion to dismiss as to both defendants at the close of all the evidence. By so moving, each defendant preserved his right to contest the sufficiency of the evidence. Rule 10(b)(3), N.C. Rules App. P.

[6] In the case *sub judice*, the following evidence, taken as a whole, is sufficient to establish that defendant F. Belle Howard

practiced medicine without a license within the meaning of G.S. 90-18: Belle Howard used the title "Dr."; she received patients in two treatment rooms in her home equipped with, *inter alia*, examining tables, surgical tape, thermometers, disposable hypodermic syringes with needles, autoscopes, sponges, tongue depressors, the Hippocratic Oath framed; stethoscopes, urethra catheterization trays, and patient files; she rendered services for a fee; in particular she received $2000 from Wilbur Clough, she treated Wilbur Clough by applying two types of salves on his abdomen; she administered capsules of cayenne pepper to Wilbur Clough; she advised him not to go to the hospital when he complained of passing blood and experiencing severe pain; she professed to Wilbur Clough that his cancer was gone when, on the eleventh day of treatment, she removed a six inch by twelve inch section of skin from his abdomen, the site of the salve applications; F. Belle Howard had a privilege license but no license issued by the Board of Medical Examiners to practice medicine.

[7] The court instructed the jury as to defendant J. C. Howard on the charge of practicing medicine without a license by aiding and abetting. In view of our holding regarding the admission of the written statement of the deceased Wilbur Clough, unquestionably there was sufficient evidence regarding defendant J. C. Howard to take the case to the jury. The written statement contained evidence that J. C. Howard was present during the treatments, prepared the salve on at least one occasion and cleaned the wound created by the salve. Also, Era Clough, wife of Wilbur Clough, testified that defendant J. C. Howard was totally responsible for Mr. Clough on the day Belle Howard left for Atlanta. Defendants' assignment of error is dismissed.

VII

[8] In defendants' last assignment of error, they contend the court committed reversible error by instructing the jury that the practice of naturopathy was not one of the fourteen exceptions listed in G.S. 90-18. Once the State produces evidence of one committing acts that satisfy the definition of "practicing medicine or surgery" within the meaning of G.S. 90-18, it is "incumbent upon defendant to introduce evidence that his actions fell within one of the 14 exceptions thereto." *State v. Nelson*, 69 N.C. App. 638, 643, 317 S.E. 2d 711, 714 (1984). If the defendant fails to produce any

such evidence, the jury need not consider the exceptions to the statute and a jury instruction to that effect is a correct statement of the law. *Id.*

Defendants, as the defendant in *Nelson, supra,* rested their entire case on theories other than the theory that the practice of naturopathy fell within one of the fourteen areas expressly excluded from the licensing requirement of G.S. 90-18. Defendants introduced no evidence to support a finding that naturopathy is contained within any one of the exceptions. The jury instruction recapitulating that fact is without error.

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

JOHN A. SHARPE, JR., HELEN A. SHARPE, CLIFFORD S. SHARPE, BRENDA B. SHARPE, AND HAL C. SHARPE v. PARK NEWSPAPERS OF LUMBERTON, INC.

No. 8516SC510

(Filed 17 December 1985)

1. **Declaratory Judgment Act § 3— necessity for actual controversy**

The existence of an actual controversy is a jurisdictional prerequisite under the Declaratory Judgment Act.

2. **Declaratory Judgment Act § 3— necessity for actual controversy**

A genuine controversy must appear from the complaint and the record to establish jurisdiction under the Declaratory Judgment Act, but there is no absolute requirement that the controversy exist at the time the pleadings are filed.

3. **Declaratory Judgment Act § 3— necessity for actual controversy**

Any genuine controversy existing at any time after the pleadings are filed up to the time the motion to dismiss is ruled upon is sufficient to establish jurisdiction under the Declaratory Judgment Act.

4. **Declaratory Judgment Act § 3— actual controversy—unavoidable litigation**

An actual controversy exists for purposes of the Declaratory Judgment Act when litigation appears unavoidable.

5. Declaratory Judgment Act § 4— anti-competitive provisions in promissory notes—justiciable controversy

A controversy justiciable under the Declaratory Judgment Act was presented as to whether plaintiffs are bound by anti-competitive provisions in promissory notes received in the sale of a newspaper's assets where the notes required defendant's written consent in order for plaintiffs to engage in a competitive newspaper business; plaintiffs repeatedly made oral requests to defendant for such consent but defendant consistently avoided giving a definite answer; and specific plans by plaintiffs for competition with defendant were not essential to a justiciable controversy.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiffs from *Ellis, Judge*. Judgment entered 11 December 1984 in Superior Court, ROBESON County. Heard in the Court of Appeals 18 November 1985.

This is a civil action in which plaintiffs seek declaratory judgment that they are not bound by certain restrictive terms of promissory notes of defendant Park Newspapers of Lumberton, Inc., which they received in distribution of the proceeds of the sale of corporate assets.

Plaintiffs are former one-third owners of the Robesonian, Inc., which prior to March 1982 carried on the business of publishing a newspaper in Lumberton, North Carolina. The officers and majority stockholders, over plaintiffs' vote in opposition, sold the assets of the corporation to defendant, for the payment of a certain sum in cash and notes for the balance of the purchase price. The notes, which plaintiffs received in distribution at liquidation of the Robesonian, Inc., were dated March 1982 and contained the following language:

> A. If the Holder does not compete against Park as hereinafter defined, the principal amount shall bear interest at the rate of ten percent (10%) per annum and shall be payable:
>
> $78,724.96 on April 1, 1983, together with accrued interest; thereafter in equal quarterly payments of principal and interest of $30,077.99 during the following nine year period on the first day of July, October, January and April of each year; or
>
> B. If the Holder does compete with Park, as hereinafter defined, then the unpaid principal amount of this Note shall

thereafter not bear interest and shall be payable in a lump sum on March 23, 1992.

For the purposes of determining the payments due under this Note, as provided above, the Holder shall be deemed and held to be competing against Park if he or she shall, without prior written consent and approval of Park, to any extent directly or indirectly own, operate, finance, establish, control, support, or be employed by a newspaper or other printed advertising medium in Robeson County, North Carolina or in any county contiguous to Robeson County, North Carolina, or if he or she shall permit any third party to use his or her name to finance, directly or indirectly, any activities which would result in competition with Park or with any corporation affiliated with Park which publishes a newspaper or other printed advertising medium in any of the aforesaid counties.

Plaintiffs have received and negotiated the checks representing the quarterly payments of interest and principal on the notes received in the distribution.

Plaintiffs instituted this action in July 1983, alleging that they had not agreed in writing to refrain from competing with defendant as they contend is required by G.S. 75-4. Plaintiffs sought a declaration that the anti-competitive provisions of the note are unenforceable as to them and that they are entitled to compete with defendant anywhere in North Carolina. The complaint contains the following allegation:

16. . . . [P]laintiffs do intend, subject to circumstances of their health, financial ability, availability of personnel, business feasibility, and public demand, to engage in the activities of publishing a newspaper or other printed advertising media, or to seek employment with a newspaper or other printed advertising media in Robeson County, North Carolina, or in a county contiguous to Robeson County, North Carolina.

In its answer, defendant denied that there is an actual controversy between the parties. Defendant admitted that plaintiffs are free to compete with defendant in the newspaper business, either with defendant's written consent or without such consent, in

which case defendant has the right to pay the lesser amount as provided in the promissory notes.

Plaintiffs deposed Roy Park, chief executive officer of defendant, and repeatedly made oral requests for permission to compete. Park responded in essence that he did not answer oral requests and would want details of the proposed competition in any event before he would answer. Park indicated that anticompetitive provisions are customary in purchases of newspaper assets. Without the complained-of provisions, he testified, the value of the purchased newspaper would have been substantially reduced; Park's bid was 43% higher than the next highest bid. Plaintiffs have never submitted a written request or provided specific details of their plans to compete. In order to maintain the capability to compete, plaintiffs have continued membership in press associations, inquired about newspaper equipment, and taken an option to purchase office space.

Plaintiffs' motion for summary judgment was denied on the grounds that there remained a genuine issue as to the material question of the existence of a justiciable controversy. After an evidentiary hearing on this issue, Judge Ellis found that "due to plaintiffs' lack of evidence of any specific plans to compete with defendant, as defined in the Promissory Note, and due to the lack of evidence of plaintiffs having requested written consent and approval of defendant to so compete, that this matter has not ripened into an actual controversy." He concluded that the court was without jurisdiction to entertain the action pursuant to the Declaratory Judgment Act. From the order dismissing plaintiffs' complaint pursuant to G.S. 1A-1, R. Civ. P. 41(b), plaintiffs appeal.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy, and Lee & Lee, by W. Osborne Lee, Jr., for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, Michael E. Weddington, and William H. Moss, for defendant-appellee.

EAGLES, Judge.

I

Defendants moved to dismiss the appeal before the trial court. That motion was denied, and defendants do not argue their cross assignments of error. That question is deemed abandoned; the appeal is properly before us. App. R. 28.

Plaintiffs failed to place any exceptions in the record. The court's findings of fact therefore are not reviewable. The appeal nevertheless brings forward the questions whether the court had jurisdiction of the subject matter and whether the judgment is supported by the findings and conclusions of law. App. R. 10(a).

II

Plaintiffs assign as error the trial court's granting of defendant's motion to dismiss. They argue that an actual controversy exists between the parties as to their rights with respect to the promissory notes and that the court therefore had jurisdiction to grant relief pursuant to the Declaratory Judgment Act ("the Act"), and particularly under G.S. 1-254, which provides as follows:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

A

[1] While there is no state statutory requirement that there exist an actual controversy for jurisdiction under the Act, *compare* 28 U.S.C. 2201, our courts have uniformly imposed such a requirement. ". . . Courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute." *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E. 2d 59, 61 (1984). The ex-

istence of an actual controversy is therefore "a jurisdictional prerequisite" under the Act. *Adams v. N.C. Dept. of Natural and Economic Resources*, 295 N.C. 683, 703, 249 S.E. 2d 402, 414 (1978).

B

[2, 3] A genuine controversy must appear from the complaint *and* the record. *Gaston Realtors v. Harrison, supra; Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654 (1964). There is no absolute requirement that the controversy exist at the time the pleadings are filed. Indeed, the Supreme Court in *Gaston Realtors* expressly considered both the pleadings and the evidence in resolving the genuine controversy issue. 311 N.C. at 235, 316 S.E. 2d at 62. The requirement of an existing controversy imposed by our courts is comparable to that under Federal Declaratory Judgment Act, 28 U.S.C. 2201. *See Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E. 2d 450 (1942). The U.S. Supreme Court has held that under that Act the controversy must exist at the time of hearing, not at the time of the complaint. *Golden v. Zwickler*, 394 U.S. 103, 22 L.Ed. 2d 113, 89 S.Ct. 956 (1969). This rule is usually applied to render moot controversies which have been resolved between the filing of the complaint and time of hearing. *Id.; Mailer v. Zolotow*, 380 F. Supp. 894 (S.D.N.Y. 1974). In light of our liberal system of notice pleading, the ready availability of discovery, and the general philosophy of the Rules of Civil Procedure, we see no reason why the rule should not operate to allow consideration of any genuine controversy existing at any time after the pleadings are filed up to the time the motion to dismiss is ruled upon. *See* J. Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Int. L. Rev. 1, 12-16 (1969). For us to require that the complaint on its face show the controversy and that subsequent discovery be ignored, would lead to judicial inefficiencies and wasteful results based on technicality that the new rules were designed to avoid. *Id.* Here the complaint was filed in July 1983 and the hearing at which the complaint was dismissed took place in August 1984. In the interim, one superior court judge deferred decision on the justiciable controversy question; neither side argues here that this judge erred in not dismissing the complaint then. At this stage of the litigation, we must consider the entire record to determine if an actual controversy exists.

C

[4] An actual controversy exists for purposes of the Act when litigation appears unavoidable. *Gaston Realtors, supra; N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178, *reh'g denied*, 286 N.C. 547 (1974). Mere apprehension or threat of litigation does not provide grounds for seeking a declaratory judgment. *Gaston Realtors; Newman Machine Co., Inc. v. Newman*, 2 N.C. App. 491, 163 S.E. 2d 279 (1968), *rev'd on other grounds*, 275 N.C. 189, 166 S.E. 2d 63 (1969). In *Gaston Realtors*, the Supreme Court held that a real estate board did not present a justiciable controversy regarding the legality of disciplinary action against one of its members, since the member had never actually stated he would file suit and had taken steps to comply with the board's action to resolve the underlying disciplinary proceeding. However, it is not necessary that the parties wait until the lawsuit is immediately imminent or risk forfeiture to have a justiciable controversy. *See Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E. 2d 813 (1971). The Act, after all, requires liberal construction in favor of resolving uncertainties. *Coleman v. Edwards*, 70 N.C. App. 206, 318 S.E. 2d 899 (1984); *see also Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949) (construing with "extreme liberality"). In *Coleman*, we held that a justiciable controversy was presented concerning the effect of a lessor's death on the lease and entitlement to the rent, even though no party had made formal demand for the rent money and plaintiffs did not allege a claim to immediate possession of the property. In *Baucom's Nursery Co. v. Mecklenburg County*, 62 N.C. App. 396, 303 S.E. 2d 236 (1983), we entertained an appeal regarding the applicability of a zoning ordinance to certain activities, where there was no evidence of any enforcement action, current or impending, and no evidence of any planned change of use. In *American Mfrs. Mut. Ins. Co. v. Ingram*, 43 N.C. App. 621, 260 S.E. 2d 120 (1979), *rev'd on other grounds*, 301 N.C. 138, 271 S.E. 2d 46 (1980), *reh'g denied*, 301 N.C. 728, 274 S.E. 2d 227 (1981), we held that there was no reason to deny plaintiff insurance company a declaratory ruling on the validity of certain binders. We reached that result even though no claims had arisen on the binders, and there was no strong likelihood that claims would arise. Rather, the principal reason for granting declaratory relief was to allow plaintiff to conduct its business properly, *i.e.*, to plan premium collection and

maintenance of reserves. The Supreme Court reversed on other grounds but did not address this question. 301 N.C. at 153, 271 S.E. 2d at 54.

D

[5] When compared with the cases cited, particularly *Ins. Co. v. Ingram*, we believe the pleadings and record in this case present sufficient controversy to invoke the jurisdiction of the court under the Act. The court did find that plaintiffs had never requested "written consent" from defendant. However, plaintiffs repeatedly requested consent from defendant, who consistently avoided giving a definite answer. Their failure to ask for an answer "in writing" should not put them out of court. Because of the situation existing between the parties, the only kind of answer that could be of practical use to plaintiffs would be an answer in writing. The promissory note does not require that plaintiffs make their request in writing; it simply requires that plaintiffs have written consent. Plaintiffs' requests for consent to compete are adequate under the circumstances. The possibility that defendant might later consent to competition appears of little moment. The mere possibility of waiver of the disputed contractual provision ought not defeat jurisdiction under the Declaratory Judgment Act.

The trial court also based its decision on the fact that plaintiffs had advanced no specific plans for competition with defendant. While specific plans might have sharpened the focus of the issues, they were not essential to a justiciable controversy. We note that competition in the news business, particularly for advertising revenue, is often fierce. *See McGuire v. Times Mirror Co.*, 405 F. Supp. 57 (C.D. Calif. 1975) (discussing effect of competition for advertising revenue on circulation and overall costs); *Levitch v. Columbia Broadcasting System, Inc.*, 495 F. Supp. 649 (S.D.N.Y. 1980) (discussing imitation of successful ideas in advertising), *aff'd*, 697 F. 2d 495 (2d Cir. 1983). We are aware of nothing in this record that would prevent defendant from pre-empting any specific plans divulged by plaintiffs by beginning similar competitive operations first. In light of this competitive atmosphere, a declaration of the effect of the note will have a decided impact on plaintiffs' financial position and their ability to raise funds to begin competition as they think most advantageous. We note that

plaintiffs have maintained their memberships in press associations and have taken an option on office space in Lumberton. They have repeatedly sought from defendant general permission to compete. We do not think it was absolutely essential in this business situation that they divulge their specific plans. The present record discloses sufficient controversy, which this litigation should resolve, to invoke the court's jurisdiction under the Act. The trial court's ruling to the contrary was erroneous as a matter of law.

III

Because of its ruling dismissing for lack of a justiciable controversy, the trial court did not reach the merits. The only other ruling brought forward by this appeal is the denial of plaintiff's motion for summary judgment. The court denied summary judgment expressly and solely on the grounds that more evidence needed to be produced on the question of whether a justiciable controversy existed. There has been no ruling whatsoever on the merits of this case. As yet, defendant has presented no evidence, and asks that we remand for that purpose. At this stage in the litigation and in light of the novel questions presented, we agree. The case is remanded to the Superior Court of Robeson County for further proceedings.

Reversed and remanded.

Judge MARTIN concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

Plaintiffs must allege sufficient facts to show the existence of an actual or justiciable controversy to invoke the jurisdiction of the court under the Declaratory Judgment Act. *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E. 2d 264, *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 300 (1979). A contract cannot form the basis for jurisdiction pursuant to G.S. 1-254 absent an actual controversy about legal rights and liabilities arising under the contract. *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984).

While the Declaratory Judgment Act is to be liberally construed, it is not without limitation, *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E. 2d 264 (1979). In *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949), our Supreme Court discussed the scope of this Act as follows:

> . . . it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightment or practical guidance concerning their legal affairs. . . . This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

Id. at 117, 56 S.E. 2d at 409.

In *Consumer Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974), the Supreme Court noted that although it is not necessary that one party have an actual right of action against another to satisfy the Act's jurisdictional requirement of an actual controversy, it is necessary that litigation appears unavoidable. It was clear in that case that the defendant would have opposed any effort by anyone to operate an electric generation and transmission system in competition with it. Since the complaint revealed that there was no practical certainty that plaintiffs had the power or capacity to perform the acts which would inevitably create a controversy with defendant, the court held that it did not appear that litigation between the parties was unavoidable.

In the present case, litigation between the parties does not appear unavoidable. The complaint discloses that there is no certainty that plaintiffs will engage in acts which the promissory note purports to prohibit, since they allege that their intent to enter the newspaper business is conditioned on a variety of factors other than their rights and liabilities under the note. Additionally, the note seeks to prevent competition against defendant without its prior written consent and plaintiffs did not allege that they requested and were denied such approval. Plaintiffs' argument that an actual controversy exists because Mr. Park, president of defendant, declined to give them permission to enter the newspaper business in response to hypothetical questions posed in his deposition and at trial, is without merit. Plaintiffs' questions were an attempt to create a justiciable issue after the com-

plaint had been filed, and the determination of whether the court had jurisdiction to enter a declaratory judgment in a particular proceeding is made from the pleadings filed in the cause. *See, Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E. 2d 264 (1979). It is possible that defendant would consent to a request from plaintiffs to enter a specific aspect of the newspaper publishing business, and litigation between the parties would be unnecessary.

The facts here alleged present an abstract question and any decision from the trial court would have been purely advisory. Plaintiffs have failed to allege sufficient facts to show the existence of an actual controversy with regard to the promissory note and thus I feel that the trial court properly dismissed the claim for lack of jurisdiction under the Declaratory Judgment Act.

For the foregoing reasons, I respectfully dissent and vote to affirm.

STATE OF NORTH CAROLINA v. RICHARD WAYNE McGUIRE

No. 8521SC129

(Filed 17 December 1985)

1. **Criminal Law § 138— aggravating factor—prior act for which defendant not charged—error**

The trial court erred in a prosecution for two attempted first degree sexual offenses by using as an aggravating factor a third joinable offense for which defendant was not charged. The State must charge defendant and prove beyond a reasonable doubt that he committed the offense in order for the court to impose a prison sentence for that act. N.C.G.S. 15A-926(a) (1983), N.C.G.S. 15A-1340.4(a)(1)(o).

2. **Criminal Law § 138— aggravating factor—defendant took advantage of his position of trust or confidence—no error**

The trial court did not err in a prosecution for two attempted first degree sexual offenses by finding in aggravation that defendant took advantage of a position of trust or confidence where the evidence showed that defendant was living with the mother of one of the victims, defendant was entrusted with each boy on each occasion, and even defendant said he was babysitting. Defendant's argument that no position of trust or confidence arose because he was not paid for his services was rejected as specious.

3. Criminal Law § 138— mitigating factors found for one offense but not for the second—error

The trial court erred when sentencing defendant for two attempted first degree sexual offenses by not treating the aggravating and mitigating factors for each offense separately and by failing to find that the three factors in mitigation that were found for one case were equally applicable to the other where the court found that defendant had no criminal record, had acknowledged wrongdoing at an early stage of the criminal process, and had been honorably discharged from the armed services; the transcript indicated that those factors would apply in both cases but they were found in only one case on the judgment and sentencing forms; the evidence of each was found at a single sentencing hearing; and there was no reason for those factors to apply in one case and not the other.

4. Criminal Law § 138— mitigating factors not found—good reputation in community—suffering from mental condition, immaturity or limited mental capacity—no error

The trial court did not err in a prosecution for two attempted first degree sexual offenses by failing to find that defendant had a good reputation in the community or that he was suffering from a mental condition, immaturity or a limited mental capacity reducing his culpability for the crimes where the only evidence of his good reputation was affidavits from friends of the family and an employer; the only evidence of mental illness was a psychiatric evaluation which showed that defendant had a mixed personality disorder with dependent passive and histrionic features, that defendant was evasive, self-centered and tended to project blame for his problems on others, and did not conclude that defendant had a mental illness; defendant offered little or no evidence of his immaturity; and defendant's I.Q. was in the dull-normal range.

5. Criminal Law § 138— greater than presumptive sentence—error

Where a prosecution for two attempted first degree sexual offenses was remanded for resentencing on other grounds, it was noted that the court's sentence of eighteen years was the equivalent of three six-year presumptive sentences for two criminal acts and one act found as a factor in aggravation and that the judge had stated during sentencing that he was in effect giving three presumptive sentences for three occasions and was trying to send a deterrence message. It is the role of the General Assembly to send out general messages to criminal offenders, and it should be obvious that giving three presumptive sentences for two offenses not only violates the policy of the Fair Sentencing Act, but also punishes defendant for crimes the State has not proven beyond a reasonable doubt.

APPEAL by defendant from *Wood, Judge*. Judgment entered 10 September 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 September 1985.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Evelyn M. Coman, for the State.

Booe, Mitchell, Goodson & Shugart, by D. Donovan Merritt, for defendant appellant.

BECTON, Judge.

Defendant, Richard Wayne McGuire, pleaded guilty in two cases, each charging attempted first degree sexual offense. In the first case, 84CRS15800 (Case '800), the victim was an eight-year-old boy and defendant was sentenced to eight years imprisonment. In the second case, 84CRS15801 (Case '801), the victim was a four-year-old boy, and defendant was sentenced to a ten-year term to run consecutively with the sentence imposed in Case '800. Each sentence exceeds the presumptive term of six years for these Class F felonies. *See* N.C. Gen. Stat. Sec. 15A-1340.4(f)(4) (1983). Defendant appeals both sentences.

I

At defendant's sentencing hearing on 10 September 1984, the State's only evidence was the testimony of Detective K. H. Blevins. Blevins had taken defendant's voluntary confession prior to his arrest and had spoken with the prosecuting witnesses, Ms. M. and Ms. S., the victims' mothers. Blevins recounted what these people had told him, referring to defendant as the babysitter of the victims at the time of the offenses. Ms. M. had told Blevins that there were two sexual acts committed on her son, one on 23 February 1984 and another in late March 1984. Defendant offered two affidavits supporting his claim of good character and reputation. Defendant's attorney informed the court that defendant had been honorably discharged from the armed services. He also summarized the findings contained in a psychiatric report concerning defendant, and offered written findings to the court.

The transcript and the record in this appeal reveal some confusion regarding these two cases. For example, the indictments and judgments in these cases were jumbled. The indictment in Case '800 charged the defendant with the commission of a sexual offense on 30 March 1984 with the four-year-old boy. When the trial court called this case number for sentencing, the prosecutor stated that it involved the four-year-old boy, and according to the

transcript, an eight-year sentence was imposed. However, the written judgment and sentence in Case '800, issued on the same day as the sentencing hearing, indicate that Case '800 involved the 23 February 1984 incident with the eight-year-old boy and resulted in a sentence of eight years. Conversely, the indictment in Case '801 describes the 23 February 1984 incident with the eight-year-old boy, and the transcript shows that the court imposed a ten-year sentence in Case '801. The written judgment in Case '801, however, describes the 30 March 1984 incident with the four-year-old child and shows a ten-year sentence.

Another complexity is that the transcript reveals the trial court intended to find the same aggravating and mitigating factors in both cases, but the written and signed judgments do not contain the same factors. The court found as factors in aggravation in both cases: (1) "the defendant took advantage of a position of trust or confidence to commit the offense," and (2) "prior to this offense, he committed an act in February for which this defendant could have been charged and was not charged." But the court found factors in mitigation only in Case '800: (1) the defendant had no criminal record, (2) defendant acknowledged wrongdoing to a law enforcement officer early in the criminal process, and (3) defendant was honorably discharged from the military. In Case '801, the court found no factors in mitigation. In both cases, the court found that the aggravating factors outweighed the mitigating factors.

Defendant contends that the trial court erred by (1) using evidence of an element of a joinable offense, with which defendant was not charged, as an aggravating factor; (2) finding that defendant had taken advantage of a position of trust or confidence; (3) failing to find certain mitigating factors; (4) relying on the same evidence to prove aggravating factors in two separate cases; and (5) imposing "three presumptive sentences" on a plea of guilty to two charges. For errors in the sentencing process, we remand for resentencing.

II

[1] In sentencing the defendant in both cases, the trial court found in aggravation that "prior to this offense he committed an act in February for which this defendant could have been charged and was not charged." For the following reasons, we hold it was

error to find this factor, and we remand for resentencing. *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223 (1985); *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984); *State v. Taylor*, 74 N.C. App. 326, 328 S.E. 2d 27 (1985); *State v. Puckett*, 66 N.C. App. 600, 312 S.E. 2d 207 (1984); *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984).

It is our understanding of the record that the defendant pleaded guilty to a February offense against the eight-year-old boy and a March offense against the four-year-old boy. A police detective testified at the sentencing hearing that Ms. M. had told him that her son had told her that defendant also committed an offense against the boy in late March.[1] For whatever reason, the State chose not to indict the defendant on this alleged act. Nonetheless, it is clear that this offense, had the State indicted thereon, was joinable with the offense against the same boy one month earlier. *See* N.C. Gen. Stat. Sec. 15A-926(a) (1983). The two incidents, assuming the one in late March in fact occurred, were similar in time, place and circumstance. *See State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. Johnson*, 280 N.C. 700, 187 S.E. 2d 98 (1972). Both incidents, as well as the offense against the four-year-old boy, took place in defendant's residence, involved the same sexual act, and occurred under very similar circumstances. *State v. Green*, 294 N.C. 418, 241 S.E. 2d 662 (1978). We find that the unindicted offense was joinable with both charges to which defendant pleaded guilty.

It is argued that there is a conflict between the decisions of our Supreme Court in *State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983) and *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984). Although we would tend to agree, the Supreme Court recently addressed this argument and stated in dicta that *Abee* and *Lattimore* are not in conflict. *See State v. Westmoreland*, 314 N.C. 442, 450, 334 S.E. 2d 223, 228 (1985).

In *Abee*, the defendant pleaded guilty to one count of second degree sexual offense. The trial court found in aggravation that

1. We note that in the non-statutory aggravating factor the trial court mistakenly refers to a February, rather than a March, act. Although this is harmless error, *cf. State v. Walters*, 294 N.C. 311, 240 S.E. 2d 628 (1978), we strongly urge that errors of this nature, which are found repeatedly throughout the record in this case, be carefully avoided on resentencing.

defendant committed repeated sexual acts. The Court held that when only one illegal act is necessary to support a conviction, other acts committed by a defendant may be used in aggravation of the sentence. 308 N.C. at 380-81, 302 S.E. 2d at 231-32; *see Westmoreland*, 314 N.C. at 450, 334 S.E. 2d at 228. In *Lattimore*, the defendant was convicted of both attempted robbery with a firearm and second degree murder. The trial court used as an aggravating factor on the robbery sentence that the victim had died, and on the sentence for murder, that it occurred during an attempted armed robbery. 310 N.C. at 300, 311 S.E. 2d at 880. The Supreme Court held:

> G.S. Sec. 15A-1340.4(a)(1)(o) specifically prohibits, as an aggravating factor, the use of convictions for offenses "joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." To permit the trial judge to find as a non-statutory aggravating factor that the defendant *committed* the joinable offense would virtually eviscerate the purpose and policy of the statutory prohibition.

310 N.C. at 299, 311 S.E. 2d at 879.

In *Westmoreland*, the Supreme Court distinguished *Lattimore* (and *Westmoreland*) from *Abee*: "In *Lattimore* and the case before us [*Westmoreland*] the aggravating factors were based on joined offenses of which defendant had been contemporaneously convicted." 314 N.C. at 450, 334 S.E. 2d at 228.

An additional and important, albeit subtle, distinction should be drawn between *Lattimore* and *Abee*. Each case involved a separate aggravating factor—in *Lattimore*, the commission of an act that constitutes a joinable offense, and in *Abee*, the repeated commission of an act which formed the basis of the offense being aggravated. The Court in *Lattimore* did not discuss *Abee* in its opinion. The Court in *Abee* was concerned with correcting the reasoning of the Court of Appeals and wrote a short, narrow opinion. The Court of Appeals in *Abee* had held that none of the evidence used to prove the offense could be used in aggravation of the sentence, even if the offense required only one act and the evidence indicated several. *Abee*, 308 N.C. at 381, 302 S.E. 2d at 231. The Supreme Court held simply that the State is not prohibited from using acts in aggravation just because they tended

to prove the offense, as long as the acts were not "necessary to prove any element of the offense." *Id.* Nonetheless, we note that there might be other prohibitions on the use of those acts as aggravating factors. Thus, for example, *Lattimore*, decided one year after *Abee*, held that the State is prohibited from using criminal acts to aggravate a sentence if the acts themselves constitute offenses joinable with the offense for which defendant is being sentenced. In *Westmoreland*, the Supreme Court explained that this applies to contemporaneous convictions as well as prior convictions under G.S. Sec. 15A-1340.4(a)(1)(o). 314 N.C. at 449, 334 S.E. 2d at 228.

In the case at bar, the defendant was not *convicted* of the contemporaneous, joinable offense against the eight-year-old boy. The trial court simply used the fact that the defendant *committed* the criminal act to aggravate the sentence for the joinable offenses. As the Supreme Court made clear in *Lattimore*, to allow the trial court to find that the defendant *committed* an act when the court is prohibited from finding the defendant was *convicted of committing* the same act, "would virtually eviscerate the purpose and policy of the statutory prohibition." *Lattimore*, 310 N.C. at 299, 311 S.E. 2d at 879; *see* G.S. Sec. 15A-1340.4(a)(1)(o). In *State v. Winnex*, 66 N.C. App. 280, 282-83, 311 S.E. 2d 594, 596 (1984), this Court followed the same reasoning:

> Defendant first contends that the trial judge erred by finding as an aggravating factor that defendant had been "engaged in a pattern of violent conduct which indicates a serious danger to society." Because defendant has no prior criminal record, it is clear that the trial judge relied upon evidence of events leading to the five kidnapping and rape convictions to prove that defendant had engaged in a "pattern of violent conduct." A defendant's prior convictions may be considered in aggravation except where the crimes are joinable with the offense for which the defendant is currently being sentenced. N.C. Gen. Stat. Sec. 15A-1340.4(a)(1)(o) (1981 Cum. Supp.). Since the five charges against defendant were joinable, the trial judge could not have properly considered defendant's conviction of one of the offenses as an aggravating factor in any of the other four cases. It would frustrate the intent of the statute to permit a trial judge to consider the fact that a defendant "committed" a joinable of-

fense, when he could not consider that defendant had been convicted of that same joinable offense.

In *State v. Puckett*, 66 N.C. App. 600, 604, 312 S.E. 2d 207, 210 (1984), this Court relied on *Lattimore* and *Winnex* to hold that the trial court erred in sentencing the defendant on an assault conviction by finding in aggravation that the defendant had killed another person during the assault because this constituted the joined offense of second degree murder. The *Puckett* Court went on to consider a related error:

> Applying the reasoning in *Lattimore* to the "lying in wait" factor requires us to reach the same result as to that factor. In the context of an assault case, "lying in wait" is nothing more or less than taking the victim by surprise, an element of secret assault, a separate but joinable offense. We are aware of the results reached by other panels of this court and our supreme court in *State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983) and *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920 (1983), where evidence which tended to show additional criminal acts committed during the crime for which defendants were being sentenced was considered as factors in aggravation. In those cases, however, the statutory prohibition against use of joinable offenses was not considered or addressed. In light of *Winnex* and *Lattimore*, we must conclude that the use of evidence of an element of a joinable offense with which defendant has not been charged is even less valid than the use of evidence of the commission of joinable offense for which a defendant has been convicted, and that this factor was erroneously found.

Id. at 604-05, 312 S.E. 2d at 210 (footnote defining felony of secret and malicious assault under N.C. Gen. Stat. Sec. 14-31, omitted); *see also Taylor* (relying on *Lattimore*, *Puckett*, and *Winnex*). Thus, this Court in *Puckett* recognized the apparent confusion regarding *Abee* and noted that the Supreme Court in *Abee* did not discuss the prohibition against the use of joinable offenses.

We now reaffirm that it is error to use as an aggravating factor "evidence of an element of a joinable offense with which defendant has not been charged." *Id.* In order for the trial court to impose a prison sentence on defendant for committing such an

act, the State must charge the defendant and prove beyond a reasonable doubt that he committed the offense. In short, although the trial court's finding was not prohibited by *Abee*, it was prohibited by *Lattimore* and *Puckett*. This case must be remanded for resentencing *de novo*. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

III

[2] Defendant next assigns as error that the trial court found in aggravation that the defendant had taken advantage of a position of trust or confidence. We address this assignment of error and several of defendant's other assignments that we believe might recur in resentencing.

The record of the judgment and findings indicates that the trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence. The transcript, however, indicates that the trial judge ruled he could *not* find this factor. Either the transcript is incorrect or the trial judge changed his mind because this factor is included in the judgment, and the judgment controls. The evidence shows that the defendant was living with the mother of one of the victims. The defendant was entrusted with each boy on each occasion, and even the defendant said he was babysitting. We reject as specious defendant's argument that no position of trust or confidence arose because he was not paid for his services. This factor was found on the sentencing records in both cases, '800 and '801, and was not error.

IV

[3] Defendant's third assignment of error is that the trial court failed to find (a) three factors in mitigation in Case '801 that were found in Case '800 and were equally applicable in both cases; and (b) two factors in mitigation that were supported by the evidence in both cases. We agree with the defendant on (a), but we disagree on (b).

The trial court found in mitigation in Case '800 that the defendant had no criminal record, had acknowledged wrongdoing at an early stage in the criminal process and had been honorably discharged from the armed services. In the transcript, the trial court ruled that these would apply in both cases, but on the judg-

ment and sentencing form these factors are found only in Case '800. We see no reason for these factors to apply in one case and not the other, especially when the evidence of each was found at a single sentencing hearing. Defendant correctly notes that the trial court should have treated the aggravating and mitigating factors for each offense separately, and failure to do so requires a new sentencing hearing under *Ahearn*. In any event, it is apparent that the trial court's wishes were not properly recorded.

[4] Defendant also contends that the trial court erred in failing to find that he had a good reputation in the community and that he was suffering from a mental condition, immaturity or a limited mental capacity reducing his culpability for the crime. The defendant has the burden of proving these factors by a preponderance of the evidence, and the trial court has the discretion to assess the credibility of defendant's evidence and either accept or reject it. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983).

The only evidence of defendant's good reputation were two affidavits—one from friends of the family and one from an employer. We cannot say the trial court abused its discretion in failing to find this factor.

The primary evidence of defendant's alleged mental illness is a psychiatric evaluation from Dorothea Dix Hospital. The report shows that defendant has a mixed personality disorder with dependent passive and histrionic features. He is evasive, self-centered and tends to project blame for his problems onto others. The report does not conclude that defendant has a mental illness, and it was within the court's discretion to reject this factor. Similarly, the record reveals that defendant offered little or no evidence of his immaturity and only demonstrated that he has an I.Q. in the dull-normal range. We find no error in the court's rulings on these factors.

V

[5] Finally, defendant argues that the trial court committed reversible error by imposing three presumptive sentences for two offenses. The presumptive term for each offense involved in this case is six years. Defendant was sentenced to eight years in Case '800 and ten years in Case '801. It would seem coincidental that defendant received eighteen years, the equivalent of three six-

year presumptive sentences for three criminal acts (two resulting in convictions and one found as a factor in aggravation), but the trial court's statement during sentencing casts doubt on the fortuity of the mathematics:

> What I'm doing is, in effect, giving him three presumptive sentences for these three occasions. And I hope that we're sending out a message to other people who have to do this sort of thing that courts aren't going to treat this lightly. That's the message I want to send out.

In light of the fact that we are remanding this case for resentencing on other grounds, it should suffice to note here that the legislature determined the lengths of presumptive terms for crimes with the ambition of deterrence in mind. The deterrence factor is embodied within each presumptive term, and courts should not consider it further in sentencing offenders. It is the role of the General Assembly, not the courts, to send out general "messages" to criminal offenders, except in abstract terms, and increasing or decreasing a presumptive term must relate to "the character or conduct of the offender." *State v. Chatman*, 308 N.C. 169, 180, 301 S.E. 2d 71, 78 (1983). It is not clear from the trial court's comment whether it considered this need to send out a message as an aggravating factor or was merely reflecting on the need to deter this sort of criminal conduct. We do not believe the court had decided defendant's sentence before the hearing. Nonetheless, it should be obvious that giving three presumptive sentences for two offenses not only violates the policy of the Fair Sentencing Act, but also punishes defendant for crimes which the State has not proven beyond a reasonable doubt.

VI

For the reasons set forth above, the sentence imposed by the trial court is vacated and the cases are remanded for resentencing.

Chief Judge HEDRICK concurs in the result.

Judge PARKER concurs.

EDWARD PRESSMAN AND MAURICE HERMAN v. THE UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE, AND C. C. HIGHT, AS AN INDIVIDUAL AND AS DEAN OF THE COLLEGE OF ARCHITECTURE OF THE UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE

No. 8526SC173

(Filed 17 December 1985)

1. **Constitutional Law § 18— visiting professor—dismissal for statements in faculty meeting—right of free speech not violated**

Plaintiff visiting professor's right of free speech was not violated by his alleged dismissal from a college teaching position because of statements he made in a faculty meeting concerning the dean's lack of administrative competence because the statements were not upon a matter of public concern.

2. **Constitutional Law § 18; Master and Servant § 10— untenured professors—terminable contracts—no due process right to continued employment**

Where professors at a state university were not tenured and were employed under terminable contracts, they had no property right in continued employment which was protected by due process. Thus, failure of the university to follow procedures concerning reappointment set forth in the Code of the Board of Governors of the University of North Carolina and the Tenure Policies manual would not support claims by the professors under the Fourteenth Amendment.

3. **Master and Servant § 1— occasional stress and depression not "handicap"**

A person suffering from occasional episodes of stress, depression and mental exhaustion does not have a mental "disability" within the meaning of N.C.G.S. 168-1 and thus is not a "handicapped person" who is protected in employment by N.C.G.S. 168-6.

4. **Contracts § 27.1— existence of contracts—insufficient evidence**

Plaintiff university professor failed to show that he had a contract with the dean whereby plaintiff would not appeal his dismissal any further in return for a final review of his dismissal by the dean similar to a final review given to another professor where the evidence showed that plaintiff and the dean never reached a mutual understanding as to what constituted a final review and when such a review would be performed.

5. **Rules of Civil Procedure § 15.1— refusal to allow amendment to complaint**

The trial court did not err in the denial of plaintiffs' motion to amend their complaint where the amendment sought to add an additional cause of action one year and seven months after the original filing of the complaint and only seven days before the hearing of a motion for summary judgment; the motion was filed nine months after extended discovery conducted in the case had been completed; and the trial court found that the amendment would result in undue delay and undue prejudice to defendants because extensive additional discovery would be required by the amendment.

Pressman v. UNC-Charlotte

APPEAL by plaintiffs from *Snepp, Judge*. Order entered 2 October 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 September 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General Thomas J. Ziko for the defendant appellees.

Shelley Blum and Deborah Blum for plaintiff appellants.

COZORT, Judge.

Plaintiffs brought an action seeking damages and reappointment to teaching positions at the College of Architecture of the University of North Carolina at Charlotte. Plaintiff Herman was employed from August 1980 until May 1982 as a visiting professor under a fixed term contract which provided that his position was exempt from permanent tenure consideration. At the end of that two-year term, Herman was denied reappointment. Plaintiff Pressman was an Assistant Professor from August 1978 until May 1982. At the conclusion of that initial four-year appointment, he was denied reappointment. In the complaint, plaintiff Herman alleges deprivation of his First Amendment right to free speech and his Fourteenth Amendment right to due process, while plaintiff Pressman alleges discrimination because he was handicapped, breach of contract, and a violation of his right to due process. The trial court granted summary judgment for the defendants on all claims and denied plaintiffs' motion to amend the complaint to add a claim based on ethnic discrimination. We affirm.

The evidentiary forecast for plaintiff Herman is as follows:

From August 1980 until May 1982, Maurice Herman was a visiting professor of Architecture at the University of North Carolina at Charlotte's College of Architecture. His appointment was made subject to the provisions of *The Code of the Board of Governors of the University of North Carolina* and the *Tenure Policies, Regulations, and Procedures of the University of North Carolina at Charlotte*. Herman's contract explicitly stated that his position was exempt from permanent tenure consideration. The *Code* provides that the appointment of visiting faculty is for a specified term, and expiration of the term shall be deemed to constitute full and timely notice of nonreappointment.

In February of 1982, Herman informed the Dean of the College of Architecture, Charles Hight, a defendant in this action, that he would like to be considered for a tenure track position at the College. Pursuant to his request, Herman submitted his resume to the Faculty Review Committee, the Committee responsible for reviewing faculty applications, and was allowed to make a presentation before the committee. Although the Faculty Review Committee recommended that Herman receive an additional two-year appointment, Dean Hight, after a review of Herman's qualifications, denied Herman reappointment in June of 1982. Herman then appealed Dean Hight's decision to Dr. James H. Werntz, Vice Chancellor of the University of North Carolina at Charlotte, and was again denied reappointment.

In May of 1982 while Dean Hight was considering his reappointment, Herman attended a faculty meeting where the faculty discussed Dean Hight's lack of administrative competence. At the meeting, Herman expressed his concern over the lack of opportunity for personal development because of a heavy workload, lack of guidance for grading, failure to develop a master's program, failure to recruit quality students and faculty, and inadequate or inappropriate educational direction for the College of Architecture. As a result of this meeting, the majority of the faculty, including Herman, gave Dean Hight a vote of no confidence. Although the vote was by secret ballot, Dean Hight later learned the results of the vote.

The evidentiary forecast for plaintiff Pressman is as follows:

From August 1978 until May 1982, Edward Pressman was appointed an Assistant Professor of Architecture at the University of North Carolina at Charlotte's College of Architecture. Pressman's appointment was made subject to *The Code of the Board of Governors of the University of North Carolina* and the *Tenure Policies, Regulations, and Procedures of the University of North Carolina at Charlotte.* The *Tenure Policies* provide that before the end of the third year of the initial appointment as assistant professor, the faculty member shall be reviewed for reappointment, promotion, and/or permanent tenure and shall receive written notice of the review.

The Faculty Review Committee, the faculty committee responsible for reappointment recommendations, after reviewing

Pressman's performance, recommended nonreappointment. On 5 January 1981, Pressman was notified by Dean Hight that his appointment as Assistant Professor of Architecture would not be renewed. Pressman appealed this decision to the College Review Committee, the committee responsible for reviewing appeals. On 26 January 1981 the College Review Committee recommended reappointment. On 11 February 1981, Dean Hight informed Pressman that after reviewing the advice from the Faculty Review Committee and the College Review Committee he would not recommend reappointment of Pressman.

Pressman stated in his deposition that Dean Hight on several occasions in 1981 promised him a final review during the fourth and final year of his appointment. He stated that this review was to be by the Faculty Review Committee and Dean Hight and was to be similar to a final review recently given another professor. On 28 May 1982, Dr. Werntz informed Pressman that his request for additional review was denied because he was not entitled to any further review under the review procedures of the College of Architecture.

During his employment at the College of Architecture, Pressman suffered from stress, depression and mental exhaustion which required him to be hospitalized for two weeks in the summer of 1980 and an additional two weeks in October and November of the 1980-81 academic year. Dean Hight took over Pressman's class during his absence in October and November. According to Mr. Pressman, his illness has been cured and he is now able to function normally in society. Pressman's illness was taken into consideration by Dean Hight and the Faculty Review Committee during Pressman's evaluation for reappointment.

The plaintiffs alleged several causes of action in their complaint. As to Herman, the complaint alleges that he was deprived of his First Amendment right to freedom of speech because he was fired for his criticism of Dean Hight and deprived of his due process rights guaranteed by the Fourteenth Amendment because the defendants failed to follow their procedures for reappointment. As to Pressman, the complaint alleges that Pressman was denied employment because of his mental health handicap; denied a final review which resulted in a breach of contract; and deprived of his due process rights guaranteed by the Fourteenth

Amendment because the defendants failed to follow their procedures for reappointment. The trial court granted summary judgment for the defendants on all of plaintiffs' causes of action. In addition, the trial court denied plaintiffs' motion to amend their complaint to add an additional cause of action against the defendants and allowed severance of the actions filed by Pressman and Herman, ordering each to proceed separately to trial.

The standard for reviewing a summary judgment motion is:

> [W]hether the pleadings, depositions, answers to interrogatories, and admissions . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. [Citations omitted.] The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. . . . The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. [Citations omitted.]

Gregory v. Perdue, Inc., 47 N.C. App. 655, 656-57, 267 S.E. 2d 584, 586 (1980).

[1] We first consider Herman's claim under the First Amendment to the United States Constitution. Public employment may not be conditioned on criteria that infringes the employees' protected interest in freedom of expression. *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 605-06, 17 L.Ed. 2d 629, 642, 87 S.Ct. 675, 684-85 (1967). An employee may not be discharged for expression of ideas on a matter of public concern. *Jones v. Dodson*, 727 F. 2d 1329, 1333-34 (4th Cir. 1984). The expression need not be public but may be made in a private conversation. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 58 L.Ed. 2d 619, 99 S.Ct. 693 (1979).

To make out a claim under the First Amendment, the employee must show that his speech is concerning a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 75 L.Ed. 2d 708, 103 S.Ct. 1684 (1983). A matter is of public concern if when fairly considered it relates "to any matter of political, social, or other con-

cern to the community." *Id.* at 146, 75 L.Ed. 2d at 719, 103 S.Ct. at 1690. The context, form, and content of the employee's speech as revealed by the whole record are used to determine the nature of the speech. *Id.* at 147-48, 75 L.Ed. 2d at 720, 103 S.Ct. at 1690. Whether speech is a matter of public concern is a question of law for the courts to decide. *Id.* at n. 7, 75 L.Ed. 2d at 720, n. 7, 103 S.Ct. 1690, n. 7.

If the speech is upon a matter of public concern, there must be a " 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* at 142, 75 L.Ed. 2d at 717, 103 S.Ct. at 1687, *quoting Pickering v. Board of Education,* 391 U.S. 563, 568, 20 L.Ed. 2d 811, 817, 88 S.Ct. 1731, 1734-35 (1968). The balancing of interests is a question of law for the courts. *Id.* at 150, n. 10, 75 L.Ed. 2d at 722, n. 10, 103 S.Ct. at 1692, n. 10.

In *Lewis v. Blackburn,* 759 F. 2d 1171 (4th Cir. 1985), the Fourth Circuit Court of Appeals interpreted the public concern standard of *Connick* to mean that a magistrate who was not reappointed because she voiced her opposition to being required to perform clerical duties such as microfilming had not made out a claim under the First Amendment because her complaints were directed to her own personal work and not matters of public concern. (See dissent of Ervin, J., in original case before the Fourth Circuit Court of Appeals at 734 F. 2d 1000, 1008-12 (4th Cir. 1984), adopted by the Fourth Circuit Court of Appeals on rehearing at 759 F. 2d 1171.) The Fourth Circuit Court of Appeals took into consideration the context, form, and content of the speech in reaching its conclusion. *Id.*

Under the facts of this case, we find that Herman's speech was not upon a matter of public concern. His speech can be more accurately described as an employee grievance concerning internal policy. Herman's speech during the meeting concerned Dean Hight's lack of administrative competence. In particular, Herman expressed concern over his lack of opportunity for personal growth because of a heavy workload, lack of guidance for grading, and the Dean's failure to develop a master's program and a recruiting program. We find Herman's criticism not based on public-

spirited concern but more narrowly focused on his own personal work and his personal displeasure with internal policies. The trial court properly granted summary judgment on Herman's First Amendment cause of action.

[2] We next consider the Fourteenth Amendment Due Process Claims of Herman and Pressman. Both Herman and Pressman argue that their Fourteenth Amendment right to due process was violated because the defendants failed to follow the Procedures set forth in the *Code* and *Tenure Policies* manual, concerning reappointment. Neither plaintiff was a tenured employee at The University of North Carolina at Charlotte. Herman's contract explicitly provided that his position was exempt from permanent tenure consideration. Pressman's contract provided that after the expiration of his original term, he could be considered for reappointment, promotion, and/or permanent tenure.

To assert a due process claim, the plaintiffs must show that they were deprived of a protected property interest in employment. *Scagnelli v. Whiting*, 554 F. Supp. 77, 79 (M.D. N.C. 1982). If tenured, an employee has a protected property right because tenure constitutes a promise of continued employment. *Id. See Mayberry v. Dees*, 663 F. 2d 502, 513-19 (4th Cir. 1981). But a state employee has no property interest protected by due process where the employee has no specific interest in continued employment, and his employment is essentially terminable at will. *Baruah v. Young*, 536 F. Supp. 356, 364 (D. Md. 1982). Absent a protected property interest the due process claim must fail. *Id.*

The case of *Kilcoyne v. Morgan*, 664 F. 2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928, 72 L.Ed. 2d 444, 102 S.Ct. 1976 (1982), is illuminating on this issue. In *Kilcoyne*, the plaintiff, a nontenured East Carolina University professor, argued that his due process rights were violated because the defendants did not follow necessary procedures set forth in their tenure and policies manual. Affirming the lower court's summary judgment in favor of the defendants the Fourth Circuit stated:

> Far from disclosing a violation of his constitutional rights, [the] complaint reveals that ECU provided procedural safeguards beyond the requirements of the Fourteenth Amendment. *Because he lacked a right to further employment at ECU, his denial of tenure and further employment*

without any procedural safeguards would have been permissible under the Fourteenth Amendment.

Id. at 942. [Emphasis added.]

We find that neither Pressman nor Herman had a protected property right in continued employment. Neither was a tenured employee at the University of North Carolina at Charlotte. Both were employed under a terminable contract. Because plaintiffs lacked any right to further employment, the procedural safeguards provided by the University in this case, as in *Kilcoyne*, extend beyond the requirements of the Fourteenth Amendment and any deviation from them will not support a claim under the Fourteenth Amendment.

The trial court properly granted summary judgment for the defendants on the plaintiffs' Fourteenth Amendment causes of action.

[3] Next, we address Pressman's claim of discrimination based on handicap. Pressman contends that he was denied employment because the Dean perceived him as handicapped by his mental condition. G.S. 168-6 provides: "Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved." G.S. 168-1 provides: " '[H]andicapped persons' shall include those individuals with physical, mental and visual disabilities." Thus, the central question is whether a person suffering from occasional episodes of stress, depression and mental exhaustion is a "handicapped person" as defined by Chapter 168 because he suffers from a mental disability.

In *Burgess v. Brewing Co.*, 298 N.C. 520, 259 S.E. 2d 248 (1979), the Supreme Court of North Carolina narrowly defined disability, in the context of Chapter 168, as "a present, noncorrectible [*sic*] loss of function which substantially impairs a person's ability to function normally." *Id.* at 528, 259 S.E. 2d at 253. Pressman's occasional episodes of stress, depression and mental exhaustion are not "disabilities" because they are not present and non-correctable losses of function. In his deposition Pressman

stated that his mental illness had been cured and he is now able to function normally in society. We find as a matter of law, that Pressman is not a "handicapped person" within the coverage of Chapter 168. The trial court properly granted summary judgment for defendants on this cause of action.

[4] Our next issue is Pressman's breach of contract claim. Pressman asserts in his complaint that Pressman and Dean Hight arrived at a contract whereby Pressman agreed not to appeal his case any further if he received a "final review" of his case by Dean Hight. In his complaint, Pressman further states that this final review was to be similar to a final review given to another professor. There is no procedure for such a "final review" in the *Code* or *Tenure Policies* manual of the University of North Carolina at Charlotte. Our question then is whether Pressman had a contract with the Dean to receive an additional review and, if so, whether the Dean violated that contract.

An agreement to make a contract, where the terms of the contract must be subsequently fixed, does not constitute a binding obligation. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 657, 267 S.E. 2d 584, 586 (1980). "To constitute a valid contract, the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Id.*; *Boyce v. McMahan*, 285 N.C. 730, 208 S.E. 2d 692 (1974).

The evidentiary forecast of the facts tends to show that there may have been an agreement that Pressman would receive some type of final review; however, there was never a concrete agreement regarding a final review between the parties with definite terms capable of enforcement. While Pressman believed that his final review procedure would be similar to that of another professor, evidence of what another final review procedure constituted is an insufficient basis for providing the terms of his contract. There was no agreed on method or time for a final review. "Where one party simply believes that a contract exists, but there is no meeting of the minds, the individual seeking to enforce the obligation upon a contract theory is without a remedy." *Elliott v. Duke University*, 66 N.C. App. 590, 595, 311 S.E. 2d 632, 636, *disc. rev. denied*, 311 N.C. 754, 321 S.E. 2d 132 (1984).

We find there was no meeting of minds as to essential terms of the agreement. Plaintiff Pressman's evidence was insufficient to show a binding contract with Dean Hight because it is clear that plaintiff and defendant never reached a mutual understanding as to what constituted a final review and when such a review would be performed.

[5] Having found the trial court correctly granted summary judgment for defendants, we now consider whether it erred by denying plaintiffs' motion to amend its complaint. Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend shall be freely given except where the party objecting can show material prejudice by the granting or denial of a motion to amend. *Roberts v. Memorial Park*, 281 N.C. 48, 56-57, 187 S.E. 2d 721, 725-26 (1972). A motion to amend is directed to the discretion of the trial court. *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E. 2d 444, 448 (1982). The exercise of the court's discretion is not reviewable absent a clear showing of abuse. *Id.*; *see also Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979).

The amendment in this case sought to add an additional cause of action one year and seven months after the original filing of the complaint and only seven days before the hearing of a motion for summary judgment. The motion was also filed nine months after extensive discovery conducted in the case was complete. The trial court found that the addition of the new cause of action would result in undue delay of the final disposition of pending claims and would result in undue prejudice to the defendants because extensive additional discovery would be required by the proposed amendment. We hold there was no abuse of discretion.

Having addressed those issues which dispose of the case on appeal, we find it unnecessary to consider plaintiffs' assignment of error relating to the trial court's severance of the actions.

Affirmed.

Judges WHICHARD and EAGLES concur.

Montague v. Wilder

J. WARREN MONTAGUE AND ADELAIDE W. MONTAGUE v. J. WELLES WILDER, JR.

No. 8518SC209

(Filed 17 December 1985)

1. **Constitutional Law § 26— Virginia default judgment—invalid under Virginia law—no full faith and credit**

A Virginia default judgment for a deficiency after a foreclosure was not entitled to full faith and credit where plaintiffs obtained service on defendant, a North Carolina resident, through service on the Secretary of the Commonwealth of Virginia under a Virginia statute which made the Secretary the fictional agent for nonresidents; defendant did not receive actual notice; the statute required an affidavit signed by the party; and the affidavit in this case was signed by plaintiffs' attorney. Substitute service is in derogation of the common law and must be strictly construed; moreover, other Virginia notice statutes used the terms party, agent, and attorney with specificity. U. S. Constitution Art. 4, § 1.

2. **Constitutional Law § 26— 1976 Virginia deficiency judgment—no notice—enforceable in North Carolina**

It was not error to enforce a Virginia deficiency judgment flowing from a 1976 Virginia foreclosure action for which defendant, a North Carolina resident, received no notice where a Virginia curative statute validates in all respects sales of foreclosure that occurred prior to October 1977 and were conducted in accordance with Virginia law as it existed at that time. This foreclosure occurred on 11 December 1976 and was conducted pursuant to the requirements in existence at that time.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Friday (John R.), Judge.* Judgment entered 28 August 1984 in Superior Court, GUILFORD County. Appeal by defendant from *Washington (Edward K.), Judge.* Judgment entered 15 October 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 September 1985.

On 9 November 1983, in the Circuit Court of Franklin County, Virginia plaintiffs were awarded a deficiency judgment plus interest and costs against the defendant mortgagor by default derived from a 1976 Virginia foreclosure proceeding. On 9 February 1984, plaintiffs filed a complaint in Superior Court, Guilford County, requesting the North Carolina court to grant the Virginia deficiency judgment full faith and credit. On 28 August 1984, Judge John R. Friday denied defendant's motion to dismiss and granted full faith and credit to the Virginia judgment. Defendant

moved the court to alter or amend the 28 August judgment, to order a new trial or, in the alternative, to give notice of appeal. Plaintiffs moved for summary judgment. On 15 October 1984, Superior Court Judge Edward K. Washington granted summary judgment in favor of plaintiffs and ordered defendant to pay $15,698.30 plus interest from 11 December 1976. Defendant appeals.

H. Marshall Simpson, for plaintiff appellees.

Evans B. Jessee of Roanoke, Virginia, for plaintiff appellees.

Richard C. Pattisall of Roanoke, Virginia, for plaintiff appellees.

Turner, Enochs & Sparrow, P.A., by Thomas E. Cone, for the defendant appellant.

JOHNSON, Judge.

The ultimate issue that is presented is whether a North Carolina court must accord full faith and credit to the default judgment for a deficiency entered in Virginia flowing from a Virginia foreclosure action when the plaintiffs did not adhere to the notice requirements of the Virginia notice statute at the time they initiated the action. We think not.

In March 1972, defendant signed two notes as one of three makers. Both notes were secured by a purchase money deed of trust for the purchase of a tract of land in Virginia. In April 1972, the property was sold to a Virginia corporation. The deed of sale provided that the corporation assume all obligations under the notes and purchase money deed of trust. At the time of this purchase, and a short time thereafter, defendant had a partial interest in the corporation but subsequently sold his interest. The payments under the note were payable annually. When the annual payment due 4 June 1976 was not paid by the current owner of the property the plaintiffs initiated foreclosure proceedings. The foreclosure occurred 11 December 1976. Virginia foreclosure law required notice to only the present owner of the property. Defendant, a North Carolina resident, had no knowledge of the foreclosure until plaintiffs' Virginia attorney notified him by letter dated 7 October 1982, almost six years later. In this letter, plaintiffs' attorney informed defendant of the events surrounding the

foreclosure and the amount of the deficiency, and requested that defendant pay the deficiency. Two weeks later, defendant's attorney responded, acknowledging receipt of the letter and requesting copies of documents pertinent to the foreclosure.

Meanwhile, plaintiffs commenced an action against the defendant in Virginia seeking a deficiency judgment. Plaintiffs attempted service as to defendant pursuant to Va. Code sec. 8.01-329 (1984). This statute allows for substitute service of a nonresident by service on the Secretary of the Commonwealth of Virginia, the fictional agent for nonresident persons. In keeping with the statute, a copy of process was sent by certified mail, return receipt requested, to the same address where defendant had received the October 1982 letter from plaintiffs' attorney. The Secretary submitted to the court an affidavit of compliance. The receipt was returned to the Secretary unsigned with the letter marked "return to sender, moved, left no address." Defendant received no actual notice of this action. Defendant filed no pleadings. Default judgment was entered 9 November 1983. In February 1984 defendant was served in North Carolina with a summons and complaint requesting that full faith and credit be extended to the Virginia judgment. Defendant filed an affidavit with the North Carolina court stating he had had no knowledge of either the 1976 foreclosure or the 1983 deficiency action; nonetheless, the trial court granted the Virginia judgment full faith and credit. Defendant moved for a new trial or for an order amending the North Carolina judgment. Plaintiffs moved for summary judgment. Defendant's motions were denied and plaintiffs were granted summary judgment against defendant.

[1] The United States Constitution provides, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, sec. 1. It has long been held that a judgment from a rendering state is entitled to the "same credit, validity and effect" in a sister state that it has in the state where it was pronounced. *Boyles v. Boyles*, 308 N.C. 488, 490, 302 S.E. 2d 790, 792 (1983), *quoting Hampton v. M'Connel*, 3 (Wheat.) 234, 235, 4 L.Ed. 378, 379 (1818). The foreign judgment need be valid in the state where it was rendered to be accorded full faith and credit—to require less would result in giving the foreign judgment more force than it would receive in the rendering state. *Boyles v. Boyles, supra* at 491, 302

S.E. 2d at 793. The judgment is deemed by the second court to be valid in the rendering state if the minimal requirements of proper subject matter jurisdiction, *see Underwriters Nat'l Assur. Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n*, 455 U.S. 691, 704, 102 S.Ct. 1357, 1365, 71 L.Ed. 2d 558, 570 (1982), and the due process concerns of personal jurisdiction, *see Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and adequate notice, *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), were satisfied. *Boyles v. Boyles, supra* at 491, 302 S.E. 2d at 793. The second court's scope of review concerning the rendering court's jurisdiction is very limited. *Id.* "[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the judgment." *Id., quoting Durfee v. Duke*, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed. 2d 186, 191 (1963). A "mere recital in the [Virginia] judgment," *Boyles v. Boyles, supra* at 500, 302 S.E. 2d at 798 (Martin, J., dissenting), that the court had proper jurisdiction and proper service is not deemed by the majority in *Boyles* to be a full and fair litigation of these issues. *Id.* at 491-92, 302 S.E. 2d at 793. The limited review by the second court "rests on the presupposition that the requirement of adequate notice had been met in the original proceeding." *Id.* When the judgment from the rendering state is a default judgment and the defendant later challenges the validity of the original proceeding based on inadequate notice of these proceedings, "the reviewing court ordinarily must examine the underlying facts in the record to determine if they support the conclusion that the notice given of the original proceeding was adequate." *Id.* While conducting this examination the statutes and decisions of the rendering state must be applied. *Id.* at 494, 302 S.E. 2d at 795.

In the instant case, the parties do not dispute that the Virginia court had proper subject matter jurisdiction. Consequently the proper scope of review for a North Carolina court is confined on these facts to the questions: (1) whether the Virginia court properly applied the pertinent statute regarding personal jurisdiction and notice; and (2) whether the applicable Virginia statutes satisfied the due process requirements of the fourteenth amendment.

First we address this two-fold inquiry to the question of personal jurisdiction. Plaintiffs claim the Virginia court had personal jurisdiction over the defendant based on Virginia's long-arm statute. Sec. 8.01-328 provides a nonresident is subject to the personal jurisdiction of Virginia on the grounds of his having transacted business in Virginia or having had an interest in real property located in Virginia. Va. Code secs. 8.01-308(1) and (6) (1984). Based on defendant's own affidavit, he did buy a tract of land in Virginia and, in connection with this purchase, signed a note in Virginia secured by a purchase money deed of trust. The Virginia court had personal jurisdiction on these facts pursuant to the Virginia long-arm statute.

In *Navis v. Henry*, 456 F. Supp. 99 (E.D. Va. 1978), a federal district court sitting in Virginia reviewed this long-arm statute and held that it passed constitutional muster. We are persuaded by that court's conclusion. We also deem this statute constitutional.

Next, we address our two-fold inquiry to the issue of notice. Defendant contends that the notice given failed on both counts: that it (1) did not satisfy the requirements set forth in the Virginia statute and (2) did not satisfy the due process requirements of notice reasonably calculated to inform the litigant. The pertinent statute is Va. Code sec. 8.01-329 (1984). This statute provides for substitute service of process or notice on a nonresident by serving on the nonresident in the same manner provided for service of process or notice on a resident, or by serving the Secretary of the Commonwealth of Virginia, the fictional statutory agent of the nonresident. The statute continues:

> A1. When service is to be made on the Secretary, the party seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.
>
> B. Service of such process or notice on the Secretary shall be made by leaving a copy of the process or notice, together with a copy of the affidavit called for in paragraph A1 hereof and the fee prescribed in [sec.] 14.1-103 in the office of the

> Secretary in the city of Richmond, Virginia. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the person or persons to be served at the last known post-office address of such person, and an affidavit of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action.
>
> . . . .

Va. Code sec. 8.01-329 (1984).

As stated above, before a North Carolina court can grant full faith and credit to the Virginia default judgment, the North Carolina court must ask whether the plaintiffs complied with the Virginia notice statute. We look to what Virginia courts have held constitutes satisfactory compliance with this statute and with other Virginia notice statutes. Statutes which are not inconsistent with another and which relate to the same subject matter are held to be in "pari materia" and should be construed together. *Soble v. Herman*, 175 Va. 489, 9 S.E. 2d 459 (1940).

Regarding defendant's first alleged defect, the statute reads, "[T]he party seeking service shall file an affidavit with the court. . . ." Va. Code sec. 8.01-329(A)(1). The affidavit at issue was not the affidavit of either of the plaintiffs but was the affidavit of their attorney. The affidavit read, "The undersigned, Evans B. Jessee, agent and attorney for the plaintiffs, J. Warren Montague and Adelaide W. Montague, makes oath and says: . . . ." The attorney's signature appears at the bottom of the affidavit. Defendant asserts that this is not in keeping with the statutory requirement that the *party* seeking service file an affidavit. At the time the affidavit was submitted to the Secretary of the Commonwealth no Virginia case law construed the meaning of this statutory language. We look to related Virginia cases for guidance. When constructive service of process is allowed in lieu of personal service, the terms of the section must be strictly construed. *Crockett v. Etter*, 105 Va. 679, 54 S.E. 864 (1906). Substitute service on a statutory agent is in derogation of the

common law and must be strictly construed. *Warner v. Maddox*, 68 F. Supp. 27 (W.D. Va. 1946).

Other Virginia notice statutes make use of the words *party*, *agent* and *attorney*. Sec. 8.01-296 provides for service on a natural person, stating "[i]f the *party* to be served be not found at his usual place of abode . . . [service may be made upon] a member of his family [found there]." Va. Code sec. 8.01-296(2)(a) (emphasis added). This language allows no inference that the attorney or an agent of the party would suffice for the party himself. When the Virginia legislature contemplated service on an agent of the party or an attorney of the party, they indicated so clearly in the statute. Sec. 8.01-301 allows for service on a foreign corporation, stating that one manner of service is personal service on "any officer, director or on the registered *agent* . . . wherever any such officer, director, or *agents* be found within the Commonwealth." Va. Code sec. 8.01-301(1) (emphasis added). Sec. 8.01-308 proscribes substitute service on a nonresident motor vehicle operator whereby "[a]ny operation in the Commonwealth of a motor vehicle by a nonresident . . . either in person or by an *agent* or employee, shall be deemed equivalent to an appointment by such nonresident of the Commissioner . . . to be the *attorney* or statutory *agent* of such nonresident. . . ." Va. Code sec. 8.01-308 (emphasis added). Sec. 8.01-319 addresses service by publication, stating, "If such absent *party* has an *attorney* of record in such suit, notice shall be served on such *attorney*, as provided by [sec.] 8.01-314." Va. Code sec. 8.01-319(B)(4) (emphasis added).

The above excerpts from the Virginia notice statutes use the terms *party*, *agent* and *attorney* with specificity. It is indeed reasonable to infer that the Virginia legislature intended the same specificity when they chose the word *party* in sec. 8.01-329. For this reason, coupled with case law demanding strict construction, we hold that sec. 8.01-329 requires the affidavit to be the sworn statement of the *party* and no one else. This construction of the language leads necessarily to the same conclusion even when the attorney, as in the case at bar, attempted to bootstrap the affidavit by referring to himself as "the attorney *and* agent" for the party (emphasis added). This vain gesture by the attorney could be interpreted as an acknowledgment that his signature, in the capacity of attorney alone, was insufficient under the statute.

Approximately six months after the plaintiffs' attorney signed the affidavit at issue, a federal district court for the Eastern District of Virginia construed the language of sec. 8.01-329 and held that an affidavit of the attorney did not satisfy the requirement that the affidavit be filed by the party. *Luke v. Dalow Indus., Inc.*, 566 F. Supp. 1470 (E.D. Va. 1983). Although we recognize *Luke, supra*, is not controlling as to this case, we agree with its result. That court concluded the language of the statute was "carefully chosen to further some appropriate official purpose." *Id.* at 1471.

Had defendant received actual notice of the Virginia deficiency action, the defective service under the substitute service statute would not be fatal to the Virginia judgment. Actual notice, that is, that which actually and timely reaches the person to whom it is directed, is sufficient even when not served in accord with Virginia notice statutes. Va. Code sec. 8.01-288. The record indicates no such actual notice even though the plaintiffs had been in written communication with defendant's North Carolina attorney. Failure of actual notice rests with the plaintiffs in the instant case in that, even though they were communicating with defendant's North Carolina attorney, they appeared to have made no effort to use an alternative manner of service, relying solely upon the Virginia statute for substitute service on a nonresident.

[2] Having found insufficient compliance with the Virginia notice statute, this Court need not address the other issues related to the notice statute, namely, whether the statutory requirement that notice be mailed "to the last known address" was satisfied and whether the statute, as applied, satisfied the due process requirements set forth in *Mullane, supra.* The Court, however, will address defendant's assertion that it is error to enforce a Virginia deficiency judgment that flows from a foreclosure action for which he received no notice. Defendant claims that, because he had no knowledge of the 1976 foreclosure in Virginia, it and any subsequent deficiency is invalid as to him. The Virginia foreclosure statute in effect at the time of the foreclosure required notice to only the "present owner." Va. Code sec. 55-59 (1950). There was no statutory requirement to notify the mortgagor if he was other than the present owner. The defendant questions the constitutionality of sec. 55-59. The defendant's challenge comes

too late. A Virginia curative statute precludes further inquiry into this issue on these facts. The curative statute validates in *all* respects sales of foreclosure that occurred prior to 1 October 1977 and were conducted in accordance with the law of Virginia as it existed on 30 June 1977. Va. Code sec. 55-65.1 (1981) (emphasis added). The foreclosure at issue occurred 11 December 1976 and was conducted pursuant to the requirements in existence at that time.

In light of our holding, we do not find it necessary to address defendant's remaining assignments of error related to the face of the order entered 28 August 1984.

In conclusion, the constructive notice of defendant failed for lack of strict compliance with the Virginia statute. No actual notice was attempted or inadvertently accomplished. An invalid default judgment for a deficiency was rendered according to Virginia law. A judgment invalid in Virginia is not entitled to full faith and credit in North Carolina.

For the foregoing stated reasons judgments of the Superior Court, Guilford County granting full faith and credit to the Virginia judgment and granting summary judgment thereon are

Vacated.

Judge WEBB concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I dissent. In my opinion the Virginia judgment against defendant is entitled to full faith and credit and the affidavit of plaintiffs' attorney fully complied with the requirements of the Virginia notice statute. I see no sensible, worthwhile reason for requiring parties to do the routine tasks incident to processing lawsuits that they hire lawyers to do and do not believe that the purpose and effect of the Virginia statute was to impose any such requirement. I would affirm the judgment appealed from.

CHARLES WAYNE HICKS, ADMINISTRATOR OF THE ESTATE OF JULIANNA MARIA STEPHENS HICKS (DECEASED) v. DINKY GRAY REAVIS AND ALINE OSBORNE REAVIS

No. 8522SC96

(Filed 17 December 1985)

1. **Automobiles and Other Vehicles § 46— opinions as to speed—based on sound alone—admissible only in relative terms**

The trial court did not err in an action arising from an automobile collision by admitting testimony that defendants' car had been traveling at a "high rate of speed," "going fast," "constantly accelerating," "flying," and going "down the road at a high rate of speed, enormous rate of speed," but excluding testimony that defendants' car had been going "85 or 100 miles per hour" and "well over 100 miles per hour" where the witnesses had only heard defendants' car or caught a glimpse of the headlights. Sound alone is sufficient for the witness to give his opinion of the speed of the vehicle in relative terms, such as "fast," "flying by," etc., but sound alone does not provide sufficient perception for a layman to have a rational basis for giving an opinion as to actual speed. Moreover, even if it was error to exclude the opinions of the actual miles per hour, such error would have been harmless because there can be no doubt that plaintiff conveyed to the jury that defendants' automobile was traveling at an excessive rate of speed. N.C.G.S. 8C-1, rule 701.

2. **Automobiles and Other Vehicles § 46— opinion of speed—investigating officer—not witness to accident—properly excluded**

The trial court did not err in an action arising from an automobile collision by excluding the testimony of a highway patrolman regarding the speed of defendants' car where the patrolman had not witnessed the accident but had based his opinion on his investigation of the accident scene. N.C.G.S. 8C-1, Rule 702.

3. **Appeal and Error § 30.2— failure to include answer in record—assignment of error overruled**

Plaintiff's assignment of error was overruled where he alleged that the trial court erred in an automobile accident case by refusing to allow two witnesses to give their opinion of the cause of the wreck, but did not include in the record what their answers would have been. N.C.G.S. 8C-1, Rule 701.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 27 August 1984 in Superior Court, DAVIE County. Heard in the Court of Appeals 28 August 1985.

Pope, McMillan, Gourley & Kutteh by William P. Pope; and Albert F. Walser for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready by James H. Kelly, Jr., Michael L. Robinson and J. Stephen Shi for defendant appellees.

COZORT, Judge.

Two women were killed when the automobile in which they were riding pulled out in front of a car "travelling at a high rate of speed." The trial court excluded opinion testimony on the actual speed of defendants' automobile from plaintiff's witnesses who heard the sound of defendants' vehicle prior to the collision but never saw the car moving. We find no error.

Plaintiff, administrator of the estate of his deceased wife, Julianna Maria Stephens Hicks, brought this wrongful death action against the estate of the driver of the automobile in which Mrs. Hicks had been riding, and against the owner and operator of the other automobile involved in the collision. Prior to trial plaintiff settled with the estate of the driver of the vehicle in which Mrs. Hicks was riding, and a voluntary dismissal was entered in that part of the case.

At trial there was uncontradicted testimony that on 27 May 1982, at approximately 9:00-9:30 p.m., Ms. McDaniel and Mrs. Hicks were traveling east on Interstate 40 in Ms. McDaniel's Oldsmobile Cutlass. They traveled onto the exit ramp of the Interstate at Highway 601, made a left turn from the exit ramp onto Highway 601, and collided with defendants' automobile, a Chevrolet Camaro, which was traveling south on Highway 601. Highway Patrol Trooper L. E. Johnson investigated the accident and found skid marks measuring eighty-nine feet left by defendants' Camaro. Both cars were extensively damaged. The steel frame of the left side of the Cutlass was pushed in twenty-two inches. After the impact the Cutlass came to rest on the southeast side of the intersection on the other side of Highway 601. The Camaro was near the center of the intersection facing south. There is a stop sign facing west in view of the cars proceeding east up the exit ramp from I-40. A passenger in defendants' car testified that the Cutlass never slowed down for the stop sign, pulling directly into the path of defendants' Camaro.

The only eyewitnesses to the accident were the occupants of the two cars, although several other witnesses heard the Camaro proceed along Highway 601 and heard the collision. The trial judge sustained defendants' objections to plaintiff's questions regarding the actual estimated speed the Camaro was traveling before the accident, based on the sound of the vehicle. The jury returned a verdict finding no negligence by defendants.

The primary issue for our consideration in this case is whether the trial court erred in excluding opinion testimony of two witnesses for the plaintiff. One would have given his opinion based solely on hearing the defendants' car go by that "[h]e was travelling in excess of 85 or 100 miles an hour." The other, who "saw the glimpse of lights . . . for a split second" and heard the car for 15 or 20 seconds, would have testified that, in his opinion, the speed of defendants' car "was well over 100 mph." We shall also consider whether the trial court properly excluded opinion testimony from the investigating officer that the defendants' car was travelling 85 miles per hour at the time of impact, with that opinion being based solely on his investigation after the accident occurred.

Dale Eugene Raney, a long-haul truck driver from Joplin, Missouri, had stopped at a commercial truck stop north of the intersection of I-40 and Highway 601 on the night of the collision. He was in his vehicle preparing to maneuver out of the parking lot when he heard a car come by "travelling at a high rate of speed." Raney's truck was three hundred feet from the center of Highway 601. He heard the vehicle for 10-15 seconds, until hearing a "crash" and a "boom," "sheet metal ripping, tearing, crumpling, like an accident had occurred." He described the sound of the car: "this loud vehicle that sounded like an engine with high RPM's, a hissing sound, traveling at a high rate of speed"; "a loud, hissing sound, raw noise of an engine turning excessive RPM's which the muffler was not capable of filtering out the sound." Raney, who owned a race car and had operated a muffler shop, was not permitted to testify before the jury on his opinion of the actual speed the car was traveling. His opinion was placed in the record: "I did not see the car; but, from my opinion of the noise which it was making, he was moving on. He was traveling in excess of 85 or 100 miles per hour. . . . My estimate of speed is based solely on sound."

John Loftin Hill lives on Highway 601 about one-fourth mile north of the truck stop where Raney had stopped on 27 May 1982. The back of his house faces the highway and is about 250 feet from the highway. He testified he was in his backyard sitting in the swing at about 9:00 p.m. on 27 May 1982 when he "heard a loud car go down the road at a high rate of speed. I saw the glimpse of lights go by kind of in between my neighbors' houses. It was dark and what I saw was just a glimpse of the lights as they went by. I just saw the lights for a split second because it was going, you know, so fast." Hill, who had some experience as a mechanic, described for the jury the sound of the car: "It was loud like a car going fast. I heard that sound for 15 or 20 seconds maybe. There were no interruptions in the sound except it was like changing gears; that's all the interruptions I heard." He was not allowed to give his opinion of the speed of the car. His opinion, placed in the record on voir dire, was: "I'd say it was well over 100 mph."

The general rule for the admission of opinion testimony on speed in North Carolina is that "a person of ordinary intelligence and experience is competent to state his opinion as to the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle and judge its speed." *Nationwide Mutual Ins. Co. v. Chantos,* 298 N.C. 246, 250, 258 S.E. 2d 334, 336 (1979). "What is a reasonable opportunity to observe the vehicle and judge its speed is a question that must be determined by the trial judge, if it arises, in each case from the facts as they appear in the evidence." *Johnson v. Douglas,* 6 N.C. App. 109, 112-13, 169 S.E. 2d 505, 508 (1969).

[1] The precise question presented by this case is whether sound alone, without the witness seeing the vehicle at all, provides a reasonable opportunity to "observe" the vehicle and judge its speed in miles per hour. Our research has uncovered only one case in North Carolina where the issue of sound as the sole basis for opinion of speed was addressed. In *State v. Fentress,* 230 N.C. 248, 250, 52 S.E. 2d 795, 796 (1949), a witness testified that he was in his service station on the side of the road when the automobile in question came by with "the accelerator wide open." Defendant objected to this testimony. When the witness went outside, the accident had already occurred. He gave his opinion that the car was traveling at 85 miles per hour. Defendant, however, did not

object to this testimony. Our Supreme Court found no error in the admission of the testimony that the car came by at "a rapid rate of speed." In so holding, the court first noted that defendant's objection was subject to two criticisms which affected its "validity as presenting reversible error": first, the objection was "only to the [answer] and not made until the matter was in, under conditions which made exclusion discretionary with the court"; and, "[s]econd, testimony as to the identical matter was later introduced without objection." *Id.* at 251, 52 S.E. 2d at 797. Then the court noted that the testimony of "a rapid rate of speed" was supported by the circumstantial evidence at the crash scene. The court then said:

> When relevant to the issue, a witness may testify to any thing he has apprehended by any of his five senses, or all of them together. The objection goes to the weight and significance rather than to the competency of the evidence. At any rate, the witness later testified to substantially the same thing without objection.

Id.

Plaintiff argues that *Fentress* stands for the proposition that an estimate of actual speed based on sound alone is competent testimony. The defendants counter that *Fentress* is of minimal precedential value because the Supreme Court noted that the witness later testified to substantially the same thing without objection.

The defendants' argument has merit. None of the subsequent cases which cite *Fentress* have involved the issue of estimating actual speed on sound alone. Thus, we do not interpret *Fentress* as establishing a general rule that sound alone is sufficient basis for estimating actual speed. The issue of estimating speed in miles per hour was not before the court because no objection was taken to that testimony.

In other jurisdictions, the issue has been squarely faced. In *Meade v. Meade*, 206 Va. 823, 828-29, 147 S.E. 2d 171, 175 (1966), noting, "[i]t is generally held that a witness who did not actually see the motor vehicle in movement is incompetent to give testimony based on sound alone as to the speed at which it was moving," the Supreme Court of Appeals of Virginia found prejudicial

error in the admission of testimony from a 14-year-old boy that the car was going over eighty miles per hour. The boy heard the roaring of the car coming down the highway as he stood across a railroad track at some undisclosed distance from the highway. The court held the witness was incompetent to give an estimate of the speed because he did not have a reasonable opportunity to judge the speed. *Id.* 206 Va. at 828-29, 147 S.E. 2d at 175.

More recently, the issue was addressed by the Indiana Court of Appeals in *Gates v. Rosenogle*, 452 N.E. 2d 467 (Ind. App. 1983). There defendant Gates, a layman, argued it was error for the trial court to exclude his opinion of the speed of the motorcycle, on which plaintiff was riding, from the sound of its engine. Gates did not offer himself as an expert; however, he had owned and ridden motorcycles and observed them racing. In affirming the trial court's ruling, the court stated:

> The general rule invests the trial court with the exercise of sound discretion in the admission or exclusion of marginally relevant evidence which has a potential for prejudice. . . . Accordingly, we will not reverse the trial court in the absence of an abuse of discretion, which requires a showing that the ruling was clearly against the logic and effect of the circumstances. . . . On the previously recited facts before us concerning both Gates' qualifications and the specific nature of the opinion sought, we cannot say it was an abuse of discretion to exclude the opinion. [Citations omitted.]

Id. at 471.

The reasoning set forth in *Gates* is applicable in the instant matter. By virtue of his profession as a truck driver and his experience with racing cars and work in a muffler shop, Raney was in a somewhat better position than the average person to judge the speed of a vehicle, solely on sound. He was not, however, tendered by plaintiff as an expert witness. In order to find error by the trial court in excluding Raney's opinion, we would have to find the trial court abused its discretion. We find no abuse of discretion and find no error.

This reasoning is applicable to plaintiff's witness Hill, who was also testifying as a layman, with some experience as a mechanic. The trial court did not abuse its discretion in not allow-

ing Hill's opinion testimony of actual speed. This ruling is correct even though Hill also caught a "glimpse of the lights as they went by." Our Supreme Court held that "[a]t night a witness may judge the speed of an automobile by the movement of its lights if his observation is for such a distance as to enable him to form an intelligent opinion." *Jones v. Horton*, 264 N.C. 549, 554, 142 S.E. 2d 351, 355 (1965). Hill's "glimpse of [the] lights . . . in between [his] neighbors' houses" did not permit observation for a distance long enough to form the basis for an intelligent opinion.

Plaintiff has further argued that the opinion testimony of actual speed based on sound alone is admissible under Rule 701 of the new Rules of Evidence (G.S. 8C-1, Rule 701, effective 1 July 1984), as being "*helpful* [to the jury] to the determination of a fact in issue." (Emphasis in original.) Rule 701 provides as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

We agree that the opinion of actual speed from Raney and Hill would be "helpful" to the jury in determining the speed of defendants' vehicle. Such an opinion is admissible, however, *only* if it meets the test under clause (a): that it is "rationally based on the perception of the witness." This language does not change the existing law on opinions based on sound. "[R]ationally based on the perception of the witness" is merely another way of stating the general rule: "reasonable opportunity to observe the vehicle and judge its speed." *Nationwide Mutual Ins. Co. v. Chantos, supra; Johnson v. Douglas, supra.* If the perception is not adequate, there is no rational basis to support the opinion. Sound alone does not provide sufficient perception for a layman to have a rational basis for giving an opinion on actual speed.

Sound alone is sufficient for the witness to give his opinion of the speed of the vehicle in relative terms, such as "fast," "flying by," etc. Those opinions were permitted at trial. Raney was permitted to testify about "this loud vehicle . . . traveling at a high rate of speed." Hill was allowed to testify that he "heard a loud car go down the road at a high rate of speed. . . . It was loud like

a car going fast." Other witnesses who were near the scene of the accident and heard defendants' vehicle were permitted to give their opinions of the sound of defendants' vehicle. Mr. Raney's wife, Twyla, who was with Mr. Raney in his tractor-trailer and did not see the car or the accident, was permitted to testify that she "heard a car fly by" and that she "heard the bellowing of a car at a rapid speed." Joe Ashburn, whose garage is approximately a mile up Highway 601 from the accident, never saw the car or the accident and was allowed to testify, based on what he heard from a mile away, that the car was "constantly accelerating" and "sounded like it was flying." Jimmy Dean Foster, who lived on Highway 601, testified that he

> heard the tires squealing . . . . I heard the noise until it sounded like an explosion.
>
> At no time from the first time I heard the noise until I heard the explosion did the noise stop. The noise I heard was just like any car when you mash it down and hold it down. It's going to go until it blows or it's going to go until it stops.
> . . .
>
> * * * *
>
> I can describe the sound I heard from the time the car turned around there at the church. At first it was burning tires, squalling tires, taking off down the road, a loud noise, still the same noise until the explosion or whatever it was until it hit the other car. I did form an opinion about how fast the car was going. Not as far as miles per hour, not in terms of exact miles an hour. I don't think he didn't let off of it from the time he took off until the time of the impact.

Johnny Rummage, another resident on Highway 601, testified that he "heard a car go down the road at a high rate of speed, enormous rate of speed."

The opinions of the Raneys, Hill, Ashburn, Foster, and Rummage as to the speed of defendants' car, which were based on sound alone and expressed in relative terms, were properly admitted. Annot., 33 A.L.R. 3d 1405. Even if it had been error to exclude the opinion of Raney and Hill on the actual miles per hour, such error would have been harmless. There can be no doubt that plaintiff had conveyed to the jury that defendants' automobile

was traveling at an excessive rate of speed. When other evidence of the same import is admitted, error in the exclusion of evidence is harmless. *Medford v. Davis*, 62 N.C. App. 308, 302 S.E. 2d 838, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983).

[2] We next consider plaintiff's assignment of error concerning the trial court's refusing to allow Trooper L. E. Johnson to give his opinion of the speed of the Reavis vehicle at the time of impact, even though the court had previously found Trooper Johnson to be an expert in "accident investigation." We find no merit to this assignment.

> As a general rule, a witness must confine his evidence to the facts. In certain cases, however, an observer may testify as to the results of his observations and give a shorthand statement in the form of an opinion as to what he saw. For example, he may observe the movement of an automobile and give an opinion as to its speed in terms of miles per hour. However, one who does not see a vehicle in motion is not permitted to give an opinion as to its speed. A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require. [Citation omitted.]

Shaw v. Sylvester, 253 N.C. 176, 180, 116 S.E. 2d 351, 355 (1960). *See also* 1 Brandis on North Carolina Evidence Sec. 131 (1982). Trooper Johnson did not see the accident happen. Rather, he based his opinion on his investigation of the accident scene. The trial court properly excluded his opinion of the speed of the Reavis automobile. In sum, with respect to the speed of a vehicle, the opinion of a lay or expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene. North Carolina Rules of Evidence, Rule 702 does not change the rule of law.

[3] Plaintiff's next assignment of error is the trial court's refusing to allow Dale Raney and Twyla Raney to give their opinion as to the cause of the wreck, pursuant to North Carolina Rules of Evidence, Rule 701. Assuming *without deciding* that the questions asked were competent, the record does not show what their an-

swers would have been. Therefore, we cannot properly determine whether plaintiff was prejudiced by their exclusion. *Medford v. Davis, supra,* 62 N.C. App. at 311, 302 S.E. 2d at 840. It is appellant's burden to show "not only that error was committed but also that it was prejudicial." *Id.* This assignment of error is overruled.

Finally, we have reviewed plaintiff's assignments of error concerning the trial court's jury instructions and find these assignments of error to be without merit.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

EMILY McHARGUE, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER, AND AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC57

(Filed 17 December 1985)

1. **Master and Servant § 68— workers' compensation—chronic lung disease—remand for proper findings**

Plaintiff's claim to recover compensation for chronic lung disease must be remanded for findings as to whether plaintiff's exposure to cotton dust in her employment significantly contributed to, or was a significant causal factor in, the development of her disease. It was not enough that the Industrial Commission found that plaintiff's lung disease was not caused, aggravated or accelerated by her exposure to cotton dust in her employment.

2. **Master and Servant § 93.3— workers' compensation—admissibility of employer's pulmonary tests**

Although an expert in pulmonary medicine belittled the reliability of pulmonary function tests performed by the employer, a nurse's testimony that the tests were properly administered and that the results were accurate provided the minimum evidence necessary to make the employer's test results competent evidence.

3. **Master and Servant § 68— workers' compensation—pulmonary tests—finding not supported by evidence**

The Industrial Commission erred in finding that pulmonary function test results obtained by two pulmonary specialists were not accurate indications of

plaintiff's pulmonary function where there was no competent evidence tending to show that the results of tests performed by one of the specialists were not medically accurate.

APPEAL by plaintiff from opinion and award of the Industrial Commission entered 26 July 1984. Heard in the Court of Appeals 29 August 1985.

Charles R. Hassell, Jr., for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by J. A. Gardner, III, for defendant appellees.

BECTON, Judge.

I

The plaintiff, Emily McHargue, filed her workers' compensation claim on 23 July 1980 seeking compensation for chronic lung disease caused by exposure to cotton dust. The Deputy Commissioner, in an opinion and award filed 26 January 1983, found that McHargue's exposure to cotton dust did not result in an occupational disease and denied the claim. The North Carolina Industrial Commission (Commission) affirmed the opinion and award on 26 July 1984. McHargue appeals, contending that no competent evidence supports the Commission's findings on the occupational relationship of her chronic obstructive lung disease and that this case must be remanded in light of the Supreme Court's opinion in *Rutledge v. Tultex/Kings Yarn*, 308 N.C. 85, 301 S.E. 2d 359 (1983). We remand on the ground that *Rutledge* requires further findings on the issue of significant contribution.

II

McHargue's work history is as follows. Born in 1921, she began working for Cannon Mills in the spooling department at the age of sixteen. At seventeen, she began working at Mooresville Mills, now owned by Burlington Industries. The mill processed cotton and cotton blends. McHargue worked in Mooresville's weave room as a blow-off hand and as an inspector of cloth until the late 1950's. Both jobs exposed her to cotton dust. When Burlington bought Mooresville Mills, McHargue was laid off. She then went to work at Narrow Fabrics and at Carolina Mills in the winding department. She held each of these jobs for less than a

year. For a period of approximately fifteen years, McHargue was not employed outside the home. She returned to Burlington Mills' Mooresville Plant in 1972, again working in the weave room as a blow-off hand and later as a sweeper and in various other jobs. She was exposed to cotton dust during this period. McHargue last worked for Burlington on 19 March 1980.

As to McHargue's medical history, she testified that she had no breathing problems as a girl or young woman, although she has experienced nasal and sinus problems; that she has never smoked; and that her breathing difficulties began about three years before her retirement. According to McHargue, her early symptoms were wheezing, chest pain, and a cough. These symptoms were worse during the week; she generally felt better on Sundays. McHargue stated that her symptoms have worsened over time, but she feels better now than in 1979 when she was hospitalized.

McHargue was hospitalized for four days in February 1979 because of sore throat, cough, chest pain and congestion of a week's duration. Her final diagnosis included acute influenza with bronchitis, and pansinusitis (inflammation of one side of paranasal sinuses). She was relatively asymptomatic upon discharge, and she subsequently returned to work. McHargue was again hospitalized on 4 March 1980 at Davis Hospital in Statesville as the result of a serious episode of shortness of breath. At her 7 March 1980 discharge, McHargue was "almost entirely symptom-free," with a final diagnosis of "acute respiratory disorder with severe dyspnea recurring nightly associated with obstructive bronchial disease and accentuated by acute infection," and "pan sinusitis [sic] aggravated by acute infection." McHargue returned to work for a single day, 19 March 1980. She stated she was unable to breathe in the dusty work environment. She has not worked since.

In April 1980, McHargue was admitted to Rowan Memorial Hospital in Statesville for an elective evaluation of her pulmonary function. Her treating physician, Dr. James Reynolds, an otolaryngologist, testified for McHargue. Dr. Reynolds' discharge summary shows that pulmonary function tests were given to McHargue during this hospitalization and that her diagnosis at discharge was chronic obstructive pulmonary disease, allergic asthma and sinusitis. A 4 June 1980 letter from Dr. Reynolds to

Burlington Industries states that McHargue is "totally disabled from a pulmonary function standpoint and should not return to work." Dr. Reynolds also testified that McHargue is "short of breath even at rest."

Sometime after April 1980, McHargue was referred to Dr. Leo Heaphy, a pulmonary specialist. Dr. Heaphy ordered pulmonary function tests which were administered 1 July 1980 at Baptist Hospital in Winston-Salem and 5 May 1981 at his office. Dr. Heaphy testified that these tests all showed results in the respiratory failure range and that, in his opinion, McHargue has chronic obstructive pulmonary disease caused by her exposure to cotton dust.

The defendants' two expert medical witnesses were Virginia Lumpkin, a registered nurse who has been the plant nurse at Mooresville Mills since May 1977, and Dr. Douglas Kelling, a physician specializing in pulmonary medicine who saw McHargue on referral from the Industrial Commission on 20 October 1980. Lumpkin's testimony largely pertained to the results of the annual pulmonary function tests and respiratory questionnaires administered to McHargue by Lumpkin and others at Mooresville Mills between 1973 and 1980. Lumpkin testified that the breathing tests consistently showed McHargue to have normal pulmonary function. When questioned about the validity of the testing procedure, Lumpkin responded that although she could not say with certainty that the 1973, 1974 and 1975 tests were properly administered, the 1976, 1977, 1978, 1979 and 1980 tests were properly administered and the results were accurate.

Dr. Kelling testified that he had pulmonary function tests performed on McHargue at Cabarrus Memorial Hospital in Concord on 20 October 1980; however, he indicated that the test results did not validly reflect McHargue's pulmonary capacity, as her patient cooperation was poor. In response to a hypothetical question that incorporated the Burlington Industry pulmonary function test results from 1975 to 1980, Dr. Kelling stated that, in his opinion, McHargue is not suffering from any disease caused by exposure to cotton dust or caused otherwise from her work in a textile mill.

III

[1] McHargue's principal argument is that she is entitled to a remand to have the evidence in this case evaluated according to the "significant contribution" criteria articulated in *Rutledge v. Tultex/Kings Yarn*, 308 N.C. 85, 301 S.E. 2d 359 (1983). We agree. The critical holding in the *Rutledge* case is as follows:

> [C]hronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contacting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors. . . . The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Id. at 101-02, 301 S.E. 2d at 369-70.

The opinion and award in the instant case was entered prior to the decision in *Rutledge*. The Commission found:

> [To] the extent that plaintiff presently suffers from any impairment in pulmonary function, such impairment was caused by and has resulted from the acute respiratory illness which she experienced in March 1980. Such illness was not caused by her occupational exposure to respirable cotton dust.
>
> Plaintiff does not have byssinosis or lung disease caused, aggravated or accelerated by her exposure to cotton dust in her employment.

The Commission concluded that McHargue did not suffer from an occupational disease as a result of her employment and denied her claim.

The Commission did not, however, make any findings on the issue of "significant contribution." It is not enough under *Rutledge* to say that McHargue's lung disease was "not caused by" exposure to cotton dust in her employment. Nor does the Com-

mission's use of the terms "aggravated" or "accelerated" save its finding. For even if we were to assume that the Commission presciently anticipated the *Rutledge* standard in referring to aggravation or acceleration in its findings, we would still be compelled to remand by *Dean v. Cone Mills Corp.*, 67 N.C. App. 237, 313 S.E. 2d 11, *vacated and remanded*, 312 N.C. 487, 322 S.E. 2d 771 (1984), and *Clark v. American & Efird Mills*, 66 N.C. App. 624, 311 S.E. 2d 624 (1984), *aff'd*, 312 N.C. 616, 323 S.E. 2d 920 (1985). Both of those cases involved pre-*Rutledge* awards in which the Commission denied compensation.

In *Clark*, the Commission found, *inter alia*, that:

> 8. Respirable material in the winding room where claimant worked aggravated her cough. The cotton dust did not, however, cause *or aggravate* her basic illness which is chronic bronchitis.
>
> 10. Claimant experienced long-term exposure from 1943 through 26 February 1976 to causes and conditions characteristic of and peculiar to the cotton textile industry known to result in chronic obstructive pulmonary disease. The exposure did not, however, cause *or materially aggravate* her underlying pulmonary disease, which is chronic bronchitis.

66 N.C. App. at 625-26, 311 S.E. 2d at 625-26 (emphasis added). The Commission concluded:

> Claimant's pulmonary disease, chronic bronchitis, was not caused *or materially aggravated* by long-term exposure while in defendant's employ to causes and conditions characteristic of and peculiar to the cotton textile industry known to result in chronic obstructive pulmonary disease.

Id. at 626, 311 S.E. 2d at 626 (emphasis added). This Court in *Clark* reversed the Commission and remanded the cause for further findings in accordance with *Rutledge*. The Supreme Court affirmed. The language in *Clark* is not significantly distinguishable from the language used by the Commission in the case before us.

In *Dean*, the Commission found and concluded that:

> [P]laintiff has failed to carry his burden of establishing that his condition has been caused *or contributed to* by his exposure to cotton dust in defendant's mill, that his employ-

> ment placed him at an increased risk of contracting [chronic obstructive pulmonary disease], or that he was permanently or partially disabled from employment in 1975 as a result of an occupational disease.

67 N.C. App. at 239, 313 S.E. 2d at 12 (emphasis added). This Court affirmed the Commission, and the Supreme Court vacated, stating simply that the case must be remanded for further findings in light of *Rutledge*. The Supreme Court reached its result in *Dean* despite expert testimony that "it was *medically unlikely* that Mr. Dean's occupational exposure to cotton dust *contributed to* his obstructive lung disease," and that Dean's occupational exposure "perhaps placed him at *slightly increased risk* of developing obstructive lung disease," *id.* at 238, 313 S.E. 2d at 12 (emphasis added), due in part, we suspect, to the definition of "significant" adopted in *Rutledge*. In this context "significant" does not mean "material," but rather "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." *Id.* at 101-02, 301 S.E. 2d at 370 (quoting Webster's Third New International Dictionary (1971)). Because the lawyers, the Commissioners, and the physicians alike were only concerned with causation under the pre-*Rutledge* standard, *see Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 154-55, 314 S.E. 2d 833, 836 (1984) (comparing pre- and post-*Rutledge* standards), this cause must be remanded for further factual findings on the issue of significant contribution.

IV

McHargue's other argument is that no competent evidence supports certain findings of the Industrial Commission. The critical finding of fact to which McHargue assigns error reads, in its entirety, as follows:

> 13. Prior to March of 1980 plaintiff exhibited no demonstrable degree of a decrement in her pulmonary function, although she had suffered at least one acute episode of a respiratory infection from which she had dramatically recovered on antibiotic therapy. In early March of 1980, she suffered another acute respiratory infection from which she initially recovered rapidly, but following which she has experienced a decrease in her pulmonary function which suggests permanent obstruction. The degree to which plaintiff

has suffered permanent impairment in pulmonary function cannot be determined for the reason that pulmonary function test results obtained in March 1980 were obtained at a time when plaintiff was in acute respiratory distress and pulmonary function test results obtained thereafter by Dr. Heaphy and Dr. Douglas Kelling are not accurate indications of plaintiff's pulmonary function.

However, to the extent that plaintiff presently suffers from any impairment in pulmonary function, such impairment was caused by and has resulted from the acute respiratory illness which she experienced in March 1980. Such illness was not caused by her occupational exposure to respirable cotton dust.

It is primarily upon this factual finding (actually a mixed finding of fact and conclusion of law) that the Commission based its conclusion that McHargue does not have a lung disease caused by her exposure to cotton dust. As McHargue correctly points out, this factual finding must find support in the testimony of Dr. Kelling, as no other witness testified that McHargue did not have an occupational disease caused by exposure to cotton dust. Although the Commission erroneously focused on actual causation rather than significant contribution, we address this assignment of error because whether the facts support the Commission's conclusion that McHargue's lung disease was not *caused* by exposure to cotton dust will bear with equal directness upon the issue of significant contribution.

McHargue's argument is as follows: (1) Dr. Kelling testified that if McHargue showed "some evidence of real obstructive lung disease on pulmonary function tests," properly conducted, then he would have to say her lung disease was caused by exposure to cotton dust; (2) Dr. Heaphy's pulmonary function test results do show "some evidence of real obstructive lung disease"; and (3) the Commission erred in rejecting Dr. Heaphy's test results. Thus, considering (2) and (3) together with (1), (1) amounts to an opinion by Dr. Kelling that McHargue's lung disease was caused by cotton dust exposure. Although this argument is compelling in isolation, McHargue has taken Dr. Kelling's testimony out of context.

On direct examination, Dr. Kelling was asked by the defendant to assume several things, including the fact that McHargue

had relatively normal lung function before her 1980 illness.[1] His conclusion was that the illness must have caused the subsequent lung obstruction. On cross examination, Dr. Kelling was asked by the plaintiff to assume the same facts as he assumed on direct, except for the assumption that McHargue exhibited relatively normal lung function from 1975 to 1980. From this, Dr. Kelling felt compelled to conclude that McHargue "could have byssinosis." Defendant's theory was that McHargue's lung function was relatively normal until her illness in 1980, and thus, the illness must have caused the lung impairment. Plaintiff's theory was that her lung function was gradually declining over the years, and thus, must have been impaired as a result of cotton dust exposure.

[2] The Commission accepted defendant's theory that plaintiff had relatively normal lung function from 1975 to 1980. It found that "prior to March of 1980, plaintiff exhibited no demonstrable degree of a decrement in her pulmonary function. . . ." This finding is supported only by the Burlington Industries test results from 1975 to 1980 and the testimony of Nurse Lumpkin that these tests were properly administered and that the results were accurate. *See* n. 1, *supra.* Dr. Kelling's medical opinions were all based on hypotheticals that either assumed the validity and accuracy of the Burlington tests (thus indicating no cotton dust causal connection) or ignored them (thus indicating that cotton dust exposure must have been the cause). We hold that, although Dr. Kelling belittled the reliability of the Burlington tests, Nurse Lumpkin's testimony provides the minimum evidence necessary to make the Burlington tests competent evidence. The Commission was free to accept the Burlington tests and conclude that McHargue had not exhibited a demonstrable degree of decrement in lung function prior to March 1980. We note, however, that this finding on remand would not resolve the issue whether McHargue's occupational exposure to cotton dust significantly contributed to the development of her lung impairment after March 1980. It is entirely possible that, although her illness in March

1. This was a proper hypothetical as it assumed facts validly in evidence. Lumpkin had already testified that the Burlington Industry pulmonary function tests between 1976 and 1980 were properly administered and the results accurate. Although McHargue objected and assigned error to Lumpkin's competency to testify, she abandoned this assignment of error by failing to argue it in her brief. App. R. 28(a). Therefore, Lumpkin's testimony must be deemed competent.

1980 was the major cause of her lung impairment, McHargue's cotton dust exposure significantly contributed to the post-illness development or severity of her physical disability. *See Rutledge.*

[3] Finally, we find merit in McHargue's argument that because no competent evidence was introduced tending to show that Dr. Heaphy's pulmonary function test results were inaccurate, it was error for the Commission to find that "pulmonary function test results obtained [after March 1980] by Dr. Heaphy and Dr. Douglas Kelling are not accurate indications of [McHargue's] pulmonary function." Although Dr. Kelling stated that because of poor patient cooperation, *his* test results were not medically accurate, there was no testimony that Dr. Heaphy's test results were not medically accurate. Although the Industrial Commission is the sole judge of credibility and weight of evidence, some competent evidence must support its findings. *See Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E. 2d 747 (1981); *see also Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 262 S.E. 2d 830, *disc. rev. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980) (although Commission may ultimately refuse to believe particular testimony, it must at least consider competent testimony, and may not wholly disregard or discount it). On remand, the Commission is to evaluate the results of the tests ordered by Dr. Heaphy according to these legal principles.

V

The opinion and award of the Industrial Commission is reversed, and the cause is remanded for further findings made in accordance with this opinion as to whether McHargue's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the development of her chronic obstructive lung disease.

Reversed and remanded.

Judges WEBB and MARTIN concur.

J. KENNETH LEE, TRUSTEE FOR MEDICAL CARE, INC., PENSION PLAN v. PARAGON GROUP CONTRACTORS, INCORPORATED

No. 8518SC401

(Filed 17 December 1985)

1. **Contracts § 14.2— contract modification—third-party beneficiary—absence of consideration**

Plaintiff, a subcontractor's lender, could not recover as a third-party beneficiary of an alleged modified contract between the contractor and the subcontractor to make checks due the subcontractor payable jointly to the subcontractor and plaintiff where the contract modification was not enforceable because it was not supported by any new consideration.

2. **Estoppel § 4— promissory estoppel as substitute for consideration—inapplicable to third-party beneficiary**

Only the promisee, and not a third-party beneficiary, may assert promissory estoppel as a substitute for consideration. Therefore, a subcontractor's lender could not assert promissory estoppel as a ground for recovery under a modified agreement between the contractor and the subcontractor that checks due the subcontractor would be payable jointly to the subcontractor and the lender.

3. **Negligence § 2— negligence in contract performance—absence of duty of care**

A subcontractor's lender could not recover against the contractor for negligence in the performance of a contract modification between the contractor and the subcontractor to make checks due the subcontractor payable jointly to the subcontractor and the lender where the contractor's promise was not supported by consideration, and the contractor thus owed no legal duty to plaintiff lender based on contract.

APPEAL by plaintiff from *Ross, Judge*. Order entered 11 January 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 October 1985.

In this civil action plaintiff alleges that he is the third-party beneficiary of a contract entered into between defendant Paragon Group Contractors, Inc. (Paragon) and P & F Drywall and Painting (P & F). He asserts that he is entitled to damages arising from defendant Paragon's breach and negligent performance of the contract.

The essential facts are:

Paragon was responsible for completing certain work at Woodstream Apartments. On 11 November 1982 Paragon entered into two contracts with P & F in which P & F agreed to perform

specified painting and drywall work for Paragon at the Woodstream project. The contracts included detailed payment terms and specified that Paragon would make payments to P & F. The total contract prices were $295,000.00 for the drywall work and $101,350.00 for painting.

After P & F commenced work on the project, it found that it needed additional monies to pay its workers and suppliers. P & F approached plaintiff for a loan. Plaintiff agreed with P & F that it would advance the money to P & F provided future checks due from Paragon to P & F were made payable jointly to P & F and the plaintiff with the exception of checks covering amounts owed to Lowe's-Greensboro.

P & F approached Paragon and requested that Paragon make future payments due P & F for work performed on the Woodstream project payable to both P & F and the plaintiff. On 3 March 1983 D. L. Morgan, Vice President of Paragon, sent the following letter to Richard Powell of P & F who signed it in the place indicated:

> Dear Mr. Powell:
>
> In accordance with your request, and effective this date, future payments due your firm for work performed under the terms and conditions of your contracts, will be made payable jointly to your company and J. Kenneth Lee, Trustee for Medical Care, Inc. Pension Fund with the exception of monies due and payable to Lowe's-Greensboro, for material purchases as they become due.
>
> Please sign in the space provided below indicating your approval.
>
> Sincerely,
> s/ D. L. Morgan
> D. L. Morgan-Vice President
>
> APPROVED: P.&F. Drywall & Painting, Inc.
>
> s/ Richard K. Powell
> Richard K. Powell

Subsequently checks due to P & F for work performed under its contracts with Paragon were issued by Paragon jointly to

P & F and Lee, jointly to P & F and Lowe's and jointly to P & F and other creditors as requested by Paragon. On 17 September 1983 the contracts between Paragon and P & F were terminated.

In count one of his complaint, plaintiff alleged that as of 17 September 1983 Paragon had paid a total of $238,908.15 to P & F. Of that sum, Paragon paid $187,229.92 to plaintiff and P & F or to P & F and Lowe's-Greensboro. Plaintiff further alleged he had been damaged when Paragon paid $51,678.23 to "parties unknown and failed, and refused to include the name of plaintiff or Lowe's in violation of said agreements." In count two plaintiff alleged that Paragon owes P & F an additional $28,653.91 for work completed prior to 17 September 1983 and that Paragon's failure to pay those sums has caused plaintiff to incur additional expenses and loss of profits and "valuable contract rights with P & F" causing injury to plaintiff in the amount of $30,000.00. In the third count of plaintiff's complaint, plaintiff alleged that Paragon negligently breached the duty and standard of care owed to the plaintiff by failing "to exercise reasonable diligence and care to see that checks due and owing to P & F were made jointly to P & F and plaintiff or Lowe's" and that Paragon "negligently and without care paid said sums to others in violation of agreements." Based on this alleged negligence, plaintiff claimed damage in the amount of $51,678.23. By his fourth and final count, plaintiff alleged that Paragon "negligently failed to account and pay over sums due for work performed pursuant to said agreements" and claimed damage in the amount of $30,000.00.

Paragon filed a motion to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Paragon's motion to dismiss was granted and plaintiff appeals.

Romallus O. Murphy for plaintiff-appellant.

Robinson, Bradshaw & Hinson, by Richard A. Vinroot and Dan T. Coenen for defendant-appellee.

EAGLES, Judge.

By his sole assignment of error, defendant contends that the trial court erred in granting defendant's motion to dismiss. We find no error.

> The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. [Citation omitted.] A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. [Citation omitted.] For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. [Citation omitted.]

Leasing Corp. v. Miller, 45 N.C. App. 400, 403-04, 263 S.E. 2d 313, 316, *cert. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980) (quoting *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 263-64, 257 S.E. 2d 50, 54 (1979)). Plaintiff asserts three alternative legal theories any one of which he contends could sustain the complaint.

a.

[1] Plaintiff seeks to recover as a third-party beneficiary on the agreement entered into between Paragon and P & F on 3 March 1983. To establish a contract claim based on third-party beneficiary doctrine, the complaint's allegations must show the existence of a valid and enforceable contract between two other persons and that the contract was entered into for the complainant's direct and not incidental benefit. *Leasing Corp. v. Miller, supra; Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233 (1955).

Plaintiff argues that the 3 March 1983 agreement constitutes a new and distinct contract between Paragon and P & F or, alternatively, constitutes a modification of their existing agreement. Plaintiff can recover as a third-party beneficiary only if the contract or modification sued upon is valid and enforceable. An enforceable contract is one supported by consideration. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). Moreover, where a contract has been partially performed, as is the case here, a modification of its terms is treated as any other contract and must also be supported by consideration. *Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981), *appeal after remand*, 59 N.C. App. 68, 295 S.E. 2d 607 (1982), *review denied*, 307 N.C. 468, 299 S.E. 2d 220 (1983). It is well established that consideration sufficient to support a contract or a modifica-

tion of its terms consists of "any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." 302 N.C. at 215, 274 S.E. 2d at 212. Consideration is the "glue" that binds parties together, and a mere promise, without more, is unenforceable. *In re Foreclosure of Owen*, 62 N.C. App. 506, 509, 303 S.E. 2d 351, 353 (1983).

Under the contract entered into 11 November 1982 between Paragon and P & F, a copy of which plaintiff attached to his complaint, P & F was legally bound to provide to Paragon the painting and drywall work outlined in the contract. The agreement of 3 March 1983 does not expand or extend P & F's existing obligation to Paragon. The 3 March 1983 agreement recites no new consideration given by P & F to Paragon and plaintiff has alleged none in his complaint. Generally, a promise to perform a preexisting contractual obligation is not adequate consideration in exchange for a new promise by the other party. *Penn Compression Moulding, Inc. v. Mar-Bal, Inc.*, 73 N.C. App. 291, 326 S.E. 2d 280 (1985). Paragon, as promisor, received no benefit, right or interest as a result of the 3 March agreement. Conversely, P & F suffered no detriment or loss. P & F was bound by its contract with Paragon to perform drywall and painting work. It was to do that and nothing more. Without consideration the promise made by Paragon to P & F was not binding in law. Without a valid and enforceable contract or modification of its terms, plaintiff, as a matter of law, cannot recover as a third-party beneficiary.

b.

[2] As a substitute for the want of consideration, plaintiff relies on the doctrine of promissory estoppel. Promissory estoppel has its roots in the nineteenth century as a generalized theory of recovery based on reliance, where gratuitous promises were first recognized as a basis for recovery. A. Farnsworth, Contracts Section 2.19 (1982). *See* J. Calamari & J. Perillo, The Law of Contracts Sections 6-1 to -7 (2d ed. 1977). While the first use of the term "promissory estoppel" is attributed to Williston, in Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. Pa. L. Rev. 459 (1950), in 1933 the American Law Institute promulgated Section 90 of the Restatement of Contracts defining detrimental reliance as a substitute for consideration. Although never denominated as the doctrine of "promissory

estoppel," Section 90 became the Restatement's most notable and influential rule. Farnsworth, *supra.* It states, in terms generally applicable to all promises, the following principle:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the *promisee* and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. [Emphasis added.]

Restatement of Contracts Section 90 (1932).

As originally drafted, promissory estoppel was applied only to two-party situations. The Restatement required that the reliance be "on the part of the promisee." However, this requirement was changed with the revision of Section 90 in the Restatement (Second) of Contracts adopted in 1979. The following version now appears as Section 90:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the *promisee or a third person* and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. [Emphasis added.]
>
> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Restatement (Second) of Contracts Section 90 (1979).

With the change of Section 90 to allow a third person, not the promisee, to assert promissory estoppel as a substitute for consideration the question becomes: Does the third party have the right to assert his own reliance to enforce a gratuitous promise made for his benefit? Since there was no consideration and consequently no contract created between promisor and promisee, the beneficiary's rights are more tenuous than in cases where consideration passed from promisee to promisor. For a discussion of promissory estoppel and third-party beneficiaries, see Note, *Should a Beneficiary Be Allowed to Invoke Promisee's Reliance to Enforce Promisor's Gratuitous Promise?*, 6 Val. U. L. Rev. 352 (1972). Before the revision of Section 90 there was debate as to

the propriety of expanding the doctrine to third parties. Professor Boyer argued against the expansion. Boyer, *supra.* Professor Corbin, on the other hand, supported the expansion so long as the named or intended beneficiaries themselves relied upon the promise and the promisor actually foresees or has reason to foresee action in reliance. 1A A. Corbin, Corbin on Contracts Section 200 (1963). The Restatement (Second) of Contracts Section 90 accepts Corbin's view and gives the beneficiary who relies upon the promise the right to invoke Section 90 against the promisor, subject to the qualifications of foreseeability and if injustice can be avoided only by enforcement of the promise.

Our research has disclosed no North Carolina cases that have recognized this expanded version of Section 90 permitting recovery by a third party. While our courts have recognized the doctrine of promissory estoppel to some extent, under the current state of the law only the promisee may assert promissory estoppel as a substitute for consideration. *Clement v. Clement*, 230 N.C. 636, 640, 55 S.E. 2d 459, 461 (1949) ("it is required to make it [the promise] effectual that the *promisee* in reliance upon the promise has been placed in a changed condition or position. . . ."; the promise "must have induced definite and substantial action on the part of the *promisee*. . . .") (emphasis added). Our courts have applied the doctrine in cases involving waiver by the promisee, *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 293 S.E. 2d 749, *reh. den.*, 306 N.C. 753, 302 S.E. 2d 884 (1982); but have denied its application in an action for breach of an employment contract, *Tatum v. Brown*, 29 N.C. App. 504, 224 S.E. 2d 698 (1976), in an action to enforce a plea bargain agreement, *State v. Collins*, 44 N.C. App. 141, 260 S.E. 2d 650 (1979), *affirmed*, 300 N.C. 142, 265 S.E. 2d 172 (1980), and in an action by citizens for an injunction against a municipal corporation, *Sykes v. Belk*, 278 N.C. 106, 179 S.E. 2d 439 (1971).

While some jurisdictions have accepted the third-party theory of recovery, see generally *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W. 2d 267 (1965); *Silberman v. Roethe*, 64 Wis. 2d 131, 218 N.W. 2d 723 (1974); *Burgess v. California Mutual Building & Loan Assn.*, 210 Cal. 180, 290 P. 1029 (1930); *Aronowicz v. Nalley's, Inc.*, 30 Cal. App. 3d 27, 106 Cal. Rptr. 424 (1972); *Lear v. Bishop*, 86 Nev. 709, 476 P. 2d 18 (1970), we decline to do so in this case.

Plaintiff's complaint reveals that he was not a party to the 3 March 1983 agreement. He is not the promisee. His reliance, if any, was based on a gratuitous promise made by Paragon to P & F. As his complaint discloses a fact which necessarily defeats his third-party beneficiary claim, the trial court properly dismissed counts I and II of plaintiff's complaint.

c.

[3] Finally, plaintiff argues that the trial court improperly dismissed the complaint because the complaint stated a cause of action for negligence. We disagree.

"Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed to the plaintiff under the circumstances surrounding them." *Dunning v. Warehouse Co.*, 272 N.C. 723, 725, 158 S.E. 2d 893, 895 (1968) (quoting *Moore v. Moore*, 268 N.C. 110, 150 S.E. 2d 75 (1966)). "The first prerequisite for recovery of damages for injury by negligence is the existence of a legal duty, owed by the defendant to the plaintiff, to use due care." *Meyer v. McCarley and Co.*, 288 N.C. 62, 68, 215 S.E. 2d 583, 587 (1975).

As plaintiff properly asserts in his brief, negligent performance of a contract may give rise to an action in tort as well as breach of contract. *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981). However, there was no consideration given for Paragon's promise to P & F and no contractual obligation arose out of the 3 March 1983 agreement. As a result, Paragon owed no legal duty to the plaintiff based on contract. Further, the complaint alleges no circumstances from which a duty, owed by Paragon to plaintiff, could be implied. Whether a duty to use care is owed by one party to another, and the degree of care required, depends upon the relationship between the parties. *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53 (1966). Here, nothing is alleged in plaintiff's complaint to indicate that any relationship ever existed between the plaintiff and the defendant. They both dealt with P & F but never dealt with each other. Since plaintiff's complaint fails to show any duty owed by defendant to plaintiff, the trial court properly dismissed counts III and IV of plaintiff's complaint.

d.

We note that the record contains the affidavit of Donald L. Morgan, vice president of Paragon. This affidavit is incorporated by reference into defendant's memorandum in support of its motion to dismiss. The trial judge's order granting defendant's motion to dismiss states that he considered "the pleadings, memoranda and arguments of counsel presented." This may have included consideration of defendant's affidavit, the consideration of which would convert the motion to dismiss to a summary judgment motion. G.S. 1A-1, Rule 56. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Assuming *arguendo* that the trial court considered the affidavit of defendant, after reviewing all the evidence contained in the record under the standard set forth in G.S. 1A-1, Rule 56, we conclude that there is no genuine issue of material fact and the defendant would be entitled to judgment as a matter of law.

Affirmed.

Judges WHICHARD and COZORT concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. RONNIE WAYNE LAND, JESSIE H. PRUITT, ARCHIE ROLAND TALLEY, NORTH CAROLINA NATIONAL BANK AND LUMBERMENS MUTUAL CASUALTY COMPANY

No. 8517SC161

(Filed 17 December 1985)

1. **Insurance § 87; Landlord and Tenant § 5; Trover and Conversion § 1— leased automobile—default and failure to return—no coverage under lessor's insurance**

In a declaratory judgment action to determine whether an automobile insurance policy written by plaintiff for NCNB as an automobile lessor covered a collision, the trial court erred by concluding that Talley was operating the automobile as NCNB's lessee at the time of the collision where the relationship of lessor and lessee had ceased to exist because Talley's continued possession of the automobile after NCNB had given him notice that he was in default and demanded possession was adverse to the rights of NCNB as owner and lessor and amounted to a conversion of the automobile. N.C.G.S. 20-281, N.C.G.S. 20-279.21(b)(2).

2. Insurance § 87.2— leased automobile—breach of lease—continued operation not with permission of lessor—not covered by lessor's insurance

In a declaratory judgment action to determine whether a policy plaintiff had issued to NCNB as an automobile lessor covered an accident which occurred after the lessee breached the lease, the trial court erred by concluding that NCNB was insufficiently aggressive in its efforts to recover the automobile after default, that its efforts were ineffective to revoke the permission initially given to the lessee to operate the car, that its conduct signified assent to the lessee's use of the car, and that the lessee was therefore driving the car with NCNB's permission when the accident occurred. NCNB had employed an automobile recovery agency in an attempt to locate the car, had contacted the lessee's relatives and acquaintances, had procured a warrant for the lessee's arrest, and had notified the Winston-Salem Police Department. It was not unreasonable for NCNB to rely on one law enforcement agency to seek the assistance of others and the mere fact that the lessee possessed a license plate and a registration showing NCNB as the owner of the car at the time of the accident did not support the conclusion that NCNB acquiesced in the lessee's operation of the automobile absent findings as to how he came into possession of the license plate and registration. N.C.G.S. 20-279.21(b)(2).

APPEAL by plaintiff from *Morgan, Judge.* Judgment entered 19 November 1984 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 24 September 1985.

This is a declaratory judgment action instituted by Nationwide Mutual Insurance Company (Nationwide) to determine whether it provided coverage, under a policy issued to North Carolina National Bank (NCNB), for injuries sustained by Ronnie Wayne Land and Jessie H. Pruitt in an automobile collision occurring in South Carolina on 12 April 1981. Land and Pruitt were injured when the automobile which they occupied collided with a 1979 Chrysler automobile owned by NCNB and driven by Archie Roland Talley. Lumbermens Mutual Casualty Company provides uninsured motorists coverage for Land and Pruitt.

All parties waived a jury trial. The trial court entered judgment declaring that Nationwide provided coverage, pursuant to G.S. 20-281 and its policy, for "legal liability of Archie Roland Talley for personal injury and property damage arising out of the operation of NCNB's 1979 Chrysler automobile on April 12, 1981 . . . ." Nationwide appeals.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by James H. Kelly, Jr. and Michael L. Robinson for plaintiff appellant.

Tuggle, Duggins, Meschan & Elrod, P.A., by Kenneth R. Keller and J. Reed Johnston, Jr. for defendant appellees.

MARTIN, Judge.

The ultimate issue to be decided in this appeal is whether Nationwide's policy issued to NCNB affords coverage to Archie Roland Talley for liability incurred while he was operating an automobile owned by NCNB. The answer to that issue depends upon whether Talley was operating the automobile as NCNB's lessee, so as to be within coverage required by G.S. 20-281, or with NCNB's permission, so that he would be an "insured" within the provisions of the policy itself. For the reasons which follow, we conclude that Talley was neither a lessee nor an insured. Accordingly, we reverse the judgment of the trial court.

From the stipulations of the parties, and the evidence presented at trial, the trial judge found the following pertinent facts: On 7 December 1979, Talley leased the 1979 Chrysler automobile from NCNB for a period of three years. The lease provided for a monthly rental fee to be paid by Talley and required that he maintain insurance, including liability insurance, on the automobile. The lease provided that a breach of either of these conditions, as well as the occurrence of other specified events, would constitute "events of default." Upon the occurrence of an "event of default" NCNB had a right to terminate the lease without releasing Talley from any of his obligations thereunder, and to demand and receive immediate possession of the automobile.

Talley made four rental payments on the automobile, paying the monthly rental fee through February, 1980. Talley also procured a policy of insurance on the vehicle from another insurance company, however he did not pay the required premium and his insurance policy was cancelled in June, 1980, effective 15 May 1980.

In March, 1980, NCNB became aware that Talley was being sought by law enforcement officials for a felony allegedly com-

mitted in South Carolina. Due to that information and to Talley's default in the payment of rental for March, 1980, NCNB undertook to try and locate Talley and the vehicle. On 28 March 1980 NCNB was informed by Talley's employer that Talley had quit his job and left Winston-Salem. NCNB then contacted the Automobile Recovery Bureau in Atlanta for assistance in locating Talley and repossessing the automobile. On 2 April 1980 NCNB sent a letter to Talley at his address in Winston-Salem, which was shown in the lease. The letter, stipulated into evidence, advised Talley that he was in default, demanded payment of the balance due and demanded that he surrender "any collateral which secured the account above identified." NCNB also contacted Talley's former wife and others who knew him in South Carolina and in Georgia, and relayed information obtained from those contacts to the Automobile Recovery Bureau in Atlanta. On 25 July 1980 the Recovery Bureau notified NCNB that they had been unable to locate Talley or the automobile. On 20 August 1980 NCNB obtained a warrant, in Forsyth County, for Talley's arrest. The warrant alleged that Talley had obtained possession of the Chrysler automobile by fraud, in violation of G.S. 20-106.1. NCNB did not contact any law enforcement agency other than in Forsyth County relative to Talley or the automobile.

When the automobile was leased, NCNB caused it to be titled and registered with the North Carolina Department of Motor Vehicles in NCNB's name. On 12 April 1981, Talley was operating the 1979 Chrysler in South Carolina and collided with a vehicle occupied by Land and Pruitt. At the time of the collision, the 1979 Chrysler displayed a current North Carolina license plate and inspection sticker and Talley was in possession of a current registration card identifying NCNB as the owner of the automobile. The car had not been reported as a stolen vehicle in South Carolina.

Both Land and Pruitt commenced actions against Talley in the Court of Common Pleas of Horry County, South Carolina, alleging that they suffered personal injuries as a result of Talley's negligent operation of the 1979 Chrysler automobile. Lumbermens Mutual Casualty Company provided uninsured motorist coverage to them.

Upon those facts, the trial court concluded, *inter alia:*

6. At the time of the accident on April 12, 1981, Archie Roland Talley was a lessee of NCNB, operating the 1979 Chrysler automobile as a member of the public subject to and within the meaning of G.S. § 20-181.

7. Nationwide is required by G.S. § 20-181 to provide insurance coverage, up to the face amount of Nationwide's policy 61-GA-640-273-0002 ($500.00 [sic] for bodily injury/$250,000 for property damage) for liability imposed by law for bodily injury or property damage arising out of the operation of the 1979 Chrysler automobile by Archie Roland Talley, specifically including personal injury and property damage sustained by Ronnie Wayne Lane [sic] and Jessie H. Pruitt.

8. Archie Roland Talley had initial permission from NCNB to operate the 1979 Chrysler automobile.

9. NCNB was insufficiently aggressive in seeking to recover the 1979 Chrysler automobile and allowed the vehicle to be registered with the North Carolina Department of Motor Vehicles and display a current safety inspection sticker for year 1981.

10. NCNB's course of conduct constitutes mutual acquiescence or lack of objection signifying assent to the operation of the 1979 Chrysler automobile by Archie Roland Talley at the time of the accident on April 12, 1981.

11. NCNB's efforts were ineffective to revoke initial permission to Archie Roland Talley to operate the 1979 Chrysler automobile on April 12, 1981.

12. Archie Roland Talley had permission from NCNB to operate the 1979 Chrysler on April 12, 1981.

13. Alternatively, Nationwide provides voluntary coverage under policy 61-GA-640-273-0002 with NCNB for legal liability of Archie Roland Talley arising out of the operation of the 1979 Chrysler automobile on April 12, 1981, up to the limits of Nationwide's policy ($500,000 bodily injury/$250,000 property damage).

I

[1] Nationwide excepts and assigns error to the trial court's conclusions of law that Talley was, on 12 April 1981, operating the

automobile as NCNB's lessee and that Nationwide is therefore required, pursuant to G.S. 20-281, to provide coverage. Nationwide contends that the court's conclusion that Talley was NCNB's lessee on the date of the accident is unsupported by the evidence and the court's findings. We agree.

G.S. 20-281 requires every person, firm or corporation engaged in the business of renting or leasing automobiles to the public to maintain motor vehicle liability insurance. The statute provides in part:

> Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee . . . from any liability imposed by law for damages . . . because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle . . . .

The provisions of the statute are a part of Nationwide's policy issued to NCNB. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 68 N.C. App. 668, 316 S.E. 2d 105, *disc. rev. allowed*, 311 N.C. 750, 321 S.E. 2d 125 (1984).

G.S. 20-281 would apply, and require the extension of coverage to Talley, if Talley was NCNB's lessee at the time of the accident. The trial court found, however, that Talley made only four rental payments, the last of which was made on 25 January 1980. The court also found that NCNB mailed Talley, at his last known address, correspondence by which NCNB declared him to be in default and demanded possession of the automobile. The lease gave NCNB the right to terminate upon default by non-payment and to demand and receive possession of the automobile. Talley's continued possession of the automobile, after NCNB had given him notice that he was in default and demanded possession of the automobile, was adverse to the rights of NCNB as owner and lessor and amounted to a conversion of the automobile. The relationship of lessor-lessee ceased to exist. Therefore, the trial court erred in concluding that Talley was operating the automobile as NCNB's lessee at the time of the collision, some twelve months after the lease had been terminated by reason of his default. Since Talley was not operating the 1979 Chrysler as NCNB's lessee, Nationwide is not required by G.S. 20-281 to extend coverage for personal injuries caused by his operation of that

automobile. *See Iowa Nat'l Mut. Ins. Co. v. Broughton*, 283 N.C. 309, 196 S.E. 2d 243 (1973).

Our holding should not be construed as relieving an insurer, who issues a policy to satisfy the requirements of G.S. 20-281, from its duty to provide coverage for a lessee upon a mere breach of an automobile lease agreement, or even upon a default in its terms. We believe that the Legislature intended that coverage under G.S. 20-281 should be extended until such time as there has been a clear termination of the relationship of lessor-lessee. Such a rule would be consistent with the view of our Supreme Court, adopted in cases involving questions of permissive use under G.S. 20-279.21(b)(2), that a minor deviation from the permitted use of a vehicle will not defeat coverage, but a material deviation from the permission given constitutes a use without permission. *See Hawley v. Indemnity Ins. Co. of North America*, 257 N.C. 381, 126 S.E. 2d 161 (1962); *Fehl v. Aetna Casualty & Sur. Co.*, 260 N.C. 440, 133 S.E. 2d 68 (1963).

II

[2] In the alternative, the trial court concluded that NCNB was "insufficiently aggressive" in its efforts to recover the automobile after Talley defaulted, that its efforts were ineffective to revoke the permission initially given him to operate the car, that its conduct signified assent to Talley's use of the car and, therefore, that Talley was driving the car on 12 April 1981 with NCNB's permission. The court further concluded that Nationwide, under the terms of the policy which it issued to NCNB, provided "voluntary coverage" to Talley.

Nationwide contends that these conclusions of law are likewise not supported by the facts found by the court. Again, we find ourselves in agreement with its contentions.

Nationwide's policy provided coverage to "any person while using an . . . automobile . . . with the permission of . . ." NCNB. As an owner's policy of motor vehicle liability insurance, the coverage provided by Nationwide's policy is extended by G.S. 20-279.21(b)(2) to include "any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured, or any other persons in lawful possession . . . ." Thus, in order for coverage to be extended, under the

terms of the policy and pursuant to G.S. 20-279.21, for Talley's negligent operation of NCNB's Chrysler, Talley must have had either express or implied permission to operate it, or he must have been in lawful possession of it.

As we have previously pointed out, Talley was not in lawful possession of the automobile. NCNB had declared the lease to be in default, demanded possession of the automobile and given Talley notice of its actions at his last known address as shown in the lease. Talley continued in possession and successfully avoided efforts to locate him or the automobile. His possession was violative of G.S. 20-106.1, G.S. 14-167 and G.S. 14-168.1.

According to the facts found by the trial court, NCNB employed an automobile recovery agency in an attempt to locate the car and contacted various of Talley's relatives and acquaintances in its attempts to locate him. Failing in its efforts, NCNB procured a warrant for Talley's arrest. Although the court found that NCNB did not notify the North Carolina, South Carolina or Georgia highway patrols, NCNB did notify the Winston-Salem Police Department. We do not believe it unreasonable for NCNB to rely on one law enforcement agency to seek the assistance of others. Certainly there were additional measures which NCNB could have taken to recover the car, however, we conclude that those which the court found were taken were not so perfunctory as to support its conclusion that NCNB was "insufficiently aggressive."

The trial court also found that at the time of the accident, the 1979 Chrysler displayed a 1981 license plate and Talley was in possession of a valid 1981 registration card showing NCNB as the owner. However, there was no evidence, nor was there any finding, as to how Talley came into possession of the license plate and registration, or that NCNB knowingly provided him with them. Absent such additional findings, the mere fact that Talley possessed the license and registration does not support the court's conclusion that NCNB acquiesced in, or did not object to, Talley's operation of the automobile. Moreover, we hold that NCNB's efforts to secure the return of its automobile and to locate and contact Talley were sufficient to constitute a revocation of its initial permission given Talley to operate the car.

Permission to use an automobile may be express, or may be implied from a course of conduct between the parties. *Bailey v.*

General Ins. Co. of America, Inc., 265 N.C. 675, 144 S.E. 2d 898 (1965). However, the relationship between the owner and the user has a substantial bearing on the question of whether the owner has granted implied permission. *Id.* Talley's initial use of this automobile was permitted under the terms of a written lease and was subject to the terms thereof. Once he defaulted and failed to return the car as demanded by NCNB, his continued use was a material deviation from the permission granted in the lease. As such, it was not a permissive use within the meaning of the policy or G.S. 20-279.21(b)(2). *See Wilson v. Hartford Accident and Indem. Co.*, 272 N.C. 183, 158 S.E. 2d 1 (1967). Thus, Talley's operation of the automobile at the time of the collision with Land and Pruitt was not within the coverage provided by Nationwide's policy and the trial court erred in concluding that it was.

Notwithstanding the strong public policy of this State to provide financial protection to persons injured by the negligent operation of automobiles by financially irresponsible drivers, considerations of public policy are not unlimited. G.S. 20-279.21(b)(2) does not permit victims of accidents to recover from the owner of a motor vehicle, or his insurer, where the offending driver of the vehicle had neither permission to drive it nor lawful possession of it.

Reversed.

Judges ARNOLD and WELLS concur.

BOBBY J. CHASTAIN AND WIFE, GLORIA T. CHASTAIN v. ELIZABETH D. WALL

No. 8511DC213

(Filed 17 December 1985)

1. Unfair Competition § 1— unfair trade practice—sale of fabric store—patterns on consignment—representations by owner

In an action for damages arising from defendant's conduct in the sale of her business to plaintiffs which plaintiffs alleged constituted unfair or deceptive acts under N.C.G.S. 75-1.1, evidence was sufficient for the jury to find that defendant represented to plaintiffs that she owned certain patterns, racks

and cabinets which in fact belonged to various pattern companies where such evidence tended to show that plaintiffs attempted to find out if any patterns were held by defendant on consignment; defendant indicated that nothing was held on consignment, that everything was all hers; but many patterns were on standing debit with pattern companies.

2. **Unfair Competition § 1— sale of fabric store—conduct having capacity to deceive**

In an action to recover for an unfair or deceptive trade practice committed by defendant in the sale of her business, plaintiffs were not required to allege fraud or misrepresentation on the part of defendant; rather, it was sufficient that defendant's assertions with regard to her ownership of patterns in her fabric store, combined with her denials that any items were held on consignment and her signed affidavit that there were no debts or other obligations which constituted a lien on any of the assets sold, constituted conduct which had the capacity or tendency to deceive and mislead.

3. **Unfair Competition § 1— unfair trade practice—instructions proper**

There was no merit to defendant's contention that the trial court failed properly to instruct the jury so as to enable them to determine facts which constituted unfair or deceptive acts, and the trial court's error in submitting an issue as to whether defendant's conduct was in commerce or affected commerce was harmless error.

APPEAL by defendant from *Pridgen, Judge*. Judgment entered 17 September 1984. Heard in the Court of Appeals 27 September 1985.

This is an action for damages arising from defendant's conduct in the sale of her business to the plaintiffs which plaintiffs allege constitutes unfair or deceptive acts under G.S. 75-1.1, entitling plaintiffs to treble damages.

On 3 May 1983 defendant sold her retail fabric business in Sanford, known as "Lib's Stitchery" to the plaintiffs for the sum of $29,000.00. The business sold consisted of all inventory, including all fabrics, patterns, cabinets, racks and notions. The defendant did not own the real property where the business was located. Excluded from the sale were the store's sign and name, a refrigerator, copy machine, and several personal items located on the premises belonging to the defendant. As part of the sale agreement, the defendant agreed not to operate any retail fabric business in the city of Sanford for a period of five years beginning 1 May 1983.

Prior to the sale, defendant employed Clara Peterson, a real estate broker, to list the defendant's business for sale. Ms. Peter-

son located the plaintiffs as prospective purchasers. The evidence presented at trial showed that the plaintiffs, Mr. and Mrs. Chastain, dealt with defendant through the real estate broker. Except for one visit to the store by Mr. Chastain and two visits to the store by Mrs. Chastain, all negotiations and inquiries were handled through Ms. Peterson.

During the sale negotiations, Mr. Chastain, through Ms. Peterson, requested that defendant prepare an itemized list of all the inventory. The defendant prepared the inventory list, with some assistance from Ms. Peterson. The total retail value of the business inventory as indicated by defendant's inventory list totaled $67,056.34. Eventually, a contract was entered into to sell the business assets for $30,000.00. Ultimately, the sale closed for $29,000.00, $1,000.00 less than the agreed upon sales price apparently because of delay. At closing the defendant signed an affidavit stating that she had incurred no debt or other obligation which constituted a lien against any of the property transferred.

Following the close of the sale, the plaintiffs learned that certain items including all the McCall, Butterick, and Simplicity patterns and certain racks and cabinets which had been included in the inventory list having a value of $3,181.50 (at cost), were not owned by the defendant but were held by her on a standing debit. The debits represented the unpaid portion of the merchandise in stock and were carried by the various pattern companies at various annual interest rates charged to the customer.

According to plaintiff's Exhibit 6, a letter from the Simplicity Pattern Company to Mrs. Chastain dated 27 May 1983, upon the sale of the business assets, including the pattern stock, it is customary for the purchaser to assume the standing debit. Assumption of the standing debit is accomplished by reducing the inventory of patterns, racks and cabinets on hand by the amount of the standing debit.

Defendant testified that she notified the pattern companies that she was selling and transferring the standing debits to new purchasers. The inventory list prepared by the defendant included all items subject to the standing debits. No exceptions were made on the list for items held on standing debit. Defendant's testimony was that she deducted the items on standing debit from the total inventory of $67,056.34 in negotiating the sales

price. However, plaintiffs' evidence showed that they based their negotiated purchase offer on one-half the retail value of the inventory. The actual value of the retail inventory owned by the defendant and available for sale totaled approximately $63,894.00.

The jury found facts in favor of the plaintiffs and determined the amount of damages to be $3,118.50. The trial judge determined as a matter of law that the defendant's conduct constituted an unlawful, deceptive act within the meaning of G.S. 75-1.1 and trebled the damages to $9,688.14 plus interest from date of judgment. The trial judge also awarded plaintiff attorney fees in the amount of $700.00. From entry of the final judgment defendant appeals.

Gerald E. Shaw for plaintiff-appellees.

A. B. Harrington, III, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns error to the trial court's denial of her motion for a directed verdict. Defendant contends that the evidence established as a matter of law that defendant did not misrepresent or fraudulently misrepresent the property sold. We disagree.

In determining the sufficiency of evidence to withstand a defendant's motion for directed verdict, the court must consider all the evidence supporting the plaintiffs' claim in the light most favorable to the plaintiffs, giving them the benefit of every reasonable inference and resolving contradictions, conflicts and inconsistencies in their favor. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E. 2d 843-44 (1978). Applying this test to the facts of this case, it is clear that the evidence was sufficient to go to the jury. The evidence provided an adequate basis from which the jury could find that the defendant knowingly represented to the plaintiffs that she owned certain cabinets, racks and patterns when in fact she did not.

Plaintiffs' evidence tended to show that plaintiff Bobby Chastain asked the defendant's agent Peterson to find out if the pat-

terns in the store were held on consignment; that Peterson inquired of the defendant both by phone and in person at the store and the defendant said "They are all mine and they represent a lot of money"; that Peterson told Bobby Chastain that the patterns belonged to the defendant and were not held on consignment; that some time after the sale the parties met and discussed what the plaintiffs' had learned about the standing debits and that defendant stated "Maybe I didn't present it properly, because I know all of the patterns were not mine to sell"; that the inventory list the Chastains reviewed did not make exceptions for any items not owned by the defendant or held by her on consignment; that Mr. Chastain asked Peterson if anything was on consignment and Peterson relayed that the defendant said nothing was on consignment; that Bobby Chastain believed the term standing debit meant consignment; that plaintiffs relied on the retail inventory total of $67,056.34; that Bobby Chastain always communicated with defendant's agent Peterson and not the defendant.

The defendant's evidence tended to show that Peterson was her agent in the sale of the business; that defendant did not discuss standing debits with Bobby Chastain; that she prepared the inventory list with some assistance from Peterson and that the list included certain items held on standing debit with pattern companies; that before the sale closed defendant explained standing debits twice to Peterson and twice to Mrs. Chastain; that she explained the difference between consignment and standing debits; that the defendant showed Mrs. Chastain letters from Simplicity and the contract about standing debits before the sale closed; that the defendant asked Mrs. Chastain to take the contract to her husband.

Plaintiffs' rebuttal evidence tended to show that Mrs. Chastain visited the store twice before the sale closed; that her daughter asked the defendant if the patterns were on consignment and that defendant replied, "No, they are on standing debit"; that defendant did not explain standing debits and did not give Mrs. Chastain any papers; that Mrs. Chastain told her husband what defendant said; that Bobby Chastain called agent Peterson to inquire about standing debits because the plaintiffs did not understand; that Peterson responded that nothing was on consignment; that the Chastains only dealt with agent Peterson; that

defendant told Peterson "the patterns represent a lot of money. They are all mine, not on consignment"; that defendant "went through some mumble of some kind about the debits, and she couldn't really explain, and then she said 'they are not charging and they are not paying; the patterns are mine, nothing is on consignment' "; that defendant insisted that everything was clear and what was in the store was paid for.

Plaintiffs' only claim for relief was that the defendant's conduct constituted a deceptive act proscribed by G.S. 75-1.1. The evidence, considered in the light most favorable to the plaintiffs, was clearly sufficient to go to the jury. Likewise it was an adequate evidentiary basis and from which the jury could find that the defendant represented to the plaintiffs that she owned certain patterns, racks and cabinets which, in fact, belonged to various pattern companies.

II

Defendant next assigns error to portions of the charge relating to misrepresentation and fraud. The record reveals that defense counsel made only one objection. This objection was made at the charge conference and related to the trial court's instructing the jury on unfair and deceptive trade practices (G.S. 75-1.1). The record is silent as to any further objections by defense counsel with respect to jury instructions. Defendant merely sets out an "exception" in the record. This objection is waived by operation of Rule 10(b)(2) of the Rules of Appellate Procedure. *Lee v. Keck*, 68 N.C. App. 320, 315 S.E. 2d 323, *cert. denied*, 311 N.C. 401, 319 S.E. 2d 271 (1984). Failure to object to the instructions given constitutes a waiver of the right to challenge the instructions on appeal. *Id.*

III

Defendant's last assignments of error are that the trial court erred in submitting the issue of unfair and deceptive trade practices to the jury. We disagree.

Defendant contends that the evidence established as a matter of law that the defendant did not commit unfair or deceptive trade practices in that she did not make any misrepresentations, fraudulent or otherwise in the sale of her business to the plaintiffs. In support of this contention the defendant basically makes

two arguments: (1) that the plaintiffs, in their complaint, did not allege fraud or misrepresentations, and (2) that the court failed to adequately instruct the jury to enable them to determine facts which might constitute unfair or deceptive practices.

a.

[2] As to defendant's first argument, it is not required that the plaintiffs allege fraud or misrepresentation on the part of the defendant. In order "to succeed under G.S. 75-1.1, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E. 2d 1, 7 (1981). Intent of the defendant and good faith are irrelevant. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). A practice or act "is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." *Id.* at 548, 276 S.E. 2d at 403. Even a truthful statement can be deceptive, if it has the capacity or tendency to deceive. "Though words and sentences may be framed so that they are literally true, they may still be deceptive." *Johnson v. Insurance Co.*, 300 N.C. 247, 265, 266 S.E. 2d 610, 622 (1980).

The plaintiffs' evidence showed that the defendant, through her agent Peterson, told the plaintiffs that the patterns represented a lot of money and that they belonged to her. This assertion, combined with her constant denials that any items were held on consignment and her signed affidavit that there were no debts or other obligations that constituted a lien on any of the assets sold, constitutes conduct that has the capacity or tendency to deceive and mislead.

b.

[3] Defendant's second argument, that the trial court failed to properly instruct the jury so as to enable them to determine facts which constituted unfair or deceptive acts, is without merit.

Four issues were submitted to the jury:

1. Did the defendant, Wall, represent to the plaintiffs, Bobby J. Chastain and Gloria T. Chastain, that she owned

certain cabinets, racks and patterns which were, in fact, the property of various pattern companies?

ANSWER: YES

2. Was defendant Wall's conduct in commerce or did it affect commerce?

ANSWER: YES

3. Was defendant's conduct a proximate cause of plaintiffs' injury?

ANSWER: YES

4. What amount, if any, have the plaintiffs Chastain been injured?

ANSWER: $3,118.50.

In cases under G.S. 75-1.1 and 75-16 the jury finds facts and based on the jury's findings, the court then determines as a matter of law whether the defendant's conduct violated G.S. 75-1.1. *Love v. Pressley, supra; Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Here the jury properly found facts that the defendant represented to the plaintiffs that she owned certain patterns, cabinets and racks which were, in fact, the property of various pattern companies; that the defendant's conduct was the cause of plaintiffs' injury; and that the amount of injury totaled $3,118.50, the cost value of the disputed items. While the trial judge erred in submitting the commerce issue to the jury because it is a part of the court's finding that the acts or conduct proven do or do not constitute an unfair or deceptive act within the meaning of G.S. 75-1.1, *Hardy v. Toler, supra*, it is harmless error from which the defendant suffered no prejudice.

For the reasons stated, we find

No error.

Judges WHICHARD and COZORT concur.

H. K. MARTIN AND DOROTHY J. MARTIN v. HOUSTON HARE, D/B/A HOUSTON'S BOAT EQUIPMENT AND MOVING, AND DWAYNE CRAVENS

No. 8518SC322

(Filed 17 December 1985)

1. **Rules of Civil Procedure § 15— amendment to deny earlier admission—not allowed—no abuse of discretion**

The trial court did not abuse its discretion in an action for damages to a boat being hauled from the Ohio River to Lake Norman by refusing to allow defendant Hare to amend his answer and deny an earlier admission that defendant Cravens was transporting the houseboat as the agent, servant, and employee of defendant Hare and was acting within the scope of his agency. Granting the amendment almost two years and eight months after defendants' original answer, when the case was almost ready for trial, would have resulted in undue delay and prejudice to the plaintiffs. N.C.G.S. 1A-1, Rule 15(a).

2. **Evidence § 48.3— marine surveyor—opinion on overland transportation of boat—general objection—no error**

The trial court did not err in an action for damages to a boat being transported from the Ohio River to Lake Norman by admitting the testimony of an expert in marine surveying on the question of whether the boat was properly hauled. Defendants' general objection will not support exclusion of the testimony based on a lack of expertise under the facts of this case; moreover, the testimony would have been admissible under N.C.G.S. 8C-1, Rule 701 (1983), because it was rationally based on the witness's perception and it was helpful in determining a crucial fact in issue at trial.

3. **Bailment § 3.3— overland transportation of boat—prima facie case of bailment**

Plaintiffs established a prima facie case of bailment and the trial court was required to instruct on that issue in an action arising from the transportation of a boat from the Ohio River to Lake Norman where the boat was delivered to defendants; defendants accepted delivery and took possession of the boat when they placed it on a trailer and transported it to North Carolina; defendants maintained exclusive possession and control of the boat from the time they took delivery until the time they arrived at Lake Norman; and the evidence indicated that the boat was in a damaged condition when it was returned to plaintiffs. Personal delivery of the boat by plaintiffs to defendants was not required for a bailment to exist.

4. **Appeal and Error § 24— failure to object to erroneous instruction—not reviewable on appeal**

Defendants could not raise on appeal an alleged erroneous instruction where they did not object at trial. N.C. Rules of App. Procedure Rule 10(b)(2).

5. **Damages § 17.8— damages to boat—damage for loss of use—evidence insufficient**

The trial court did not err in an action for damages a houseboat suffered during its transfer from the Ohio River to Lake Norman by refusing to in-

struct the jury on loss of use damages. Although plaintiffs do not have to actually rent a substitute to recover loss of use damages for a pleasure vehicle, plaintiffs in this case failed to present sufficient evidence to prove loss of use damages.

APPEAL by defendant from *Washington, Judge.* Judgment entered 27 August 1984, *nunc pro tunc*, 23 August 1984, in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 October 1985.

Henson, Henson & Bayliss by Perry C. Henson, Jr., for plaintiff appellees.

Wyatt, Early, Harris, Wheeler & Hauser by A. Doyle Early, Jr., and Frederick G. Sawyer for defendant appellants.

COZORT, Judge.

Plaintiffs sued for damages to their boat occurring during the defendants' hauling of the boat from the Ohio River to Lake Norman. The jury awarded $36,500 to the plaintiffs. Defendants appealed, alleging the improper admission of testimony regarding whether the boat was improperly hauled on the trailer, and assigning error to the trial court's jury instructions on bailment. On cross-appeal, the plaintiffs contend the trial court erred by refusing to give a requested instruction on loss of use damages. For reasons stated below, we find no error. The essential facts follow:

In May of 1981, plaintiffs purchased a 57-foot Carl Craft houseboat, named the "Ante-Up," for $53,500. The houseboat was docked on the Ohio River near Cincinnati, Ohio. The plaintiffs contracted with the defendant, Houston Hare, to have the boat hauled from Ohio to the Commodore Marina, located on Lake Norman, near Mooresville, North Carolina. Prior to purchasing the houseboat, the plaintiffs had Peer Krueger, a yacht broker, perform a marine survey of the boat. At trial, Krueger was admitted as an expert in the field of marine surveying. Krueger found the houseboat to be in above average condition and very well maintained. He noted no deficiencies in the houseboat.

On 21 May 1981, defendant Cravens, an employee of defendant Hare, loaded the boat onto a 42-foot-long trailer. The boat was loaded by backing the trailer in the water and driving the boat onto the trailer. The boat hung over the end of the trailer approx-

imately 15 feet. In spite of concerns about the 15-foot overhang, the defendants transported the boat 537 miles from Cincinnati to Lake Norman.

Upon arrival at Lake Norman, the owner of the Commodore Marina noticed some damage to the boat. Plaintiffs refused to accept delivery of the boat. The boat was placed on braces to keep any additional damage from occurring. Eventually, the boat was placed in the water at the marina.

Peer Krueger inspected the boat after its arrival while it was still on the trailer. Krueger noted severe cracks in the deck, parting of the aft section of the boat from the whole boat, and other substantial damage. Plaintiffs sent the boat to the manufacturer in Tennessee, who charged plaintiffs over $19,000 to repair the boat.

Plaintiffs alleged that the boat was damaged due to the negligence of the defendants in transporting the boat on a trailer too short for the purposes for which it was utilized. The defendants denied any negligence and counterclaimed for breach of contract because plaintiffs never paid defendants for transporting the boat. The jury returned a verdict in favor of plaintiffs and awarded damages in the amount of $36,500. On the defendants' counterclaim, the jury returned a verdict in favor of the plaintiffs, and awarded no damages to defendants.

The defendants present four assignments of error on appeal: (1) the trial court erred by denying defendants' motion to amend their answer; (2) the trial court erred in admitting the testimony of Peer Krueger that in his opinion the houseboat was improperly hauled; (3) the trial court erred in instructing the jury on bailment; and (4) the trial court improperly submitted a stipulated fact as an issue to the jury. By way of cross-appeal, the plaintiffs assert that the trial court erred by failing to give a requested instruction on loss of use damages. We overrule all assignments of error.

[1] Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend. *Roberts v. Memorial Park*, 281 N.C. 48, 56-57, 187 S.E. 2d 721, 725-26 (1972). A motion to amend is

directed to the discretion of the trial court. *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E. 2d 444, 448 (1982). The exercise of the court's discretion is not reviewable absent a clear showing of abuse. *Id. See also Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979).

Defendants sought to amend their answer and deny an earlier admission. In their original answer, defendant Hare admitted that defendant Cravens was transporting the houseboat as the agent, servant, and employee of the defendant Hare and was acting within the scope of his agency. In the proposed amendment, filed almost two years and eight months after the original answer was filed, defendants sought to deny any employee, servant, or agency relationship between Hare and Cravens. The trial court summarily denied the amendment stating no reasons for the denial.

The failure of the trial court to state specific reasons for denial of the motion to amend does not preclude this Court from examining the reasons for denial. *Kinnard v. Mecklenburg Fair*, 46 N.C. App. 725, 266 S.E. 2d 14, *aff'd*, 301 N.C. 522, 271 S.E. 2d 909 (1980). "In the absence of any declared reason for the denial of leave to amend, this Court may examine any apparent reasons for such denial." *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 42-43, 298 S.E. 2d 409, 411 (1982), *pet. disc. rev. denied*, 308 N.C. 194, 302 S.E. 2d 248 (1983). Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. *Id.* at 42-43, 298 S.E. 2d at 411-12; *Bryant v. Nationwide Mutual Fire Ins. Co.*, 67 N.C. App. 616, 618, 313 S.E. 2d 803, 806 (1984), *modified on other grounds*, 313 N.C. 362, 329 S.E. 2d 333 (1985).

Under the facts of this case denial of defendants' motion to amend was not an abuse of discretion. At the time the amendment was filed, this case was almost ready for trial. The granting of the amendment almost two years and eight months after defendants' original answer would have resulted in undue delay and prejudice to the plaintiffs. Defendants have not carried their burden of proving that the trial court abused its discretion in denying defendants' motion to amend.

[2] Defendants' second assignment of error concerns the admission of Peer Krueger's opinion testimony on whether the boat was properly hauled. The substance of the testimony is the following:

> Q. Did you see the boat on the trailer?
>
> A. Yes, I did.
>
> Q. Do you have an opinion satisfactory to yourself, as to whether the manner in which that boat was transported on that trailer was proper?
>
> [DEFENDANTS' COUNSEL]: Objection.
>
> COURT: Overruled. Subject to cross examination.
>
> * * * *
>
> Q. Do you have an opinion?
>
> A. As to what?
>
> Q. As to whether the manner in which that boat was hauled was proper?
>
> A. Definitely not.

Defendant challenges Krueger's testimony arguing that Krueger could not give such testimony because the substance upon which he based his testimony concerning the loading of the boat was beyond the scope of the areas in which he was an expert. At trial, however, defendants raised only a general objection. It is well established that,

> "A party cannot be silent while a witness is testifying, as a qualified expert, to matters of opinion which are material to the controversy, and, after he has so testified, object generally to some question which may be afterwards asked him, and then make the point as to his competency for the first time in this Court. If the objection had been made in apt time, we have no doubt the judge below would have instituted the proper inquiry and found the facts as to the competency of the witness to testify as an expert, and those facts and his ruling thereon would have appeared in the case. This objection is untenable."

Dept. of Transportation v. McDarris, 62 N.C. App. 55, 59, 302 S.E. 2d 277, 279 (1983), *quoting Summerlin v. Railroad*, 133 N.C. 550, 558, 45 S.E. 898, 901 (1903). Where the record demonstrates that the witness could properly be found to be an expert, it is assumed that the trial court found him to be an expert. *Id.* Under the facts of this case defendants' general objection will not support exclusion of Krueger's testimony based on the claim of lack of expertise in the area of marine hauling.

Furthermore, Krueger's testimony would have been admissible under Rule 701 of the North Carolina Rules of Evidence, which provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

G.S. 8C-1, Rule 701 (1983). The testimony in question fully meets the requirements set forth in Rule 701. Krueger's testimony was rationally based on his own perception of the boat in its undamaged condition prior to being loaded on the trailer and its damaged condition while still on the trailer after hauling, and it was helpful in determining a crucial fact in issue at the trial. The defendants' assignment of error is overruled.

[3] Defendants' third assignment of error addresses whether the plaintiffs established a *prima facie* case of bailment thus requiring the trial court to give an instruction on that issue. A *prima facie* case of negligent bailment is made out where the bailor offers evidence tending to show (1) the property was delivered to the bailee, (2) the bailee accepted it and therefore had possession and control of the property, and (3) the bailee failed to return the property, or returned it in a damaged condition. *Clott v. Greyhound Lines, Inc.*, 278 N.C. 378, 388-89, 180 S.E. 2d 102, 110 (1971). The facts of this case clearly establish a *prima facie* case of bailment. The property was delivered to defendants, the bailees, who accepted delivery and took possession of the boat when they placed it on their trailer and transported it to North Carolina. The defendants maintained exclusive possession and control of the boat from the time they took delivery until the time they ar-

rived at Lake Norman. When the boat was returned to plaintiffs, the evidence indicated it was in a damaged condition. All the elements of negligent bailment were proven. The trial court correctly instructed the jury on the issue of bailment.

Defendants contend that no bailment existed because plaintiffs did not personally deliver the boat to them, and thus they could not have been in exclusive possession of the boat. We find this argument unpersuasive. Personal delivery by plaintiffs is not required for a bailment to exist.

[4] Defendants' final assignment of error challenges the judge's instruction to the jury concerning the question of whether a contract existed between the parties where the parties had stipulated in a pretrial order that there was a contract. Defendants did not object at trial to the portion of the instruction which they now bring forth on appeal. Rule 10(b)(2) of the Rules of Appellate Procedure states:

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

The failure of defendants to object at trial to the alleged erroneous instruction precludes the defendants from bringing the assignment of error on appeal. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983).

[5] By way of cross-appeal the plaintiffs contend that the trial court erred in failing to give a requested instruction on loss of use damages. Plaintiffs assert that the evidence adduced at trial supported a loss of use instruction. In order to establish loss of use the plaintiffs must specifically plead loss of use and then present sufficient evidence to prove the loss. *Gillespie v. Draughn*, 54 N.C. App. 413, 417, 283 S.E. 2d 548, 552 (1981), *cert. denied*, 304 N.C. 726, 288 S.E. 2d 805 (1982). *See also Roberts v. Freight Carriers*, 273 N.C. 600, 606, 160 S.E. 2d 712, 717 (1968); *Ling v. Bell*, 23 N.C. App. 10, 12-13, 207 S.E. 2d 789, 791 (1974).

A loss of use recovery is generally allowed as to pleasure vehicles as well as business vehicles. D. Dobbs, *Remedies*, 384

(1976). Even though loss of use is allowed for pleasure vehicles, some courts have denied recovery unless an actual substitute is obtained. *Id.* We decline to hold that plaintiffs must actually rent a substitute to recover for loss of use damages of a pleasure vehicle. Reviewing the evidence in this case, we find that the plaintiffs have failed to present sufficient evidence to prove loss of use damages. The boat was out of use for five weeks, but plaintiffs still went to Lake Norman. The plaintiffs also owned another houseboat when they bought the "Ante-Up." Finally, it is unclear from the record whether the jury ever heard any evidence of the rental value of a similar houseboat. Because the plaintiffs failed to offer adequate proof of loss of use damages, the trial court did not err in denying plaintiffs' requested instruction for such damages.

Having examined all assignments of error, we find no error.

No error.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. RANDY PAUL SMALLWOOD

No. 856SC593

(Filed 17 December 1985)

1. **Robbery § 1.2— *no* dangerous weapon as a matter of law—submission of common law robbery required**

It is error to refuse to submit common law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law.

2. **Robbery § 1.1— armed robbery—knife as dangerous weapon**

Whether a knife is a dangerous weapon depends upon the circumstances of the case, including the extent of the threat to the victim, the physical stature of the knife wielder, the weakened state of the victim, and whether or not and to what extent the victim was actually injured.

3. **Robbery § 1.1— armed robbery—knife as dangerous weapon—jury question**

Where the victim has in fact suffered serious bodily injury or death, the courts have consistently held that a knife is a dangerous or deadly weapon *per se* absent production or detailed description; however, in cases where the knife has not been produced or described in detail and the victim has not suffered

injury or death, the question of whether a knife is a dangerous weapon is generally for the jury.

4. **Robbery § 4.3— armed robbery—knife as dangerous weapon—sufficiency of evidence**

Defendant's motion to dismiss in an armed robbery case for failure to show that a knife was a dangerous weapon was properly overruled since eyewitness testimony of the victim that defendant held a knife to his throat and robbed him established all elements of the crime and was sufficient to go to the jury.

5. **Robbery § 5.4— armed robbery charged—weapon not produced—failure to submit common law robbery error**

The trial court in an armed robbery case erred in refusing to submit common law robbery to the jury where the knife allegedly used during the crime was never produced; according to the victim, the knife was drawn and put right to his throat, and defendant ran as soon as he had the victim's money; according to an eyewitness, defendant and the victim were together for some time, and defendant had a knife but was holding it down by his side rather than at the victim's throat when the witness saw him; and there was therefore some evidence of the nonexistence of the element of danger to life.

6. **Robbery § 5— armed robbery—alibi evidence—instructions required**

There was no merit to the State's contention that, because defendant presented alibi evidence, the only choice was between armed robbery and not guilty.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 14 January 1985 in Superior Court, HERTFORD County. Heard in the Court of Appeals 24 October 1985.

This is an armed robbery case.

The State's evidence tended to show the following: The victim and several of his friends drove into Ahoskie, where they drank beer, rode around, and talked to a girl. The girl drank beer with them, and suggested they go to an after-hours cafe to buy more. Defendant approached the victim outside the cafe and offered to sell him some dope. Victim refused and went in to buy beer, defendant following. Victim and the girl walked down a hallway into the back of the cafe, then turned and came out. As the victim came up the hallway to the front of the cafe, defendant shoved the door shut in front of him. According to the victim, defendant held a knife to his throat, reached into victim's pocket, took his cash, turned and ran. Another State's witness, Gatling, testified that he came into the hall during the holdup and that defendant had the knife in his hand but down by his side. Gatling

provided the only description of the knife, that it was "approximately that long"; no knife was introduced into evidence. The victim left after the robbery and returned firing a gun. When police arrested him, he told them of the robbery.

Defendant's cross examination evidence tended to show that the State's witnesses made up the robbery story to divert attention from their association with prostitution, drugs, and other crime. Defendant also presented alibi evidence.

The jury considered issues of guilty of armed robbery or not guilty; defendant's request for submission of common law robbery was denied. The jury found defendant guilty. From a sentence in excess of the presumptive, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General George W. Lennon, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Geoffrey C. Mangum, for the defendant.

EAGLES, Judge.

Of the four assignments argued, three relate to whether the knife used was a dangerous weapon. We conclude that because the evidence supported, but did not compel, a finding that the knife used was a dangerous weapon and there was no instruction on common law robbery, defendant is entitled to a new trial.

I

[1] One of the elements of armed robbery is that the accused used or threatened to use a firearm or other dangerous weapon. G.S. 14-87(a). In fact, the courts have characterized the use of a dangerous weapon as the main element of the offense. *See State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982). Common law robbery is distinguished from armed robbery by the absence of this element, *State v. Stewart*, 255 N.C. 571, 122 S.E. 2d 355 (1961). Common law robbery is accordingly a lesser included offense of armed robbery. *State v. Ross*, 268 N.C. 282, 150 S.E. 2d 421 (1966) (per curiam). It is error to refuse to submit common law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law. *Id.*

A

Although the foregoing general principles seem reasonably straightforward, the case law regarding knives as dangerous weapons gives rise to a certain amount of confusion. Both sides cite cases which appear to support their position. In *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981), Justice Copeland reviewed some of the apparently conflicting cases involving knives, but did not resolve them. He summarized the law thus: "[T]he evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *Id.* at 301, 283 S.E. 2d at 726.

We note that *Sturdivant*, a rape case, involved the definition of "deadly" as opposed to "dangerous," and analyzed "deadly" in terms of potential for producing death or great bodily harm. We perceive no functional difference in the terms, however. By statute, the "dangerous" weapon or means must be one which endangers or threatens life. G.S. 14-87(a); *State v. Mullen*, 47 N.C. App. 667, 267 S.E. 2d 564 (two terms synonymous), *disc. rev. denied*, 301 N.C. 103, 273 S.E. 2d 308 (1980); *see* G.S. 14-27.2 (rape with "dangerous or deadly" weapon).

B

[2] Our research has disclosed no case which unequivocally holds that a knife is *always* a dangerous weapon *per se*. Rather, the circumstances of each case must be considered: for example, the extent of the threat to the victim, *State v. Ross, supra* (knife held to throat); the physical stature of the knife wielder, *State v. Sturdivant, supra* (large man used knife); the weakened state of the victim, *State v. Archbell*, 139 N.C. 537, 51 S.E. 801 (1905); or whether or not and to what extent the victim was actually injured, *State v. Roper*, 39 N.C. App. 256, 249 S.E. 2d 870 (1978) (victim's throat slashed). The circumstances of the case, rather than the physical description of the knife itself, ultimately determine this issue. *Sturdivant.* This is particularly true in armed robbery cases because the issue of whether a weapon is dangerous is so closely related to another key element, *i.e.*, whether a person's life was in fact endangered or threatened. G.S. 14-87(a); *State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982).

C

There is authority that whether or not a knife is dangerous or deadly is solely for the court. *State v. Roper, supra; State v. Collins,* 30 N.C. 407 (1848). This authority appears to rest on older cases where the weapon was either introduced into evidence or described in detail without contradiction. "Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are questions of fact; but these ascertained, its character is pronounced by the law." *Id.* at 412-13 (knife described in detail; stabbing admitted, but provocation raised); *see also State v. West,* 51 N.C. 505 (1859) (oak stick produced in court; question of law).

D

[3] Where the victim has in fact suffered serious bodily injury or death, the courts have consistently held that a knife is a dangerous or deadly weapon *per se* absent production or detailed description. *See State v. McKinnon,* 54 N.C. App. 475, 283 S.E. 2d 555 (1981) ("small pocketknife," punctured lung); *State v. Lednum,* 51 N.C. App. 387, 276 S.E. 2d 920 ("kitchen" or "small paring" knife, multiple stab wounds resulting in serious injuries), *disc. rev. denied,* 303 N.C. 317, 281 S.E. 2d 656 (1981); *State v. Roper, supra* ("keen bladed" or "pocket knife," near-fatal wound).

E

In cases where the knife has not been produced or described in detail, and the victim has not suffered injury or death, the question of whether a knife is a dangerous weapon is generally for the jury. In *Sturdivant,* the court held that the trial court properly submitted the issue to the jury. The State did not produce the knife or describe it, but the evidence showed it was sturdy enough to puncture an oil can and sharp enough to slash clothing such that in the hands of a large man like defendant it could cause death or serious injury. *See also State v. Ross, supra* (knife not described, evidence conflicted on whether it was held to victim's throat); *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965) (per curiam) (pocketknife, not otherwise described, "pointed at" victim).

II

[4] Defendant's first assignment of error, that his motion to dismiss for failure to show that the knife was a dangerous weapon, is overruled. On that motion, the court must consider the evidence favorable to the State as true. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed. 2d 124, 99 S.Ct. 107 (1978). The eyewitness testimony of the victim that defendant held a knife to his throat and robbed him established all elements of the crime and was sufficient to go to the jury. Taking the victim's testimony as true, it shows a use of the knife which had undoubted potential for causing death or serious bodily injury. Our Supreme Court reached the same result on virtually identical evidence in *State v. Ross*, *supra*. This assignment is overruled.

III

Defendant's next two assignments are whether the court erred (1) in refusing to submit common law robbery and (2) in instructing that a knife was a dangerous weapon *per se*. These two assignments present the same question, since the existence here of a jury question on common law robbery depends on the existence of a jury question on the dangerous weapon issue.

A

Common law robbery is a lesser included offense of armed robbery. Where there is some evidence of a lesser included offense, it is error not to charge the jury accordingly. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). This rule applies even when the defendant presents no evidence. *See State v. Joyner*, 312 N.C. 779, 324 S.E. 2d 841 (1985). In *Joyner*, the State's evidence on armed robbery charges was inconclusive as to whether a rifle used actually was operable. The court stated that this constituted *some evidence* of the nonexistence of the element of danger to life, and that such evidence *required* the trial court to permit the jury to consider common law robbery. *Id.* at 784, 324 S.E. 2d at 846. *Compare State v. Peacock*, 313 N.C. 554, 330 S.E. 2d 190 (1985) (State's positive and unequivocal evidence, where defendant presented none, did not support offense on dangerous weapon issue).

B

[5] Examining the circumstances under which the knife was used in the present case, we conclude that there was *some evidence* of the nonexistence of the element of danger to life, and that the court therefore erred in defining the knife as a dangerous weapon and in refusing to submit common law robbery to the jury. The knife was never produced (the State attempted unsuccessfully to introduce a knife for comparison purposes). The victim simply stated that defendant pulled out "a knife," held it up to the victim's throat, pulled out his wallet and took his money, then ran out. Witness Gatling testified that the knife was "approximately that long," giving no other description. Gatling testified that defendant had an open knife, but that he was holding it down at his side when he entered the hallway where the robbery took place. Defendant told Gatling to mind his own business, and Gatling went down the hall into the back of the cafe, leaving defendant and victim talking. Gatling stayed there a few minutes before going out the back, followed shortly by defendant.

The jury had before it equivocal evidence as to how the robbery was carried out. According to the victim, the knife was drawn and put right to his throat, and defendant took off and ran as soon as he had the money. According to Gatling, defendant and the victim were together for some time. Defendant had a knife but was not holding it at the victim's throat when Gatling came in. These stories contain obvious inconsistencies sufficient to make the State's evidence on the circumstances in which the knife was used less than positive and conclusive. The inconsistencies were for the jury, not the court, to resolve. We therefore hold that the jury should have been instructed on common law robbery. *State v. Ross, supra.*

C

[6] The State argues that since defendant presented alibi evidence the only choice was between armed robbery and not guilty, citing *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974). *Black* is distinguishable, however: there all the evidence about the use of the knife was that it was used to threaten the victim, who actually received cuts, and the knife itself was produced. The alibi evidence did not affect these circumstances. The *Black* opin-

ion relied on *State v. Fletcher*, 264 N.C. 482, 141 S.E. 2d 873 (1965) (per curiam), where there was again only one version of how the knife was used, the knife was described in detail, and the defendant reached around the victim with his other hand. As noted above, defendant could obtain the benefit of inconsistencies in the State's evidence if he put on no evidence at all. *State v. Joyner, supra.* Nothing in *Black* or *Fletcher* suggests that defendant waives that benefit by putting on his own alibi evidence.

D

Whether or not the circumstances of its use made the knife a dangerous weapon constituted a key feature of this case. On this evidence, the jury should have been allowed to decide it. Both assignments of error are well taken, and defendant is entitled to a new trial.

IV

Defendant also assigns error to certain arguments of the prosecutor, arguing that the absence of the trial judge during parts of the argument compounded the error. Since we have decided that defendant is entitled to a new trial, we need not reach these questions. We note that our Supreme Court has declined to absolutely *require* the trial judge's presence during jury arguments. *State v. Arnold*, 314 N.C. 301, 333 S.E. 2d 34 (1985).

CONCLUSION

For error in failing to submit a lesser included offense and in defining a knife as a deadly weapon *per se*, there must be a new trial.

New trial.

Judges WHICHARD and COZORT concur.

RALPH JUNIOR HENDRIX v. LINN-CORRIHER CORP. (SELF-INSURED)

No. 8510IC276

(Filed 17 December 1985)

Master and Servant § 68— workers' compensation—chronic obstructive lung disease—insufficient evidence of disability

The evidence was insufficient to support a finding that plaintiff textile worker is disabled from chronic obstructive lung disease where plaintiff showed only that he was not earning the wages he was earning before his injury at the time of his compensation hearing, and the undisputed medical evidence showed that plaintiff is capable of work involving a clean environment, moderate activity and manual dexterity. N.C.G.S. 97-2(9).

Judge BECTON dissenting.

Judge PARKER concurring in result.

APPEAL by defendant from the Industrial Commission. Order of the Full Commission entered 17 September 1984. Heard in the Court of Appeals 16 October 1985.

Plaintiff filed a workers' compensation claim on 4 May 1982. From an opinion and award for the Full Commission by Commissioner Charles A. Clay granting plaintiff compensation for permanent partial disability, defendant appealed.

Lore & McClearen, by R. James Lore, for plaintiff, appellee.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III, and Linda Stephens, for defendant, appellant.

HEDRICK, Chief Judge.

Appellant, Linn-Corriher Corporation, contends that the evidence in the record does not support the findings of fact underlying the conclusion of law that plaintiff is disabled. In order to support a conclusion of disability, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury. . . .

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982).

In passing upon issues of fact, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even when there is evidence to support a contrary finding. *Id.*

The Industrial Commission heard evidence which tends to show the following: Plaintiff, Ralph Hendrix, is a 46 year old man with an eighth grade education who is unable to read a newspaper or spell. He began working in cotton mills at age sixteen. In January 1981, plaintiff contracted pneumonia and missed over three weeks of work with Linn-Corriher Corporation. He was laid off by Linn-Corriher Corporation pursuant to a company policy of terminating the employment of any employee who misses more than twelve days work in a one year period. Mr. Hendrix testified as to his attempts to find work after being laid off. He testified that he had a job at three mills before taking the "breathing test," but after he took the tests, he did not have a job anymore.

The uncontradicted medical testimony of Dr. Douglas Kelling of the North Carolina Textile Occupational Disease Panel indicates that plaintiff suffers from a mild case of employment related chronic obstructive lung disease, he has a twenty to thirty percent lung impairment, and he should not be exposed to dust or fumes. Plaintiff himself reported that "I never had shortness of breath so bad that I couldn't do my job," and that he could not list any activities outside of work that he could not do. Dr. Kelling testified that plaintiff is physically capable of certain types of jobs. Since defendant laid off plaintiff, plaintiff has held a construction job and a restaurant job.

Plaintiff's entitlement to compensation under the Workers' Compensation Act is measured by his capacity or incapacity to earn wages. *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755 (1967). "Disability" under Chapter 97 means an impairment in the employee's wage-earning capacity because of injury, not merely a physical impairment. G.S. 97-2(9); *Sebastian v. Hair Styling*, 40 N.C. App. 30, 251 S.E. 2d 872, *disc. rev. denied*, 297 N.C. 301, 254 S.E. 2d 921 (1979).

The evidence in the present case is strikingly similar to the evidence in *Lucas v. Burlington Industries*, 57 N.C. App. 366, 291 S.E. 2d 360 (1982). The 62 year old plaintiff in *Lucas* had "no skills other than those . . . [she] learned by virtue of her occupation in the mills since age 14." The plaintiff in *Lucas* was capable of work involving moderate activity and a clean environment, and she sought the kinds of employment she was capable of performing, but was unable to secure such employment before the date of her compensation hearing. We held in *Lucas* that these facts supported a finding of no disability.

The workers' compensation system is not an unemployment insurance program. Before the plaintiff may receive compensation, he must show that he is not *capable* of earning the same wages he had earned before his injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 687 (1982). Merely showing that plaintiff is not earning the same wages after his injury than before is insufficient.

In the present case, plaintiff has shown that he was not earning the wages he was earning before his injury at the time of his compensation hearing. However, the evidence produced at the compensation hearing is insufficient to support a finding that plaintiff is *incapable* of earning the same wages. In fact, the undisputed medical evidence is that plaintiff is capable of work involving a clean environment, moderate activity and "certainly anything requiring manual dexterity." Therefore the opinion and award of the Industrial Commission is reversed.

Reversed.

Judge PARKER concurs in the result.

Judge BECTON dissents.

Judge BECTON dissenting.

The majority's reliance on *Lucas v. Burlington Industries*, 57 N.C. App. 366, 291 S.E. 2d 360, *disc. rev. allowed*, 306 N.C. 385, 294 S.E. 2d 209 (1982), *remanded by order* (9 November 1982) (settled by parties before argument in Supreme Court), is misplaced. Considering *Hilliard v. Apex Cabinet Company*, 305 N.C. 593, 290

S.E. 2d 682 (1982) and *Donnell v. Cone Mills Corporation*, 60 N.C. App. 338, 299 S.E. 2d 436, *disc. rev. denied*, 308 N.C. 190, 302 S.E. 2d 243 (1983), and believing the evidence in the record supports the findings of fact underlying the conclusions of law that plaintiff is disabled and has a compensable occupational disease, I dissent.

The precedential value of *Lucas* is questionable at best. *Lucas* derived its primary strength from *Sebastian v. Hair Styling*, 40 N.C. App. 30, 251 S.E. 2d 872, *disc. rev. denied*, 297 N.C. 301, 254 S.E. 2d 921 (1979) and *Mills v. J. P. Stevens & Company*, 53 N.C. App. 341, 280 S.E. 2d 802, *disc. rev. denied*, 304 N.C. 196, 285 S.E. 2d 100 (1981). However, both of those cases were specifically limited to their facts by this Court's later opinion in *Hilliard v. Apex Cabinet Company*, 54 N.C. App. 173, 282 S.E. 2d 828, *rev. on other grounds*, 305 N.C. 593, 290 S.E. 2d 682 (1982) because *Sebastian* and *Mills* had peculiar sensitivities that were personal in nature. Later still this Court in *Donnell* said:

> But *Mills* can be distinguished on its facts. The plaintiff there did not meet his burden of proof on the disability issue and the Commission held against him. The case *sub judice* is different because there is sufficient competent evidence in the record to support the Commission's findings for the plaintiff.

60 N.C. App. at 343, 299 S.E. 2d at 439.

Equally important, the *Lucas* Court never considered the North Carolina Supreme Court's opinion in *Hilliard* which recognized that a person could be considered disabled even though physically able to work. *Lucas* was filed fourteen days after *Hilliard* but did not cite *Hilliard*. In *Hilliard*, one of the doctors found no disability and opined that Mr. Hilliard could return to work. Another doctor found no abnormality, no permanent damage, and concluded that Mr. Hilliard could return to work in an environment free of wood dust and chemical fumes. Indeed, Mr. Hilliard worked part time as a carpenter and set up his own cabinet shop as a sole proprietor, earning $7,114.43 in 1978. 305 N.C. at 598, 290 S.E. 2d at 685 (Exum, J., concurring). Notwithstanding these facts, the Supreme Court remanded *Hilliard* for the Industrial Commission to determine whether Mr. Hilliard was unable to find a job in a pollutant-free environment because of his age, lack of education, and limited work experience.

In the case *sub judice*, the evidence shows, and the Commission found, that the claimant's "partial incapacity to work and earn wages results from his permanent physical impairment caused by his chronic obstructive lung disease and byssinosis which in combination with his age, his limited education and his twenty-nine years of employment in the cotton textile industry, limit his ability to earn wages." As plaintiff points out in his brief,

> claimant sought a multitude of different jobs, both inside and outside the textile industry, with very little, if any, success. The jobs he otherwise could have obtained in the textile industry were denied him once he could not pass the breathing test. The construction job he attempted to perform between July and August, 1981, was terminated because the plaintiff could not hold out to do the job. The only other job he did obtain, washing dishes, was terminated because of the closing of the restaurant. Numerous other jobs outside of the textile industry including those of a garbageman, a truck driver, a bagboy, a cashier, an employee of Philip-Morris, a farm job, a textile job, and a sawmill job were all denied him on application.

Unlike the *Lucas* Court, this Court in *Donnell* followed the guiding principles set forth by the Supreme Court in *Hilliard*. Donnell, a fifty-year-old claimant, lost his textile job when the plant closed. His employer rejected him for a "promised" job at another plant when he could not pass the breathing test. Two months later, Donnell obtained a job at a lesser wage at another plant and worked at that job until his worker's compensation hearing was held. The medical testimony in *Donnell* was remarkably similar to the medical testimony in the case *sub judice*. This Court, affirming the Commission's opinion and award in *Donnell*, said:

> Given plaintiff's physical condition, the limits on his ability to work and his lack of training in any job except the textile industry, we hold that there was competent evidence before the Industrial Commission to find that plaintiff was disabled from byssinosis.

60 N.C. App. at 342, 299 S.E. 2d at 438.

In this case, the Commission concluded that claimant has a "compensable occupational" disease, and defendants did not

challenge that conclusion. That conclusion is mandated by the evidence. As stated by Justice Exum in his concurring opinion in *Hilliard*: "In light of this conclusion [that claimant has an occupational disease], it is difficult to see what else plaintiff could do to prove that he has had a diminution in earning capacity as the result of an occupational disease." 305 N.C. at 599, 290 S.E. 2d at 685. Indeed, in most occupational disease cases (excepting, for example, those involving payments made pursuant to N.C. Gen. Stat. Sec. 97-31(24) (1985) for partial loss of lung function, *see Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, --- S.E. 2d --- (filed 5 November 1985); *Grant v. Burlington Industries*, 77 N.C. App. 241, 335 S.E. 2d 327 (1985)), a conclusion of "compensability" contemplates a finding of some "disability."

In this case I fear the majority has implicitly engrafted a new and troublesome requirement in occupational disease cases —a requirement that claimants unsuccessfully apply for every job in the marketplace that pays as much or more than claimant earned before his disability or produce expert testimony on job relocation which proves to the Commission that claimant is incapable of finding such a job. Believing that this is not required by law, I dissent. But even if this were a requirement, claimant came commendably close to fulfilling it. He made a good faith attempt without success to find alternative employment outside his usual vocation. The facts and every inference suggest that, because of his occupational disease, he is incapable of earning the same wages he was earning before his injury.

Judge PARKER concurring in result.

I concur in the result, but I agree with the dissent that reliance on *Lucas v. Burlington Industries*, 57 N.C. App. 366, 291 S.E. 2d 360 (1982) is misplaced. In my view, claimant's evidence at the Commission hearing was not sufficient even considering his age, education and work experience, *see, Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982), to support a finding that claimant was not capable of earning the same wages as the result of his occupational disease. As stated in *Hill v. Dubose*, 234 N.C. 446, 447-48, 67 S.E. 2d 371, 372 (1951), "Compensation must be based upon loss of wage-earning power rather than amount actually received."

Other than the jobs for which claimant applied at textile mills, there is no evidence that his inability to obtain employment was due to his occupational disease. The award of the Full Commission simply assumes this fact for periods when claimant has not been and is not gainfully employed notwithstanding the fact that claimant has demonstrated wage-earning capacity.

PERRY J. RAY v. JOHN ARVIE NORRIS, ADMINISTRATOR CTA OF THE ESTATE OF DEBORAH LYNN NORRIS, JOHN ARVIE NORRIS AND KATHERINE HODGES NORRIS

No. 8511SC120

(Filed 17 December 1985)

1. Trusts § 19— purchase money resulting trust—sufficiency of evidence

In an action to impose a purchase money resulting trust, plaintiff's evidence was sufficient to be submitted to the jury where it tended to show that he furnished money to deceased defendant for the purpose of buying a house, that she used some of the money to make a partial downpayment on the house, and that the balance of the downpayment was secured by a lien on plaintiff's car and was later paid by a check from plaintiff's business; a witness testified that she heard plaintiff tell deceased defendant that he would use company money, put it in defendant's account, then pay the downpayment, pay the remainder, and then have the deed put in his name when his credit was cleared, and the witness heard defendant agree to this arrangement; a reasonable inference could be drawn from this testimony that plaintiff was obligated by a promise made to defendant before the title passed to provide funds with which she could pay the note for the balance of the purchase price; and there was also evidence tending to show that plaintiff carried out this agreement either by depositing funds in defendant's account so that she could make the payments, or by making payments directly to defendant's lender.

2. Trusts § 15; Equity § 1.1— purchase money resulting trust—clean hands doctrine inapplicable

The clean hands doctrine was not applicable in an action to impose a purchase money resulting trust, though there was evidence that plaintiff and deceased defendant were cohabiting illicitly and had planned a deceptive scheme to secure financing, since there was no evidence that plaintiff provided the funds as consideration for illicit sexual intercourse or that plaintiff had acted dishonestly or unfairly toward defendant; there was no evidence that title was placed in defendant's name for an illegal purpose; though the lender may have been induced to make a loan which it otherwise would not have made, the scheme was not designed to shield the property from foreclosure in the event of nonpayment or to diminish or imperil the lender's secured posi-

tion in any respect; and the lender did not complain but willingly accepted payments from plaintiff.

3. Trusts § 20— purchase money resulting trust—instruction on pro tanto resulting trust not required

In an action to establish a purchase money resulting trust, defendants were not entitled to an instruction on *pro tanto* resulting trust, even if there was evidence that deceased defendant was obligated on the purchase money note and made fourteen payments on it from her own account, since, under the instructions given, the jury was permitted to find that plaintiff was entitled to a resulting trust only if they found that he had advanced all the funds for the downpayment and that he was obligated to provide defendant with the remaining funds for the mortgage payments pursuant to the agreement of the parties at or before the time title passed.

APPEAL by defendant from *Bowen, Wiley F., Judge.* Judgment entered 3 October 1984 in Superior Court, HARNETT County. Heard in the Court of Appeals 18 September 1985.

Plaintiff brought this action against Deborah Lynn Norris seeking the imposition of a purchase money resulting trust upon property which he alleged was purchased by her with monies supplied by him, pursuant to an oral agreement that she would hold title for his benefit. Deborah Lynn Norris died during the pendency of the action and by consent order John Arvie Norris, as Administrator CTA of her estate, was substituted for her as a defendant. In addition, John Arvie Norris, individually and his wife Katherine Hodges Norris, who are Deborah Norris' parents, were joined as defendants.

At trial, plaintiff offered evidence tending to show that plaintiff and Deborah Norris were cohabitating at the time plaintiff located a home in the Buffaloe Lakes area which he wished to purchase. Due to his bad credit rating plaintiff knew he could not purchase the home in his own name because he could not qualify for a home loan. Knowing that Deborah's credit was good, plaintiff discussed with her a plan whereby he would place $12,000 from his business into her bank account so that it would appear to the lending institution that she had sufficient funds for a downpayment on the home and payment of closing costs. She would then apply for a loan for the balance of the purchase price. According to plaintiff's evidence, plaintiff told Deborah that he would make the monthly payments on the loan and when his credit cleared, the deed to the house would be put in his name. Deb-

orah agreed to the arrangement. However, Deborah had a salary of only $50 per week as a part time employee of plaintiff's partnership and it was apparent to the parties that this was insufficient to obtain a home loan. In the furtherance of the plan, Deborah represented to the lending institution that she had a monthly salary of $1,375 as an employee of Eastern Seaboard Advertising, a partnership in which plaintiff had a fifty percent interest. Plaintiff provided a wage verification statement to the lending institution certifying that Deborah's annual salary was $16,500. Deborah made a written offer to purchase the house for $44,000 which was accepted by the seller, Edward Lind. The contract provided for a $5,000 deposit and an additional $5,000 to be paid at the closing. The $5,000 deposit, according to plaintiff's evidence, was paid from the money deposited by plaintiff in Deborah's account. The remaining $5,000 due on the downpayment was secured by a lien on plaintiff's car. This amount was later paid in full with a check from plaintiff's partnership. Deborah also borrowed $34,000 from First Federal Savings and Loan of Sanford, securing her note by a deed of trust on the property. After closing plaintiff and Deborah moved into the home and resided together from February 1979 until January 1982 when their relationship deteriorated. Plaintiff also offered evidence tending to show that while they were living in the house Deborah referred to the house as plaintiff's house. The evidence also indicated that several checks were issued by plaintiff's company to Deborah in the exact amount of the monthly mortgage payments; other checks were issued from plaintiff's company directly to First Federal Savings and Loan.

Upon a jury verdict finding that the property was held under a purchase money resulting trust for the benefit of plaintiff, judgment was entered awarding him fee simple title and possession of the property. Defendants appealed.

L. Randolph Doffermyre, III for plaintiff appellee.

Bryan, Jones, Johnson & Snow, by James M. Johnson for defendant appellants.

MARTIN, Judge.

Defendants bring forward three assignments of error; (1) the trial court's failure to direct a verdict in favor of the defendants

due to the insufficiency of plaintiff's evidence, (2) the trial court's refusal to instruct on the doctrine of clean hands, and (3) its refusal to instruct on the doctrine of *pro tanto* resulting trust. Upon our review of the record we find that neither the doctrine of *pro tanto* resulting trust nor the clean hands doctrine is applicable to these facts and that there was sufficient evidence from which the jury could find that a resulting trust arose in favor of the plaintiff. We find no error in the trial.

In their first assignment of error defendants contend that their motion for a directed verdict made at the close of plaintiff's evidence and again at the close of all the evidence should have been granted because the plaintiff failed to establish that he was obligated to pay the purchase price. Defendants also contend that plaintiff's own evidence, showing that he and Deborah Norris were cohabitating and that they planned a deceptive scheme to secure financing for the transaction, barred his cause of action under the doctrine of clean hands.

Defendants' first contention requires a brief review of principles relating to the creation of resulting trusts. A compilation of these principles is contained in *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). A summary of those applicable in the case *sub judice* follows:

> A resulting trust arises "when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another." (Citation omitted.) The trust is created in order to effectuate what the law presumes to have been the intention of the parties in these circumstances—that the person to whom the land was conveyed hold it as trustee for the person who supplied the purchase money. (Citations omitted.) "The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. . . ." (Citation omitted.)

Id. at 46-47, 286 S.E. 2d at 783-84. "[A] resulting trust arises, if at all, in the same transaction in which legal title passes, and by virtue of consideration advanced before or at the time legal title passes, and not from consideration thereafter paid." *Id.* at 57, 286 S.E. 2d at 790 (quoting *Bryant v. Kelly*, 279 N.C. 123, 129, 181 S.E. 2d 438, 441 (1971)). The creation of a resulting trust depends on the intention, at the time of transfer, of the person furnishing the consideration, which intention is to be determined from the facts and circumstances surrounding the transaction. *Id.* The intent of the party claiming the trust may be shown by evidence of statements made by the parties at or before the time title passes, and statements made by the grantee after title passes. *Id.* Evidence of the parties' conduct, before and after title passes, is admissible on the issue of intent. *Id.* Where less than the full amount of the purchase price is paid at the time of purchase, the party seeking imposition of the trust must have furnished that portion which has been paid, and must have incurred an absolute obligation to pay the remainder as a part of the original transaction of purchase at or before the time of conveyance. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957).

Defendants argue that because plaintiff was not legally obligated on the purchase money note to First Federal, he has not incurred an obligation to pay. We disagree. The person claiming the benefit of a resulting trust need not be obligated directly to the grantee's lender; it is sufficient if he is obligated to the *grantee*, pursuant to a promise made before title passes, to make payments to the grantee which will enable the grantee to pay the remainder of the purchase price. *See Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979). In such a case, the grantee is considered to have made a loan of credit to the one who promises to, and actually does, provide the funds to pay the remainder of the purchase price. *Davis v. Downer*, 210 Mass. 573, 97 N.E. 90 (1912); *Crowell v. Stefani*, 12 Mass. App. Ct. 966, 428 N.E. 2d 334 (1981). *See also* Bogert, The Law of Trusts and Trustees § 456 (Rev. 2d ed. 1977). The grantee does not benefit from, and is not entitled to, the proceeds of the loan; the grantee's only interest is to be indemnified against paying the indebtedness. *Albae v. Harbin*, 249 Ala. 201, 30 So. 2d 459 (1947).

Upon a motion for directed verdict the evidence is to be viewed in the light most favorable to the nonmovant. All conflicts

and inconsistencies in the evidence are resolved against the party moving for a directed verdict. The party against whom the motion is made is also entitled to every reasonable inference that may be drawn from the evidence. *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985).

[1] Applying these principles to the case before us, we hold that plaintiff's evidence was sufficient to withstand the motion for directed verdict. Plaintiff's evidence tends to show that he furnished money to Deborah Norris for the purpose of buying the house, that she used some of the money to make a partial downpayment on the house, and that the balance of the downpayment was secured by a lien on plaintiff's car and later paid by a check from plaintiff's business. Paula Ray, plaintiff's ex-wife, testified that she heard plaintiff tell Deborah Norris that "he would use the money, company money, put it in Debbie's account, then pay the down payment, pay the remainder, then at another time when his credit would be cleared . . ." the deed to the house could be put in his name. Paula Ray testified that Deborah Norris agreed to this arrangement. A reasonable inference may be drawn from this testimony that Perry Ray was obligated, by a promise made to Deborah before the title passed, to provide funds with which she could pay the note for the balance of the purchase price. There was also evidence tending to show that he carried out this agreement by either depositing funds in Deborah's account so that she could make the payments, or by making the payments directly to the savings and loan. This assignment is overruled.

[2] Defendants also contend that they were entitled to a dismissal of plaintiff's action because the evidence that plaintiff and Deborah were cohabitating illicitly and had planned a deceptive scheme to secure financing establishes, as a matter of law, that plaintiff had not come into court with "clean hands." Alternatively, they contend that they were entitled to have the issue of "clean hands" submitted to the jury.

The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands. However, "[r]elief is not to be denied because of general iniquitous conduct on the part of the complainant or because of the latter's wrongdoing in the course of a transaction between him and a third person, or because of a wrong

practiced by both parties on a third person. . . ." 27 Am. Jur. 2D *Equity* § 142, at 678-79 (1966).

We find the rule in *Collins v. Davis*, 68 N.C. App. 588, 315 S.E. 2d 759, *aff'd*, 312 N.C. 324, 321 S.E. 2d 892 (1984) to be controlling on the question of the applicability of the clean hands doctrine to cohabitation by parties who are not married to each other. In *Collins*, plaintiff and defendant were living together prior to plaintiff's divorce from another woman. Plaintiff alleged that he provided funds for the purchase of a house and lot to be placed in defendant's name with the understanding that if the parties later married, title would be placed in their joint names. Otherwise, the property would be sold and he would be repaid. In the absence of evidence that plaintiff provided the funds as consideration for illicit sexual intercourse, or that plaintiff had acted dishonestly or unfairly toward defendant, the court held the doctrine of clean hands to be inapplicable. The evidence with respect to cohabitation in the case before us is strikingly comparable to the evidence in *Collins*, thus we are constrained to uphold the trial court's ruling that plaintiff was not barred from relief because of his cohabitation with Deborah Norris, nothing else appearing.

Neither is the plaintiff barred from relief because of his participation with Deborah Norris in the deceptive scheme to secure a loan for the purchase. The doctrine of clean hands is only available to a party who was injured by the alleged wrongful conduct. 27 Am. Jur. 2D *Equity* § 142; *Ferguson v. Ferguson*, 55 N.C. App. 341, 285 S.E. 2d 288, *disc. rev. denied*, 306 N.C. 383, 294 S.E. 2d 207 (1982); *High v. Parks*, 42 N.C. App. 707, 257 S.E. 2d 661, *disc. rev. denied*, 298 N.C. 806, 262 S.E. 2d 1 (1979). *But cf. Hood v. Hood*, 46 N.C. App. 298, 264 S.E. 2d 814 (1980). It does not appear from the record that title was placed in Deborah's name for an illegal purpose, i.e., for the purpose of defrauding plaintiff's creditors or avoiding any lawful obligation, and we therefore find inapplicable the holdings of *Penland v. Wells*, 201 N.C. 173, 159 S.E. 423 (1931) and *Hood v. Hood*, 46 N.C. App. 298, 264 S.E. 2d 814 (1980). Although the savings and loan may have been induced to make a loan which it otherwise would not have made, it does not appear that the scheme was designed to shield the property from foreclosure in the event of nonpayment or to diminish or imperil the lender's secured position in any respect. It should also

be noted that the lender has not complained and has willingly accepted payments from the plaintiff. For the foregoing reasons, we also reject defendants' argument that the trial court should have instructed the jury on the doctrine of clean hands. This issue does not arise upon the evidence in this case.

[3] By their last assignment of error defendants contend that the trial court erred in refusing to instruct on the doctrine of *pro tanto* resulting trust. Where a party advances only part of the payment or promises to make part of the payment a trust only results *pro tanto* in favor of that party. *See Kelly Springfield Tire Co. v. Lester*, 190 N.C. 411, 130 S.E. 45 (1925). A *pro tanto* resulting trust is created in the same manner as a resulting trust. It merely allows one who has advanced only part of the funds to recover up to the amount of his payment. As is the case with a resulting trust, these partial funds, in order to establish a *pro tanto* resulting trust, must also be advanced or promised prior to or at the time legal title passes. If a *pro tanto* resulting trust is found, then a trust arises in favor of the one making part payment commensurate with his interest. *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982).

Defendants contend that they were entitled to an instruction on *pro tanto* resulting trust because there was evidence that Deborah Norris was obligated on the purchase money note and made fourteen payments on it from her own account. We reject this contention. Under the instructions given, the jury was permitted to find that plaintiff was entitled to a resulting trust only if they found that Perry Ray had advanced *all* the funds for the downpayment *and that he was obligated* to provide Deborah Norris with the remaining funds for the mortgage payments pursuant to the agreement of the parties at or before the time title passed. Assuming *arguendo* that there was evidence from which the jury could find that Deborah Norris subsequently made payments on the note from her own funds, the evidence was relevant only upon the question of the agreement and intent of the parties at the time legal title passed. Any such payments would not establish a *pro tanto* resulting trust because the consideration was furnished after legal title had passed.

No error.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. ELLSWORTH BURRIS MIDGETT, III

No. 851SC470

(Filed 17 December 1985)

1. Criminal Law § 23— plea bargain for federal offense—no effect on State case

A plea agreement entered into between defendant and the U. S. Attorney did not entitle defendant to immunity in this driving while impaired case, since (1) imposing a federal plea agreement upon a State prosecutor would impinge upon the concept of dual sovereignty in a State prosecution of an unrelated crime; (2) the plea agreement, which assured defendant that no additional charges would be brought, was signed and approved at a time when the State had already charged defendant with driving while impaired, and he had been convicted in district court and had appealed to superior court; and (3) the Assistant U. S. Attorney wrote a letter to the State District Attorney indicating that the charges contemplated in the plea bargain agreement were solely drug offenses and at no time was his office aware of any driving while impaired charge.

2. Automobiles § 126.3— driving while impaired—chemical analysis of blood and breath—evidence admissible

In a prosecution of defendant for driving while impaired, the trial court did not err in allowing an officer to testify that defendant's alcohol concentration was "0.14 grams of alcohol per 210 liters of breath," though defendant contended that the officer was competent to perform chemical analysis of the breath to determine blood alcohol concentration as opposed to alcohol breath concentration and therefore should have said "0.14 grams of alcohol per 100 milliliters of blood" rather than "0.14 grams of alcohol per 210 liters of breath," since it was irrelevant whether the officer's permit to perform chemical analysis stated blood alcohol concentration or breath alcohol concentration because both are measured in the same manner and produce the same mathematical result which can be expressed in terms of 100 milliliters of blood or 210 liters of breath.

3. Automobiles § 130; Criminal Law § 138.11— conviction in a trial de novo—increased sentence

The trial court did not err by increasing defendant's sentence following his conviction in a trial *de novo*, since defendant was convicted of a federal drug offense in the intervening period between the district court trial and the superior court appeal, and this intervening conviction justified an enhanced sentence and amply rebutted any presumption of vindictiveness.

State v. Midgett

APPEAL by defendant from *Small, Judge*. Judgment entered 6 December 1984 in Superior Court, DARE County. Heard in the Court of Appeals 23 October 1985.

This is a criminal case in which defendant, Ellsworth Burris Midgett, III, was convicted at a jury trial for driving while impaired. From a judgment imposing a seven month prison sentence, defendant appeals.

On 23 October 1983 at approximately 3:00 a.m. Manteo Police Officer Jacob S. Ball observed a green van driving in the wrong lane. Officer Ball followed the van and then pulled it over. The defendant was driving. Officer Ball testified that the defendant smelled of alcohol, was unstable and staggering, his eyes glassy and his face flushed. Officer Ball arrested the defendant for driving while impaired and took him to the Dare County Courthouse for chemical analysis and other tests.

At the courthouse, defendant failed several performance tests of sobriety. His speech was slurred and his conduct was described as "loud, boisterous, abusive, cocky, unruly, belligerent and arrogant." The officers present were of the opinion that the defendant was under the influence of alcohol and a chemical analysis of defendant's breath was administered by Officer A. Arnold Simmons, Jr.

On 20 December 1983 defendant was tried for the offense in District Court, Dare County. He was convicted of driving while impaired and sentenced to six months imprisonment, suspended for two years. He received special supervised probation for two years, the mandatory seven day jail term and a $385.00 fine. Defendant appealed his conviction to the Dare County Superior Court.

Subsequently, the defendant became involved in another unrelated criminal offense. On 30 April 1984 he signed a plea bargain agreement with the United States Attorney's office for the Eastern District of North Carolina. In that agreement, the defendant agreed to plead guilty to conspiring to import controlled substances (hashish) into the United States in violation of 21 U.S.C. Section 963. In July 1984 defendant pleaded guilty to this federal drug offense. The plea agreement contained the following statement:

7. The Government can assure the defendant that neither the Federal Government nor the State of North Carolina will bring additional charges against the defendant for any violation of law now known to the Government. Furthermore, that upon the defendant's plea of guilty of Count One, the Government agrees that it will not indict or prosecute defendant for any criminal offenses that the Government currently has knowledge of with respect to defendant or are currently under investigation in the United States or any of its territories.

On 26 July 1984 the Dare County Superior Court heard defendant's case *de novo*. The trial ended in a mistrial. On 4 December 1984 the defendant was re-tried. Defense counsel moved to dismiss the charge based on the federal plea bargain agreement. Defendant argued that the federal agreement granted him immunity in the State matter. Defendant's motion was denied. From a conviction of driving while impaired, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General David Roy Blackwell for the State.

L. Randolph Doffermyre, III, for the defendant-appellant.

EAGLES, Judge.

I

[1] The defendant first assigns error to the trial court's denial of his motion to dismiss. Defendant argues that the plea agreement entered into between the defendant and the United States Attorney entitles him to immunity from prosecution in this case and urges this Court to honor his plea agreement. Defendant asserts that his governmental immunity is unique because the federal court approved his agreement. Defendant's argument is without merit.

Imposing a federal plea agreement upon a State prosecutor impinges upon the longstanding concept of dual sovereignty in a State prosecution of an unrelated crime. State and federal governments derive their power from different sources. Each government represents a distinct and separate sovereign. Each may determine what shall be an offense against its authority. Each

sovereign may punish those offenses by exercising its own power and this power is not dependent upon the actions of another sovereign. *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed. 2d 303, 98 S.Ct. 1079 (1978).

Ignoring the concept of dual sovereignty, the defendant's federal plea bargain cannot apply to bar this State prosecution. The plea agreement offers two assurances to the defendant. The first assurance made is that the State of North Carolina (along with the federal government) would not "bring *additional* charges against the defendant for any violation of law *now known* to the Government." [Emphasis added.] This agreement was signed and approved 30 April 1984. As of that date, this State had already charged the defendant with the offense of driving while impaired. The defendant had been convicted in district court and appealed to the superior court. The driving while impaired charge does not constitute "additional charges." Further, by letter dated 3 August 1984 to State District Attorney H. P. Williams, Jr., Assistant United States Attorney J. Douglas McCullough wrote that the charges contemplated in the plea bargain agreement were solely drug offenses and that at no time was his office aware of any driving while impaired charge. The second assurance made in the plea agreement is that the "Government" would "not indict or prosecute defendant for any criminal offenses that the Government" had knowledge of or that were under investigation. This language clearly contemplates that use of the word "Government" means the United States government and not the State of North Carolina.

For the reasons stated, defendant's first assignment of error is overruled.

II

[2] By his second assignment of error, defendant argues that the trial court erred in overruling his objection to Officer Simmons' testimony as to the results of chemical analysis of the defendant's breath. We disagree.

Officer Simmons testified that defendant's alcohol concentration was "0.14 grams of alcohol per 210 liters of breath." Defense counsel objected to this testimony based on the language of the permit granting the officer authority "to perform chemical analy-

sis of the breath to determine blood alcohol concentration." Defendant contends that by the express language of the permit, Officer Simmons "was only competent to determine chemical analysis of the breath to determine blood alcohol concentration as opposed to alcohol breath concentration."

Defendant does not challenge the officer's certification to administer a chemical analysis of breath nor does defendant allege that the officer erred when performing the analysis. Defendant does not contest the 0.14 reading. The only dispute is whether Officer Simmons should have said "0.14 grams of alcohol per 100 milliliters of blood" rather than "0.14 grams of alcohol per 210 liters of breath."

G.S. 20-4.01(0.2) defines alcohol concentration and provides that the concentration of alcohol in a person may be expressed either as:

a. Grams of alcohol per 100 milliliters of blood; or

b. Grams of alcohol per 210 liters of breath.

G.S. 20-4.01(3a) defines chemical analysis as "[a] chemical test of the breath or blood of a person to determine his alcohol concentration, performed in accordance with G.S. 20-139.1." G.S. 20-4.01 (3b) defines chemical analyst as "[a] person granted a permit by the Department of Human Resources under G.S. 20-139.1 to perform chemical analyses." Officer Arnold Simmons, Jr. was issued such a permit under the authority of G.S. 20-139.1(b) by the Department of Human Resources on 16 November 1982 with effective dates from 1 December 1982 through 1 December 1984. For purposes of this case, it is irrelevant whether the certificate states blood alcohol concentration or breath alcohol concentration because both are measured in the same manner and produce the same mathematical result which can be expressed in terms of 100 milliliters of blood or 210 liters of breath.

G.S. 20-4.01(0.2) allows Officer Simmons to express alcohol concentration in terms of 210 liters of breath. His permit authorizes him to perform that analysis. His testimony was competent.

III

[3] Defendant's last assignment of error is that the trial court erred by enhancing the defendant's sentence following his conviction in a trial *de novo*. We disagree.

The due process clause of the Fourteenth Amendment does not prohibit increased sentences in a second trial. A violation occurs only when the court imposes an increased sentence motivated by actual vindictiveness toward the defendant for having exercised his guaranteed right to appeal. *Wasman v. United States*, 468 U.S. 559, 82 L.Ed. 2d 424, 104 S.Ct. 3217 (1984). A presumption of vindictiveness arises when the State offers no evidence or the sentencing court fails to explain or justify the increase. The State must rebut the presumption. *Wasman, supra.*

The presumption of vindictiveness does not apply in this case. There is ample evidence in the record that the defendant had been convicted of a federal drug offense in the intervening period between the district court trial and the superior court appeal. This intervening conviction justifies an enhanced sentence and amply rebuts any presumption of vindictiveness. *Wasman, supra.* Since the presumption of vindictiveness does not apply, the defendant must prove actual vindictiveness. *Wasman, supra.* This he has failed to do. The defendant contends that the trial judge sentenced defendant to seven months imprisonment *after* the defendant noted an appeal and that the trial judge increased the sentence only because the defendant chose to appeal. The evidence does not support this argument.

Defendant was subject to Level 2 punishment. "A defendant subject to Level Two punishment may be fined up to one thousand dollars ($1,000) and must be sentenced to a term of imprisonment of not less than seven days and not more than 12 months." G.S. 20-179(h). The trial judge offered the defendant an option, he could serve a seven-month active sentence, or, if he could raise $1,000, which included a $400.00 fine plus costs and attorney's fees, he could serve the mandatory seven-day term. The defendant requested the seven-month active sentence and the trial judge then noted the appeal.

For the reasons stated, defendant's third assignment of error is overruled.

The defendant received a fair trial free from error.

No error.

Judges WHICHARD and COZORT concur.

LEMUEL F. SWINDELL v. DAVIS BOAT WORKS INC. AND AMERICAN INTERNATIONAL ADJUSTMENT

No. 8510IC252

(Filed 17 December 1985)

Master and Servant § 55.3— workers' compensation—knee injury not result of accident

The evidence and findings supported the Industrial Commission's determination that plaintiff's knee was not injured by accident when he sidestepped behind another employee and pivoted while attempting to get to a soda machine in a break area. N.C.G.S. 97-2(6).

APPEAL by plaintiff from order of the North Carolina Industrial Commission filed 10 September 1984. Heard in the Court of Appeals 15 October 1985.

This is a claim for benefits under the Workers' Compensation Act. G.S. Chap. 97-1. On 31 March 1983 this matter was heard before Deputy Commissioner Bryant. In an opinion filed 30 June 1983 Deputy Commissioner Bryant, *inter alia*, found as fact the following:

> 8. Plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer.

From Deputy Commissioner Bryant's award of compensation, defendant appealed to the Full Commission.

On 8 August 1984 this matter was heard before the Full Commission. The Full Commission adopted Deputy Commissioner Bryant's Findings of Fact, one (1) through seven (7), and vacated the remaining Findings of Fact and inserted new Findings of Fact in lieu thereof.

Findings of Fact

> 1. Plaintiff is 44 years old and completed high school and two and one-half years of college.
>
> 2. Plaintiff has been employed with defendant-employer since August 1981 as a mechanical hook-up technician. Plaintiff's job is to install diesel engines on boats, to hook-up the steering and to install the plumbing lines.

3. On September 10, 1982, while on morning break, plaintiff side-stepped behind another employee in a close area and pivoted to attempt to get to a soda machine. After plaintiff side-stepped behind the employee and pivoted, he felt a severe pain in his left knee with his next step. Plaintiff's left knee popped and felt out of joint. Plaintiff was trying to pass through a space of about 10 inches while facing the other employee.

4. As a result of the side-stepping and pivoting motion on the date above indicated, plaintiff sustained a bucket handle tear of his left medial meniscus. Plaintiff's condition was surgically repaired.

5. Seventy-five percent of plaintiff's work time is spent working in confined areas and cramped conditions with his legs folded and leaning in at an angle while pushing with his legs in a folded position. Plaintiff has felt a popping and pain in his knee, approximately 12 times during his employment while in the position described above. Occasionally plaintiff has to crawl on his knees in order to change positions, and on one occasion while crawling plaintiff's knee felt loose when he attempted to pick it up from the crawling position.

6. Plaintiff does not contend that he is suffering from an occupational disease caused by the cramped conditions of his work on his knees and there is no medical evidence in the record to support such a contention.

7. In 1970 as the result of a car accident, plaintiff sustained a condition which resulted in fluid on his left knee. Plaintiff received no specific treatment for his knee other than x-rays and experienced no pain after this incident. Plaintiff has not had any problem with his knees until the injury described herein.

8. Plaintiff admits that he went to the break area about every day. There was nothing unusual about the number of employees present on September 10, 1982, and he had side-stepped other employees in this same manner on other occasions without ill effect. He did complain that for two weeks prior to September 10, 1982, he had worked in a cramped position, but felt no pain in his knees. He did feel a 'popping' in his knees on occasion during this two-week period.

9. On the day complained of, there was nothing unusual from the way plaintiff normally did his job or his side-stepping around a fellow employee in the break area. This was no different from what he had done in the past. In fact, the only thing unusual was that he felt severe pain on this occasion when his leg came to a straight extended position when he started to walk away.

10. On September 10, 1982, plaintiff sustained an injury to his left knee arising out of and in the course of his employment. However, the injury was not the result of an accident or unusual circumstances.

The Full Commission concluded as a matter of law that plaintiff did not sustain an injury by accident and, therefore, he is not entitled to the benefits of the Workers' Compensation Act. G.S. 97-2(6). Plaintiff appealed to this Court.

Lemuel F. Swindell, pro se, for plaintiff appellant.

Teague, Campbell, Dennis & Gorham, by G. Woodrow Teague and Dayle Flammia, for defendant appellee.

JOHNSON, Judge.

We note that on appeal plaintiff has proceeded *in forma pauperis*. Plaintiff has failed to present any Assignments of Error within the Record. Rule 10(a), N.C. App. P. Neither the Exceptions, nor their respective Assignments of Error, which plaintiff relies on are set forth at the conclusion of the Record on Appeal. Rule 10(c), N.C. App. P. In order to prevent any manifest injustice to this plaintiff we will, nonetheless, review the merits of his appeal. Rule 2, N.C. Rules App. P.

The issue raised by plaintiff's appeal is whether, consistent with North Carolina law, the opinion and award filed by the Full Commission is supported by competent evidence. We hold that the Record on Appeal supports the opinion and award by the Full Commission.

Findings of Fact by the Industrial Commission when supported by competent evidence are conclusive on appeal. *Byers v. North Carolina State Highway Commission*, 3 N.C. App. 139, 164 S.E. 2d 535 (1968), *aff'd*, 275 N.C. 229, 166 S.E. 2d 649 (1969). The

Full Commission concluded as a matter of law that plaintiff's injury was not an accident and, therefore, he was not entitled to benefits under the Workers' Compensation Act. G.S. 97-2(6); *Russell v. Pharr Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973).

The statutory definition for a compensable injury under the Workers' Compensation Act is set forth in G.S. 97-2(6).

> Injury.—'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except where it results naturally and unavoidably from the accident. . . .

This Court has held that the statutory definition of the word injury is not synonymous with accident. *See Russell v. Yarns, supra.* There must be some new circumstance not a part of the usual work routine in order to find that an accident has occurred. *Id.*

In the case *sub judice*, the Industrial Commission found as fact that there were no unusual circumstances at the time plaintiff injured himself. In response to a direct question on this point, plaintiff testified that there was nothing different from any other time he was in the break area.

> Q. Is there anything—any reason you feel that side-stepping this foreman was different from any other time you were in the break area and other people were at the machine? I mean, what was so different about this occasion that caused you to hurt yourself?
>
> A. I'm not saying there is anything different from it. The only thing I can say is that I believe the accident was caused by the side-stepping, then final side-step and pivot. . . .

Plaintiff proceeded to assert that the cramped conditions he was working in may have led to the accident. However, there was no medical testimony to corroborate this assertion by plaintiff. Prior to 10 September 1982, the date of the injury plaintiff complains of, plaintiff felt a popping in his knee.

> Q. Before you talk about this occasion you need to give a date and time?

A. I can't give it a date and time because I have no recollection as to what day, because at that time it was not of importance to me. I passed it off as being no more significant as the popping of a finger joint.

Q. Could you give it a month and year?

A. No, ma'am; I couldn't.

Q. Before or after September 10, 1982.

A. Before.

Plaintiff further testified that he had experienced this popping in his knee at least a dozen times during a two week period prior to 10 September 1982.

Q. How many times have you felt the popping? Prior to September 10, 1982, how many times have you felt the popping in your knee?

A. I would say at least a dozen—a dozen and a half times.

Plaintiff had previously noticed a looseness in his knee while crawling in cramped working conditions. Seventy-five (75) percent of the time plaintiff worked in these cramped conditions and had done so since the date of his employment. Plaintiff testified that there was nothing different about the snack area on the day he injured himself. "No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by an accident." *Searsey v. Perry M. Alexander Construction Co.*, 35 N.C. App. 78, 80, 239 S.E. 2d 847, 849, *disc. rev. denied*, 294 N.C. 736, 244 S.E. 2d 154 (1978).

The Full Commission and the Deputy Commissioner found as a fact that plaintiff had a prior injury of his knee in an automobile accident. Plaintiff's testimony supported this finding. Plaintiff testified that after the accident a "sac of fluid the size of a golfball" formed on his left knee. We conclude that the Full Commission's Findings of Fact are supported by competent evidence and the Findings of Fact support the Full Commission's Conclusion of Law, that plaintiff's injury was not caused by an accident within the meaning of the Workers' Compensation Act.

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JIMMY NICHOLSON

No. 8520SC554

(Filed 17 December 1985)

1. **Forgery § 2.2— forging and uttering an endorsement—evidence sufficient**

There was sufficient evidence of forging and uttering an endorsement on a check despite the fact that the State never introduced the check into evidence where the jury could have found from the testimony of two accomplices that the forged check was the one described in the indictment and there was substantial evidence from which the jury could reasonably have found defendant guilty beyond a reasonable doubt. There is no requirement that the check be introduced into evidence.

2. **Conspiracy § 4.1; Forgery § 2.1— conspiracy to forge an endorsement—indictment sufficient**

An indictment sufficiently charged the offense of conspiracy to forge an endorsement on a tax refund check where it clearly charged that defendant conspired and agreed with Deborah Denise Quick and Janie McBride Cameron to feloniously forge, falsely make, and counterfeit a check. That information set forth the essential elements of a conspiracy as well as the purpose and object of the conspirators.

APPEAL by defendant from *Pope, Judge.* Judgment entered 17 January 1985 in Superior Court, RICHMOND County. Heard in the Court of Appeals 24 October 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General Wilson Hayman for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse for defendant appellant.

COZORT, Judge.

Defendant was convicted of forging an endorsement, uttering a forged endorsement, and conspiracy to commit felonious forgery. Defendant assigns as error the trial court's denial of his mo-

tions to dismiss the forging and uttering charges and the trial court's denial of his motion to quash the conspiracy indictment. Regarding the substantive offenses, defendant argues the evidence was insufficient to go to the jury because the State did not introduce into evidence the check allegedly forged and uttered. As to the conspiracy indictment, defendant argues it should have been quashed because it "failed to allege specifically the forgery of an identified instrument." We find no error.

The State's evidence tended to show the following:

Sometime during the first week of March 1984 Joyce Flowers noticed her income tax check was missing. The amount of the check was "about $739.00." Ms. Flowers called the Internal Revenue Service and reported the check was missing. Ms. Flowers gave no one permission to sign the check or to remove the check from her mailbox. Ms. Flowers knew the defendant.

Deborah Denise Quick, who had known the defendant for about two years, received a phone call from the defendant during the month of March. Defendant asked her if she could get a "woman's check" cashed for him. Ms. Quick told defendant she would have to ask Janie Cameron. Defendant told her "okay" and said he would get back with her. Ms. Quick contacted Ms. Cameron, who had known defendant for about a year, and told her defendant had a "woman's check," and he wanted to know if they could get it cashed. Ms. Cameron told Ms. Quick she could get the check cashed because she had an account at the bank. Ms. Quick then talked with defendant and he told her to come and get the check. Ms. Quick met defendant while he was at work, and he handed her the check in a white envelope.

Ms. Quick and Ms. Cameron went to Richmond Federal Savings & Loan the next day and cashed the check, which was in the amount of $739.19. Ms. Quick signed Ms. Flowers' name on the back of the check without her permission. At the time she signed Ms. Flowers' name she knew it was illegal to do so. Ms. Cameron then signed her own name on the check in order to get the bank to cash it. Ms. Quick and Ms. Cameron took the $739.19 in cash and met defendant in the parking lot next to where he worked. The three divided up the money. Defendant told Ms. Quick to give Ms. Cameron $200.00 of the money and Ms. Quick received $200.00. Defendant kept the rest of the money.

Defendant presented no evidence.

[1] First, we address defendant's contention that the evidence was insufficient to go to the jury on the forging and uttering charges. 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).

Defendant bases his argument that the evidence was insufficient upon the fact that the State never introduced the subject check into evidence. This argument is without merit. From the testimony of Ms. Flowers and Ms. Quick, the jury could readily find that the forged check was the one described in the forging and uttering indictment. There is simply no requirement in the law that the check, upon which the endorsement was allegedly forged, be in evidence. *See, e.g., State v. Peterson*, 129 N.C. 556, 40 S.E. 9 (1901).

A review of the record, in light of the above quoted standard, reveals that " 'there is substantial evidence from which a jury might *reasonably find* the defendant is guilty beyond a reasonable doubt.' " *State v. Harvell*, 45 N.C. App. 243, 246, 262 S.E. 2d 850, 853 (1980), *quoting, Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed. 2d 560, 574, 99 S.Ct. 2781, 2789 (1979). [Emphasis in original.] We overrule this assignment of error.

[2] Next, we consider defendant's contention that the conspiracy indictment is fatally defective and should have been quashed because the indictment "failed to allege specifically the forgery of an identified instrument." The indictment reads, in pertinent part, as follows:

Date of Offense: March 6, 1984

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [Richmond County] the defendant named above [Jimmy Nicholson] unlawfully, willfully and feloniously and designedly with his own head and imagination, and with common

design did conspire, confederate, scheme, and agree with another, to wit: Deborah Denise Quick and Janie McBride Cameron, to unite for the common object and purpose to feloniously forge, falsely make and counterfeit a check.

It is well settled that an indictment must "so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." *State v. Coleman*, 253 N.C. 799, 801, 117 S.E. 2d 742, 744 (1961). It is equally well settled, however, that a conspiracy indictment need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime. *State v. Blanton*, 227 N.C. 517, 42 S.E. 2d 663 (1947). An indictment is legally sufficient if it informs " 'the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction.' " *State v. Bowen*, 56 N.C. App. 210, 211, 287 S.E. 2d 458, 459, *pet. denied and appeal dismissed*, 305 N.C. 588, 292 S.E. 2d 7 (1982), *quoting, State v. Lowe*, 295 N.C. 596, 603, 247 S.E. 2d 878, 883 (1978). "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. * * * As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E. 2d 521, 526 (1975). Since the conspiracy is the crime, and not its execution, no overt act is necessary to complete the offense. *Id.* 288 N.C. at 616, 220 S.E. 2d at 526.

Therefore, we must determine whether the indictment here, taken as a whole, sufficiently charges the offense of conspiracy. *State v. Bowen*, 56 N.C. App. 210, 212, 287 S.E. 2d 458, 459 (1982). In making this determination, "we must find that the indictment clearly sets forth the purpose and object of the persons involved, 'as in these are to be found almost the only marks of certainty by which the . . . accused may know what is the accusation [he is] to defend.' " *Id. quoting State v. Van Pelt*, 136 N.C. 633, 639, 49 S.E. 177, 180 (1904). The indictment clearly charges that defendant conspired and agreed with Deborah Denise Quick and Janie McBride to feloniously forge, falsely make and counterfeit a check. This in-

formation sets forth the essential elements of a conspiracy (an agreement between two or more persons to do an unlawful act), as well as the purpose and object of the conspirators: to feloniously forge, falsely make and counterfeit a check. The indictment sufficiently charges the offense of conspiracy. Thus, the motion to quash was properly denied. This assignment of error is overruled.

No error.

Judges WHICHARD and EAGLES concur.

IN THE MATTER OF: COMPUTER TECHNOLOGY CORPORATION

No. 8526SC350

(Filed 17 December 1985)

Searches and Seizures § 1; Process § 6— order to make records available—not administrative search warrant—subpoena duces tecum—constitutional

An *ex parte* order directing the officials of Computer Technology Corporation to make available its records pertaining to its transactions with two other corporations and the City of Charlotte as part of an investigation into purchasing irregularities by the City was not an administrative search warrant because it was not part of an "authorized program of inspection" and these records could not be construed as "a condition, object, activity or circumstance"; furthermore, it has previously been determined that orders of the type in question here are subpoenas duces tecum and not administrative search warrants. Evidence procured by subpoenas is not normally subject to the strictures of the Fourth Amendment of the United States Constitution and the order in this case was neither unreasonably broad nor indefinite. Art. I, § 20 of the N. C. Constitution, N.C.G.S. 15-27.2.

APPEAL by Computer Technology Corporation from *Burroughs, Judge.* Order entered 29 January 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 October 1985.

The Charlotte Police Department initiated an investigation into the possibility of fraud and irregularities in the purchasing of parts, equipment, and services by the City of Charlotte. In furtherance of that investigation, the District Attorney sought an *ex parte* order from the superior court directing officials of Computer Technology Corporation (hereinafter Computer Technology)

to make available records pertaining to its transactions with two other corporations and the City of Charlotte. The District Attorney gave as grounds that the records were "necessary to the investigation [and] . . . for a proper administration of justice." Based on the verified petition and an attached affidavit, the court found that the best interest of law enforcement and the administration of justice required the production of the information. The court therefore ordered Computer Technology to make available the requested records.

This process was subsequently served on an official of Computer Technology on 1 February 1985. Through a motion filed 4 February 1985, Computer Technology sought a stay of the order. This motion was denied. Computer Technology then timely filed notice of appeal and sought from this Court a temporary stay and a writ of supersedeas which were allowed.

From the order entered in the superior court, Computer Technology appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Daniel C. Higgins, for the State.

Casstevens, Hanner & Gunter, by Nelson M. Casstevens, Jr., Marc R. Gordon and W. David Thurman, for appellant.

ARNOLD, Judge.

Computer Technology contends that the order is in essence an administrative search warrant, and as such must meet the requirements of the Fourth Amendment to the United States Constitution; Article I, Section 20 of the North Carolina Constitution; and G.S. 15-27.2. We disagree.

The order is not an administrative search warrant. G.S. 15-27.2(c)(1) mandates that one of the following two conditions must be met before an administrative search warrant can be issued. First, the property to be searched or inspected must be searched or inspected as part of a "legally authorized program of inspection which naturally includes that property" or second, there must be "probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property." The order in question required Computer Technology to make available certain requested

records. The order was certainly not part of an "authorized program of inspection," nor in this instance, can the records be construed as "a condition, object, activity or circumstance." Furthermore, this Court has previously determined that orders of the type in question are subpoenas duces tecum and not administrative search warrants. *See In re Superior Court Order*, 70 N.C. App. 63, 318 S.E. 2d 843, *disc. rev. granted*, 312 N.C. 622, 323 S.E. 2d 926 (1984), and *State v. Sheetz*, 46 N.C. App. 641, 265 S.E. 2d 914 (1980) (in reference to the 4 December 1978 order).

The Superior Court of Mecklenburg County, as a court of general jurisdiction in North Carolina, possesses the inherent power under the common law to issue a subpoena duces tecum in this instance where the interests of justice so required. *In re Superior Court Order*, 70 N.C. App. at 66, 318 S.E. 2d at 845. Computer Technology seeks to distinguish the present case from *In re Superior Court Order* in that the present case involves an order directed toward a corporation which is itself subject to a criminal investigation. However, it is not clear from the facts in this case that Computer Technology is the subject of the criminal investigation. Assuming *arguendo* that it is the subject of the investigation, this Court in *State v. Sheetz*, 46 N.C. App. 641, 265 S.E. 2d 914 (1980), approved such a subpoena in the criminal investigation of a sole proprietorship. Thus, though the facts of the present case might be distinguished from *In re Superior Court Order*, the facts do not distinguish this case from *Sheetz*.

Evidence procured by subpoenas is normally not subject to the strictures of the Fourth Amendment to the United States Constitution. *Sheetz*, 46 N.C. App. at 645, 265 S.E. 2d at 917. The Supreme Court of the United States, in *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 90 L.Ed. 614, 66 S.Ct. 494 (1946), articulated the principles of law applicable to a subpoena duces tecum directed to a corporate entity:

> [T]he Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

327 U.S. at 208, 90 L.Ed. at 629. *Accord, Meyers v. Holshouser*, 25 N.C. App. 683, 214 S.E. 2d 630, *cert. denied*, 287 N.C. 664, 216 S.E. 2d 907 (1975).

The order in question is neither unreasonably broad nor indefinite. The order describes the types of records to be produced and specifies the particular transactions and parties to which the requested records pertain. The records are relevant to the investigation and we have previously determined that the superior court is empowered to require the production of the records.

As to Article I, Section 20 of the North Carolina Constitution, we do not interpret that section to require more particularity in subpoenas than does the Fourth Amendment as applied to the states through the Fourteenth Amendment. *See generally, State v. Kornegay*, 313 N.C. 1, 326 S.E. 2d 881 (1985).

Therefore, in view of our findings, we affirm the order of the superior court and dissolve the writ of supersedeas.

Affirmed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. TONEY (SIC) WIGGINS

No. 857SC393

(Filed 17 December 1985)

1. Robbery § 5.2— instructions—box cutter as deadly weapon per se

The trial court did not err by instructing the jury that the box cutter used in a robbery was a deadly weapon *per se* despite the absence of a verbal description of the weapon where the cutter itself was admitted into evidence, and an examination of the knife by the appellate court reveals that it had an exposed, sharply pointed razor blade clearly capable of producing death or great bodily harm.

2. Robbery § 4.3— use of deadly weapon per se—presumption victim's life endangered

Where defendant committed a robbery by use of a box cutter which constituted a deadly weapon *per se*, there is a mandatory presumption that the victim's life was in fact endangered or threatened.

3. Robbery § 5.4— armed robbery—instruction on common law robbery not required

The trial court in an armed robbery case did not err in failing to instruct on common law robbery where the uncontradicted evidence showed that defendant perpetrated the robbery with the threatened use of a dangerous weapon held a couple of inches from the victim's side.

APPEAL by defendant from *Brown, Frank R., Judge.* Judgment entered 1 August 1984 in Superior Court, WILSON County. Heard in the Court of Appeals 18 October 1985.

Defendant was tried for armed robbery. The State's evidence, in pertinent part, showed that defendant entered Turner's Mini Mart in Wilson, approached the cashier, held a box cutter a couple of inches from her side, told her to open the cash register, removed the money from the register and departed.

The jury returned a verdict of guilty. Defendant appeals from a judgment of imprisonment.

Attorney General Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Fitch and Butterfield, by James A. Wynn, Jr., for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred by instructing that the box cutter used in the robbery was a dangerous weapon *per se*. He argues that whether the weapon was dangerous was for the jury to determine. We disagree.

Since a dangerous weapon is synonymous with a deadly one, cases resolving whether a particular weapon was deadly *per se* are relevant. *State v. Mullen*, 47 N.C. App. 667, 668, 267 S.E. 2d 564, 565, *disc. rev. denied*, 301 N.C. 103, 273 S.E. 2d 308 (1980). A dangerous or deadly weapon "is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E. 2d 719, 725 (1981).

> Where the alleged [dangerous] weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether . . . it is [dangerous] within the

> foregoing definition is one of law, and the [c]ourt must take the responsibility of so declaring.

State v. Buchanan, 28 N.C. App. 163, 165, 220 S.E. 2d 207, 208-09 (1975), *disc. rev. denied*, 289 N.C. 452, 223 S.E. 2d 161 (1976), *quoting State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924). *See also State v. Carson*, 296 N.C. 31, 46, 249 S.E. 2d 417, 426 (1978).

Here, while no detailed verbal description of the box cutter was offered, the court admitted the weapon itself into evidence. While a verbal description supplemental to introduction of the weapon would have been preferable, its omission was not fatal. In *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665 (1970), this Court held that the trial court did not err in declaring a steak knife a deadly weapon *per se* despite absence of a verbal description. Here, as in *Parker*, the weapon was admitted into evidence, thereby enabling the court "to determine for [itself] an adequate description." 7 N.C. App. at 195, 171 S.E. 2d at 667.

Pursuant to N.C. R. App. P. 9(b)(5), we have ordered the box cutter "sent up and added to the record on appeal." The cutter has an exposed, sharply pointed razor blade clearly capable of producing death or great bodily harm. The victim testified that defendant held the cutter a couple of inches from her side as he instructed her to open the cash register. From that position a slight movement of defendant's hand in the direction of the victim's side clearly could have resulted in death or great bodily harm. Accordingly, as in *Parker, supra*, we hold that the court did not err by instructing that the weapon was dangerous *per se*.

[2] Defendant contends the court erred by denying his motion to dismiss because of insufficient evidence that he used a dangerous weapon to endanger or threaten the life of the victim. We disagree.

Upon a motion to dismiss in a criminal action the court must consider the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). The court "must decide whether there is substantial evidence of each element of the offense charged." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

Defendant correctly asserts that the determinative question is "whether there was evidence sufficient to support a jury finding that [the victim's] life was *in fact* endangered or threatened by defendant's possession, use or threatened use of the [box cutter]." *State v. Moore*, 279 N.C. 455, 459, 183 S.E. 2d 546, 548 (1971). He maintains that such evidence was not presented. No evidence was offered, however, suggesting that the box cutter was anything but a dangerous weapon. As held above, the court properly declared it a dangerous weapon *per se*. Since defendant used a dangerous weapon, there is a mandatory presumption that the victim's life was *in fact* endangered or threatened.

> When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. [Citations omitted.] Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory.

State v. Joyner, 312 N.C. 779, 782, 324 S.E. 2d 841, 844 (1985). We thus hold that the court properly denied the motion to dismiss.

[3] Defendant contends the court erred by failing to instruct on common law robbery. We disagree.

> "The essential difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. . . . In a prosecution for armed robbery the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime. If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence *relating to the elements* of the crime charged an instruction on common law robbery is not required. (Citations omitted.)"

State v. Harris, 67 N.C. App. 97, 101, 312 S.E. 2d 541, 543, *disc. rev. denied*, 311 N.C. 307, 317 S.E. 2d 905 (1984), *quoting State v.*

Lee, 282 N.C. 566, 569-70, 193 S.E. 2d 705, 707 (1973). The evidence here shows that defendant perpetrated the robbery with the threatened use of a dangerous weapon held a couple of inches from the victim's side. There is no conflicting evidence relating to the elements of the crime. *Cf. State v. Smallwood*, 78 N.C. App. 365, 337 S.E. 2d 143 (1985) (evidence conflicted as to whether defendant held knife, which was neither described nor offered in evidence, by his side or at victim's throat; instruction on common law robbery held required). If the deadly or dangerous nature of the box cutter were a jury question, defendant would be entitled to an instruction on common law robbery. *State v. Mullen*, 47 N.C. App. 667, 669, 267 S.E. 2d 564, 565, *disc. rev. denied*, 301 N.C. 103, 273 S.E. 2d 808 (1980). We have held herein, however, that the court properly declared the weapon dangerous as a matter of law. Accordingly, it did not err in failing to instruct on common law robbery.

No error.

Judges EAGLES and COZORT concur.

NOLEN CONCRETE SUPPLY, INC. v. J. D. BUCHANAN AND JOSEPH BOHANAN

No. 8527SC106

(Filed 17 December 1985)

Trial § 41— issue submitted refused—no error

There was no prejudicial error in an action for the value of concrete furnished to defendant builders in not submitting an issue as to whether plaintiff and defendant Bohanan entered into a contract with respect to purchases by defendant Buchanan where the court submitted an issue as to whether Buchanan had actual or apparent authority from Bohanan to make the purchases involved. The form and number of the issues is within the sound discretion of the trial judge; although the contract issue could have been properly submitted, the pleadings and evidence also raise the issue submitted and the record indicates that the trial on that issue was not unfair to defendant.

APPEAL by defendant Bohanan from *Gaines, Judge*. Judgment entered 19 September 1984 in Superior Court, GASTON County. Heard in the Court of Appeals 17 September 1985.

Plaintiff sued defendants, who are individual builders, for $16,301.16 worth of concrete furnished to defendant Buchanan. Defendant Buchanan filed no answer and a default judgment was entered against him. Defendant Bohanan answered denying liability, and after a jury trial plaintiff obtained verdict and judgment against him in the amount sued for. Plaintiff's complaint alleged and its evidence tended to show that defendant Bohanan authorized Buchanan to purchase concrete from plaintiff on his credit; that Buchanan ordered and received various quantities of concrete from plaintiff, and that $16,301.16 was due plaintiff therefor. Defendant Bohanan participated in the trial but presented no evidence.

Garland & Alala, by T. J. Solomon, II and Julia M. Shovelin, for plaintiff appellee.

Stott, Hollowell, Palmer & Windham, by Grady B. Stott and Douglas P. Arthurs, for defendant appellant.

PHILLIPS, Judge.

Before the case went to the jury defendant requested that an issue be submitted as to whether plaintiff and defendant entered into a contract with respect to the purchases by Buchanan; this request was denied and the issue submitted by the court was whether Buchanan had actual or apparent authority from Bohanan to make the purchases involved. This action by the court is the basis for assignments of error contending that the court erred not only in refusing his issue and in submitting the agency issue, but in charging the jury thereon and in denying his motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial. All these assignments are based on the premise that the issue raised by the pleadings and evidence was whether plaintiff and defendant Bohanan entered into a contract covering the purchases made by defendant Buchanan, rather than the agency issue that the court submitted. While the contract issue defendant proposed could have been properly submitted to the jury the court's failure to submit it was not prejudicial error, in our opinion, because the pleadings and evidence also raised the issue submitted and the record indicates that the trial had on that issue was not unfair to defendant. Therefore, all of these assignments fail, in our opinion, and we overrule them.

The form and number of the issues is within the sound discretion of the trial judge; and when the issues submitted cover the factual matters disputed under the pleadings and enable the parties to fairly present their contentions in regard to them it is not error to refuse to submit other issues. *Miller v. McConnell*, 226 N.C. 28, 36 S.E. 2d 722 (1946). The agency issue that the court preferred and submitted meets these requirements. The tenor of plaintiff's complaint is that defendant Bohanan authorized plaintiff to accept Buchanan's orders and held him out as being his authorized agent and its evidence was also to that effect. While plaintiff could have justifiably cast his action in contract and sued for breach, the law did not require him to do so. The doctrine of apparent as well as actual authority to act for another is a recognized legal vehicle for imposing liability. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); 2A C.J.S. *Agency* Sec. 161 (1972). The agency issue which the court submitted enabled defendant to fully develop and present his contentions that no authority had been given to Buchanan to buy concrete on his account and that no agency existed. The court's instructions on the issue correctly stated the law and required the jury to consider defendant's contentions; and nothing in the record indicates that the instructions were disregarded or that the trial would have ended differently if it had been tried on the issue defendant requested.

The defendant's other assignments of error, which require no discussion, are also without merit and we overrule them.

No error.

Judges WELLS and WHICHARD concur.

BETTY M. JACKSON v. FAYETTEVILLE AREA SYSTEM OF TRANSPORTATION

No. 8510IC381

(Filed 17 December 1985)

Master and Servant § 94.1— workers' compensation—insufficient findings regarding injury

Findings by the Industrial Commission that plaintiff employee exerted an unusual amount of pressure during a particular task and then experienced pain in her back and her leg and that, as a result of such injury, plaintiff had to seek medical attention were insufficient to support a conclusion that plaintiff sustained an injury by accident arising out of and in the course of her employment absent a specific finding that plaintiff sustained an injury and a specific finding regarding the nature of such injury.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and Award filed 14 January 1985. Heard in the Court of Appeals 23 October 1985.

Defendant appeals from an opinion and award of the Industrial Commission awarding plaintiff workers' compensation benefits. The Commission found as follows, in pertinent part:

> 1. Plaintiff's job responsibilities for defendant employer included . . . pulling the money from the bus collection boxes and running the money through a sorter to get it ready for the bank.
>
> 2. While performing her duties on December 13, 1982, plaintiff experienced difficulty in running the money from one of the boxes. Plaintiff exerted an unusual extra amount of pressure on this particular box and had to stop and rest, and then try it again. Plaintiff went back and tried again, and when the box turned loose, pain went across her back and down her right leg.
>
> 3. As a result of this injury, plaintiff has experienced pain and discomfort and had to seek medical attention. Since December 13, 1982, plaintiff has used eight sick days, fifteen vacation days, and began leave without pay as of September 19, 1983.

4. Plaintiff was operated on for a slipped disc in 1961. Since this operation, she has worked for 18 or 19 years without any problem.

Based on these findings, the Commission concluded that "[o]n December 13, 1982, plaintiff sustained an injury by accident arising out of and in the course of her employment," and that she is entitled to workers' compensation benefits.

Hedahl & Radtke, by Joan E. Hedahl, for plaintiff.

Robert C. Cogswell, Jr. for defendant.

WELLS, Judge.

Defendant assigns as error the critical findings of fact made and the conclusion reached by the Commission. In passing upon an appeal from an award of the Industrial Commission, our review is limited to the following questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981).

The Commission is required to make specific findings of fact as to each material fact upon which the right to compensation depends. *Id.; Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955). If the Commission's findings are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the Commission for proper findings of fact. *Hansel v. Sherman Textiles, supra; Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952). As explained by our Supreme Court in *Thomason*:

> [The Commission's findings of fact] must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. . . . It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which these rights depend.

Guided by these principles, we conclude that the findings made in the present case are insufficient to support the Commission's conclusion and decision because no specific finding was made that plaintiff sustained an injury or that determined the nature of that injury, if any. It is obvious that the fact plaintiff sustained an injury is a critical fact upon which her right to compensation depends; thus, a specific finding of that fact is required. The Commission's finding that plaintiff experienced pain as a result of what occurred while she was performing her duties on 13 December 1982 is not sufficient as pain is not in and of itself a compensable injury. *See* N.C. Gen. Stat. § 97-31 (1985); *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943) (There is no provision in the Workers' Compensation Act for compensation for physical pain or discomfort). *But cf. Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957) and *Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E. 2d 485 (1983), *disc. rev. denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984) (Compensation may be awarded in some circumstances for pain *resulting* from an injury). Pain, rather than being itself an injury, is a manifestation or indication of an injury. *See Webster's New Collegiate Dictionary* 824 (1977) (defining "pain" as "usu[ally] localized physical suffering associated with bodily disorder (as a disease or an injury)"). Nor is the Commission's reference to an injury in finding number three sufficient, as it merely implies, rather than directly states, that plaintiff sustained an injury and does not indicate the nature of that injury.

Because of the insufficiency of the findings as to plaintiff's injury by accident, we reverse and remand the cause to the Industrial Commission for specific findings of fact regarding the injury, if any, sustained by plaintiff and the nature of that injury. Because we so hold, we need not address the assignments of error presented by defendant.

Reversed and remanded.

Judges ARNOLD and MARTIN concur.

J. W. SORRELL, JR., EMPLOYEE-PLAINTIFF v. SORRELL'S FARMS AND RANCHES, INC., EMPLOYER-DEFENDANT, AND WAUSAU INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8510IC614

(Filed 17 December 1985)

Master and Servant § 49.1— workers' compensation—injury to president of family corporation—employment status stipulated

The Industrial Commission did not err in an action for workers' compensation by the president of a family owned corporation by finding that Sorrell's Farms and Ranches, Inc. was a corporation engaged in farming, by failing to find that a partnership existed between plaintiff and his wife, and by finding and concluding that plaintiff was acting as an employee at the time of his injury. Defendant stipulated prior to the hearing that the employment relationship existed between plaintiff and defendant employer at the time of the injury; that stipulation made it unnecessary for plaintiff to offer evidence on the validity or legal status of the corporate employer and the Deputy Commissioner's findings on the issue were unnecessary.

APPEAL by defendants from the North Carolina Industrial Commission. Order entered 8 January 1985. Heard in the Court of Appeals 21 November 1985.

Following a hearing, the Deputy Commissioner entered an order which contains the following pertinent findings of fact and conclusions of law.

FINDINGS OF FACT

1. Prior to 1973 plaintiff engaged in extensive farming operations in Harnett County. He farmed on land owned by himself and land owned by his wife. In 1973 plaintiff and his wife formed a corporation entitled Sorrell's Farms & Ranches, Inc., which is the defendant employer. Plaintiff is the president of the defendant and his wife is the secretary. Since 1973 the defendant has operated the farms which were formerly operated by plaintiff individually.

2. In 1977 the defendant corporation purchased a store building as well as a house and some land at Hodges Cross Roads in Harnett County. The land on which the store and house were located was put in the name of plaintiff's wife. The defendant operated the store and rented the house with the proceeds of the rent and from the operation of the store

being received by the defendant employer. In 1978 a "Combination of Separate Entities" was filled out by some unidentified person. On 29 November 1981 an endorsement was added to the defendant employer's Workers' Compensation Insurance policy adding as additional insureds plaintiff and his wife as partners. No partnership ever existed between plaintiff and his wife and the endorsement for additional insureds had no effect.

3. Plaintiff as president of defendant employer would from time to time check on the store operated by such defendant at Hodges Cross Roads. Late on the night of 30 October 1982 plaintiff was at home and received a telephone call to the effect that he should check on the store. Plaintiff, therefore, went to the store at approximately 2:00 a.m. He entered the store and found everything in apparent good order. As he was leaving the store it blew up. Plaintiff was knocked to the ground with burning objects on top of him.

* * *

The bare facts in this case appear to be that defendants admitted that defendant insurance carrier was on the risk for defendant employer and that plaintiff was an employee of defendant employer.

CONCLUSIONS OF LAW

1. On 30 October 1982 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Martha W. Surles and Gregory C. York, for defendant-appellants.

WELLS, Judge.

Defendants contend that the Commission erred in finding as a fact that Sorrell's Farms and Ranches, Inc. was a corporation engaged in farming. Defendants argue that the evidence showed that while plaintiff had obtained a corporate charter for Sorrell's Farms, there were no stockholders or directors and hence no cor-

poration by which defendant could have been employed at the time of his injury. Prior to the hearing, defendants stipulated that at the time of injury, the employment relationship existed between plaintiff and defendant employer. Such a stipulation is binding on defendants, *see Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); 2 Brandis, *N. C. Evidence* § 166 (2d rev. ed. 1982); and such a stipulation made it unnecessary for plaintiff to offer evidence of the validity or legal status of his corporate employer at the time of plaintiff's injury. The Deputy Commissioner's findings on this issue, while interesting, were unnecessary to the conclusion that at the time of injury, the employment relationship existed. Stipulations of this type are a widely accepted and useful means of avoiding the kind of evidentiary demands reflected in this case and the legal hair-splitting now resorted to by defendants on this question. This assignment is overruled.

Defendants also contend that the Commission erred in failing to find and conclude that a partnership existed between plaintiff and his wife in the operation of McLamb's Grocery, the store in which plaintiff was injured. This is but another way of challenging the employer-employee status of defendant employer and plaintiff, an issue we have resolved against defendants. This assignment is overruled.

Defendants also contend that the Commission erred in finding and concluding that plaintiff was acting as an employee of defendant Sorrell's Farms and Ranches, Inc. at the time of his injury. Again, this is but another challenge to the employer-employee relationship and this assignment is overruled.

Defendants' other arguments are redundant to the others we have discussed and they are rejected.

For the reasons stated, the award of the Commission is

Affirmed.

Judges ARNOLD and PARKER concur.

SOUTHEAST AIRMOTIVE CORPORATION v. UNITED STATES FIRE INSURANCE COMPANY

No. 8526SC544

(Filed 17 December 1985)

Insurance § 147.1— aircraft liability policy—ambiguity—construction against insurer

Provisions of an aircraft liability policy created an ambiguity as to whether coverage was provided for a bank's claim against the insured for damage to negotiable instruments in a crash of the insured's airplane, and the ambiguity must be construed against the insurer which drafted the policy.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 14 March 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 December 1985.

This is a civil action wherein plaintiff sought a declaratory judgment pursuant to G.S. 1-253 to determine whether it was entitled to coverage under the provisions of an aircraft liability policy purchased from defendants for claims being made against it arising out of the crash of an aircraft owned by plaintiff.

Uncontroverted evidence in the record establishes that on 15 November 1983, a twin-engined aircraft owned and operated by plaintiff crashed while transporting negotiable instruments owned by Wachovia National Bank from Winston-Salem, North Carolina to Charlotte, North Carolina. The negotiable instruments were damaged. At the time of the crash, plaintiff was covered by a policy of insurance issued by defendant. Under the terms of the policy, the insurer agreed:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay . . . for damages because of injury to or destruction of property, including the loss of use thereof, caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft.

The insurer also agreed to defend any suit against the insured seeking damages for such injury or destruction. The exclusions which applied to the policy were contained in a CAB standard endorsement attached to the policy and provided, in pertinent part:

> EXCLUSIONS. Unless otherwise provided in the Policy of insurance, the liability insurance afforded under this Policy shall not apply to:
>
> > (e) Loss of or damage to property owned, rented, occupied or used by, or in the care, custody or control of the Named Insured, or carried in or on any aircraft with respect to which the insurance afforded by this Policy applies . . . .

Upon learning that Wachovia intended to make a claim under the policy for losses resulting from the damage to the negotiable instruments, defendant's claim control center notified plaintiff that the policy would not provide coverage for these losses.

Plaintiff filed a complaint wherein it alleged that it had been informed that a lawsuit brought by Wachovia and Wachovia's insurance company seeking damages for losses incurred in the crash was imminent and that the insurance policy provided coverage for these losses and required defendant to defend any resulting lawsuit. In its answer, defendant denied that the policy covered any damage to the negotiable instruments and alleged that therefore it was not required to defend any suit by Wachovia.

Both plaintiff and defendant made motions for summary judgment. From an order granting plaintiff's motion for summary judgment, defendant appealed.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Debra L. Foster, for plaintiff, appellee.

Golding, Crews, Meekins, Gordon & Gray, by Rodney Dean and Ned A. Stiles, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant's only assignments of error concern the trial court's granting summary judgment for plaintiff, rather than for defendant. Defendant contends that the exclusionary language in the insurance policy purchased by plaintiff clearly excludes the negotiable instruments damaged in the crash from coverage and therefore that defendant, rather than plaintiff, is entitled to judgment as a matter of law. We disagree.

When language used in an insurance policy is ambiguous and is reasonably susceptible of differing constructions, it must be given the construction most favorable to the insured, since the insurance company prepared the policy and chose the language. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978). The test in deciding whether the language is plain or ambiguous is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended. *Joyner v. Insurance*, 46 N.C. App. 807, 266 S.E. 2d 30, *disc. rev. denied*, 301 N.C. 91 (1980).

Exclusions from liability are not favored, and are to be strictly construed against the insurer. *Holcomb v. Insurance Co.*, 52 N.C. App. 474, 279 S.E. 2d 50 (1981); *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). When the coverage provisions of a policy include a particular activity, but that activity is later excluded, the policy is ambiguous, and the apparent conflict between coverage and exclusion must be resolved in favor of the insured. *Holcomb*, 52 N.C. App. 474.

In the present case, the damage to the negotiable instruments appears to be covered by the policy under Coverage D as "damages because of injury to or destruction of property." Defendant argues, however, that the damaged property is excepted from coverage by exclusion (e), as "[l]oss of or damage to property . . . in the care, custody or control of the Named Insured, or carried in or on any aircraft with respect to which the insurance afforded by this Policy applies . . . ." Since exclusion (e) is prefaced by the phrase "[u]nless otherwise provided by the Policy of insurance," these provisions create an ambiguity between coverage and exclusion under the policy which must be resolved in favor of the insured. A reasonable person in the position of plaintiff, as a purchaser of insurance for an aircraft to be used to transport cargo, would have understood Coverage D to be such a provision otherwise. We hold, therefore, that the trial court was correct in concluding that the policy issued by defendant provides plaintiff with liability coverage for claims asserted by Wachovia for damage to its negotiable instruments carried in plaintiff's aircraft at the time of the crash.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. EARL LORENZO DAMON

No. 855SC758

(Filed 17 December 1985)

Narcotics § 4— possession of marijuana with intent to sell and deliver—evidence sufficient

The trial court did not err by denying defendant's motions to dismiss a prosecution for possession of marijuana with intent to sell and deliver where two officers were on routine patrol in Wilmington on a rainy night at an intersection known for the sale of controlled substances; the officers observed four men, one of whom, defendant, ran when he saw the officers; the officers pursued, losing sight of defendant for less than six seconds; officers then observed defendant beside a house acting nervous; one of the officers called to defendant, who responded that he was going to the bathroom and kept walking when the officer asked him to hold on; the officer observed a paper bag in an opening where defendant had stood; the opening was saturated with water and there were hoses in the area that were wet and covered with a film of dirt; the bag was dry, warm to the touch, and without the film of dirt; the bag contained a large quantity of nickel bags of marijuana; defendant's father approached and asked "Did they find anything on you?" and defendant responded negatively; and defendant had $147.00 in bills on his person, twenty of which were in $5.00 denominations.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 20 February 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 November 1985.

Defendant appeals from a judgment of imprisonment entered upon a conviction for possession of marijuana with intent to sell and deliver.

Attorney General Thornburg, by Associate Attorney Dolores O. Nesnow, for the State.

Fullwood & Morgan, by Mallam J. Maynard, for defendant appellant.

WHICHARD, Judge.

Defendant's sole assignment of error is to the denial of his motions to dismiss. We find no error.

On a motion to dismiss the question for the court is whether there is substantial evidence of each essential element of the crime charged and that the defendant committed it. *State v. Riddle*, 300 N.C. 744, 746, 268 S.E. 2d 80, 81 (1980). The test is the same whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E. 2d 649, 653 (1982). Although some cases have applied a different standard where the evidence was wholly circumstantial, *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956), resolved the conflict in our decisional law. The Court there stated:

> We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *State v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904, 908, quoting from *State v. Johnson*, 199 N.C. 429, 154 S.E. 730: "If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. (Citations omitted.)

Stephens at 383-84, 93 S.E. 2d at 433-34. *Accord, State v. Jones*, 303 N.C. 500, 503-04, 279 S.E. 2d 835, 838 (1981); *State v. Daniels*, 300 N.C. 105, 114, 265 S.E. 2d 217, 222 (1980). "If the evidence . . . gives rise to a reasonable inference of guilt, it is for . . . the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt." *Jones* at 504, 279 S.E. 2d at 838. *Accord, State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967).

Thus, the issue is whether there was substantial evidence that defendant willfully possessed marijuana, a Schedule VI controlled substance, N.C. Gen. Stat. 90-94, with the intent to sell and deliver it, a violation of N.C. Gen. Stat. 90-95(a)(1). The evidence, considered in the light most favorable to the State as required, *Earnhardt* at 67, 296 S.E. 2d at 652, showed the following:

On a rainy day two police officers were on routine patrol at or about an intersection in Wilmington which had an "extreme reputation for the sale of all types of controlled substances." The officers observed four men there. One, identified as defendant, ran when he saw the officers. The officers pursued, losing sight of him for "less than six seconds," but then observing him beside a house. Defendant "acted nervous." One of the officers called out to him, and he responded that he was going to the bathroom. When the officer asked him to "hold on," defendant "just kept walking."

The officer approached the place where he had seen defendant and observed a paper bag in an opening where defendant had stood. The opening was "quite wet, saturated with water," but the bag was "dry and warm to the touch." There were hoses in the area that were wet and covered with a film of dirt, but "[t]he bag didn't have this on it."

The officer observed in the bag a large quantity of what he believed to be "nickel bags." A nickel bag "is how marijuana is packaged on the streets." Nickel bags sell for $5.00 and "dime bags" for $10.00 "so they can easily be distributed in the street."

Defendant denied having seen the bag. While the officers were with defendant his father approached them. Defendant responded in the negative when his father asked, "Did they find anything on you?"

Defendant had $147.00 in bills on his person. Twenty of the bills were in $5.00 denominations.

One of the officers determined that the contents of one of the sacks was marijuana. Defendant stipulated that material identified as being from the seized bag was in fact marijuana.

We hold that the foregoing constituted substantial evidence from which the jury reasonably could infer that defendant possessed the marijuana in the seized bag with the intent to sell and deliver it. Accordingly, the motions to dismiss were properly denied.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. CHARLES TABRON

No. 8510SC367

(Filed 17 December 1985)

1. **Criminal Law § 99.1— instructions on elements before evidence presented—no expression of opinion**

The trial judge did not express an opinion on the case when he gave an instruction informing the jury of the elements of the crime for which defendant was being tried, second degree murder, and the elements of self-defense after counsel had made their opening statements but before any evidence was presented.

2. **Criminal Law § 163— effect of failure to object to charge**

Where defendant failed to object to the instructions before the jury retired as required by App. Rule 10(b)(2), alleged erroneous instructions will be reviewed only for the limited purpose of determining whether "plain error" was committed.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 8 January 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 17 October 1985.

Defendant was convicted of the second degree murder of Thomas Gerald Surles. The State's evidence tends to show that:

On 5 May 1984, accompanied by his wife, children and Deborah Bobbitt, defendant was driving his car slowly down a rural road near Apex, and as the car passed Thomas Surles, a brother of Ms. Bobbitt and defendant's wife, the women yelled something at Surles, who chased the car on foot until it stopped about 100 yards away. When the car stopped the two women got out and began fighting with Surles. A little later defendant, out of the car, removed a rifle from the trunk and as Surles was walking fast toward him and was about 20 feet away, he fired the gun. A deputy sheriff, in the immediate area, heard the shot, went to the scene, and saw defendant with a rifle in his hand standing over Surles' body. A knife was on the ground near Surles' right hand.

Defendant testified that: After the fight between the women and Surles began, Ms. Bobbitt took the gun from the car and threatened Surles with it and that defendant's wife took the gun from her and put it on the ground near the car. Surles struck defendant's wife at least twice, once knocking her to the ground; the defendant then got out of the car, picked up the gun and held it pointed at the ground while watching the fight. After a few minutes, he told Surles to stop and Surles, who was bigger than him and had threatened him with a knife earlier, came after him. He could not see Surles' hands as he approached, did not know if he had a weapon, and warned him to stop; but the warning was ignored and Surles was about three feet away when defendant shot in an attempt to wound him.

Attorney General Thornburg, by Assistant Attorney General George W. Lennon, for the State.

John T. Hall for defendant appellant.

PHILLIPS, Judge.

[1] Before any evidence was presented, but after counsel for the State and the defendant had made their opening statements, Judge Bailey stated to the jury:

> Ladies and gentlemen, I think there are perhaps a few definitions that I should give you before we get into the trial of this case. It is customary to wait until after it's over to instruct the jury, but I think in this case, because of the nature of the case, it would perhaps be useful to have a little bit in advance.

[He then defined second degree murder.]

Now based on the argument of Mr. Jackson and the questions that were asked you when the jury was selected, I believe that in all probability part of the defense in this case will be self defense.

[And he then defined self defense.]

Now that is a fairly brief description of self defense. There are other aspects of self defense, but since I'm unable to tell at this time whether or not they will be involved in this case, I will not go into them at this time.

Defendant cites this action by the trial judge as error, contending that it expressed an opinion on the case to his great prejudice. We see no error either in what was said or when it was said, and do not believe that the defendant suffered any prejudice in any event. Though the jury charge proper has to be given after the evidence is completed, incidental instructions can be given jurors at other times as developments during the trial require. Indeed, every ruling on the admissibility of evidence or a motion to strike is in effect such an instruction. The instructions given here merely informed the jury of the elements of the crime defendant was being tried for and of a defense that was being asserted. The instructions accurately stated the law, as far as they went, and defendant does not contend otherwise; the claim is that the instructions caused the jury to focus unduly upon the crime of second degree murder "with no consideration of lesser included offenses." We reject this contention, as the jury must have understood from the instructions that they had received only some general definitions and were to focus on nothing until more specific instructions were received after the evidence had been completed and the contentions of the parties had been made in regard to it. That the lesser included offense of voluntary manslaughter was not charged on until later did not minimize that issue in our opinion, as there was no occasion to charge thereon earlier, any more than on burden of proof, reasonable doubt, credibility of witnesses, and many other things, as the jury must have realized.

[2] In his second, third and fourth assignments of error, defendant contends that several instructions given to the jury after the

evidence was completed were inaccurate, misleading and incomplete. Since none of these instructions were objected to before the jury retired, as required by Rule 10(b)(2) of the N.C. Rules of Appellate Procedure, we reviewed them only for the limited purpose of determining whether "plain error" within the meaning of *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) was committed. In our opinion, plain error was not committed in any of the court's instructions and these assignments are overruled. The defendant's other assignments of error, likewise without merit, require no discussion.

No error.

Judges WEBB and JOHNSON concur.

DAVID R. BADGER AND R. KEITH JOHNSON v. RONALD J. BENFIELD

No. 8524SC295

(Filed 17 December 1985)

Register of Deeds § 1; Registration § 2.1— indexing—action against register of deeds for late indexing—12(b)(6) dismissal proper

The trial court did not err by granting defendant's motion for dismissal under N.C.G.S. 1A-1, Rule 12(b)(6) where plaintiffs alleged that they were the purchasers of a condominium in Avery County; defendant was the register of deeds for Avery County; plaintiffs obtained a general warranty deed which was recorded on 5 May 1983; Republic Bank subsequently informed plaintiffs that it held a second mortgage on the property; another title search revealed a deed of trust dated 5 August 1982 in favor of the Bank; plaintiffs verified that the Bank's deed of trust had been indexed some time after their first title search; and plaintiffs were required to negotiate with and pay the Bank to cancel the deed of trust because there was no indication in the grantor index or otherwise that the Bank's deed of trust was indexed after the plaintiffs' deed was registered. The allegations of the complaint, taken as true, established that plaintiffs were not legally required to satisfy the mortgage because the Bank's deed of trust was indexed after plaintiffs' deed was duly registered. N.C.G.S. 161-22(h) (Cum. Supp.).

APPEAL by plaintiffs from *Lamm, Judge*. Judgment entered 1 November 1984 in AVERY County Superior Court. Heard in the Court of Appeals 17 October 1985.

Plaintiffs seek to recover damages arising out of defendant's late indexing of a deed of trust on property purchased by them. Defendant was at all times pertinent herein the Register of Deeds for Avery County.

The allegations of the complaint may be summarized as follows in relevant part: In the spring of 1983, plaintiffs purchased a condominium in Avery County. Prior to the purchase, plaintiffs, who are both duly licensed attorneys in this State, personally conducted a title search which revealed a deed of trust in favor of FinanceAmerica and two other liens on the property. Thereafter plaintiffs obtained a general warranty deed for the property which was recorded on 5 May 1983. Subsequently Republic Bank and Trust Company (Republic Bank) informed plaintiffs that it held a second mortgage on the property. Plaintiffs told counsel for Republic Bank that their title search had not revealed any lien in favor of Republic Bank. Plaintiffs had a second title search performed on 13 May 1985 which revealed a recorded deed of trust on the property dated 5 August 1982 in favor of Republic Bank. Plaintiffs traveled to the Office of the Avery County Register of Deeds and verified that sometime after they conducted the first title search the deed of trust in favor of Republic Bank had been indexed. Upon further inquiry, plaintiffs learned that the deed of trust had been indexed on 10 May 1983.

Plaintiffs further alleged: Since there was no indication in the grantor index or otherwise that the deed of trust in favor of Republic Bank was indexed after 5 May 1983, the date plaintiffs' deed to the property was registered, plaintiffs were required to negotiate with and pay to Republic Bank a sum of money to cancel the deed of trust. Thus, plaintiffs were injured by defendant's failure to properly index the deed of trust.

Defendant moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. By judgment entered 1 November 1984, the trial court allowed the motion and dismissed the action. Plaintiffs appealed.

Badger, Johnson, Chapman & Michael, P.A., by David R. Badger and R. Keith Johnson, for plaintiffs.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and William A. Blancato; and Kathryn G. Hemphill for defendant.

WELLS, Judge.

Plaintiffs argue that their complaint is legally sufficient to state a claim upon which relief can be granted and that the court erred in dismissing it. A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of his claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In considering a motion made pursuant to G.S. 1A-1, Rule 12(b)(6), the allegations of the complaint are to be taken as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976).

The allegations of the complaint here, taken as true, establish that Republic Bank's deed of trust did not have priority over plaintiffs' warranty deed because it was not indexed until after plaintiffs' deed was duly registered and that therefore plaintiffs were not legally obligated to satisfy the mortgage. Priority of instruments affecting an interest in real property which are required to be recorded is established by the priority of their registration. *See* Webster, *Real Estate Law in North Carolina* § 332 (1971). An instrument shall not be deemed registered until it has been properly indexed. N.C. Gen. Stat. § 161-22(h) (Cum. Supp. 1985); *Cotton Co. v. Hobgood*, 243 N.C. 227, 90 S.E. 2d 541 (1955); *Heaton v. Heaton*, 196 N.C. 475, 146 S.E. 146 (1929). Since Republic Bank's deed of trust was not indexed until after plaintiffs' deed was duly registered, it did not have priority over plaintiffs' interest.

A register of deeds will not be held liable for failure to properly index an instrument unless the default of the register of deeds was the proximate cause of pecuniary injury to the claimant. *Manufacturing Co. v. Hester*, 177 N.C. 609, 98 S.E. 721 (1919). Moreover, liability will not be imposed on the register of deeds if the negligence of the claimant caused or concurred in causing the injury. *Id.* Since plaintiffs were not legally obligated to pay off Republic Bank's mortgage, defendant's alleged failure to properly index the deed of trust was not the proximate cause of their injury. Plaintiffs were put on notice of the late indexing of the deed of trust by the title searches performed; thus, they caused their own injury.

The allegations of the complaint establish that plaintiffs are not entitled to recover damages from defendant because of his alleged failure to properly index the deed of trust. Accordingly, we hold the court acted correctly in dismissing the action.

Affirmed.

Judges ARNOLD and MARTIN concur.

EDWARD WAYNE PARKER AND LINDA JEAN PARKER v. TAM S. HUTCHINSON, MARY N. HUTCHINSON, AND TAM S. HUTCHINSON, JR.

No. 8423DC1289

(Filed 17 December 1985)

Evidence § 19; Contracts § 26.2— oral contract to care for chickens—evidence of other contracts admitted—no error

There was no error in an action for compensation due under an oral contract to care for 40,000 egg producing chickens in admitting evidence as to two written contracts defendant entered into with others. The challenged evidence bore directly on the issue for decision because it tended to show that defendant rather than Chicken Haven Feed Service, a corporation then in bankruptcy, contracted with plaintiffs to care for the chickens.

Judge WELLS dissenting.

APPEAL by defendant Tam S. Hutchinson from *Gregory, Judge*. Judgment entered 11 July 1984 in District Court, WILKES County. Heard in the Court of Appeals 20 August 1985.

Plaintiffs sued all three defendants for compensation allegedly due them under an oral contract for caring for some 40,000 egg producing chickens kept in two Wilkes County chicken houses, known as House number 5 and House number 12 of Skyview Poultry Farm, owned by defendants. After a jury trial defendants Mary N. Hutchinson and Tam S. Hutchinson, Jr. were eliminated from the case by a directed verdict and judgment was entered against defendant Tam S. Hutchinson for $10,817.10.

Plaintiffs and the defendant appellant both put on evidence and that plaintiffs had an oral contract to look after the chickens involved and in fact looked after them during the period alleged was not disputed. The dispute concerned the identity of the other

contracting party, the compensation rate agreed to, and the balance owed plaintiffs. As to these disputed issues plaintiffs' evidence tended to show that their oral contract was with the defendant Tam S. Hutchinson; that he agreed to pay them 3½ cents for each dozen eggs collected and crated, without deducting his expenses, which included the cost of heating, lighting, and maintaining the houses; and that defendant owed them $10,817.10. Defendant's evidence tended to show that plaintiffs' contract was with Chick Haven Feed Service, Inc., a corporation Tam S. Hutchinson controlled and managed; that the agreed compensation was 3½ cents for each dozen eggs collected and crated, less the maintenance and production expenses, and that Chick Haven had fully paid plaintiffs all that was due them.

Paul W. Freeman, Jr. for plaintiff appellees.

Vannoy, Moore, Colvard & Triplett, by Howard C. Colvard, Jr. and Anthony R. Triplett, for defendant appellant.

PHILLIPS, Judge.

The dispute between the parties is almost completely factual and in it being resolved against the defendant by the jury and trial court we see no error. Contrary to defendant's many contentions no inadmissible evidence was received against him; the evidence was sufficient to support the claim and verdict; the issues that the case was tried on were appropriate and the jury was correctly instructed on them.

Of defendant's eleven assignments of error only three require discussion. By assignments 3, 5 and 6 defendant contends that the court erred in receiving evidence as to two written contracts he entered into with others. He argues that the evidence was inadmissible because under our law that a contract was made with another cannot be used to prove that the same kind of contract was made between the parties. *Doub v. Hauser*, 256 N.C. 331, 123 S.E. 2d 821 (1962). Though that is certainly established law, it has no application to this case. The challenged evidence does not tend to show that defendant entered into a similar contract with plaintiffs and it was received for a different purpose, one clearly sanctioned by elemental principles of law. As the above summary of the evidence indicates, the main issue that the jury had to decide was whether defendant or Chick Haven Feed Service, a corporation

that was then in bankruptcy, engaged plaintiffs to care for the flocks of chickens in Houses numbered 5 and 12 of Skyview Poultry Farm. The evidence that defendant contends was inadmissible concerned two written contracts that defendant had with Terry's Farm Service and Reid Hampton; under these contracts Terry's Farm Service and Reid Hampton agreed to furnish the chickens for Houses numbered 5 and 12 and defendant agreed to care for the chickens and collect their eggs. This evidence bore directly on the issue for decision and could not have been properly excluded by the court because it tends to show that defendant rather than Chick Haven Feed Service contracted with plaintiffs to care for the chickens involved. Indeed, defendant himself testified that the obligation to look after the chickens referred to in the contracts was "subcontracted" to plaintiffs by Chick Haven, which would have been difficult for it to do since defendant was the prime contractor.

No error.

Judge WHICHARD concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In my opinion, the evidence plaintiff was allowed to present of other egg-gathering contracts entered into with other persons by defendant in his individual capacity went right to a principal issue in the case. It was prejudicial error to admit this evidence, and I would therefore award defendant a new trial.

DORIS ELLIS, ETHEL YOUNG, EUGENE YOUNG, DOROTHY PATTERSON, AND CENTRAL PARK TENANTS ASSOCIATION v. PETER P. WILLIAMS, HENRY D. HAYWOOD, AND ALFRED L. HOBGOOD, JR., D/B/A CENTRAL PARK ASSOCIATES; JOEL M. WHITE AND PERRY C. WALTON

No. 8510SC368

(Filed 17 December 1985)

Appeal and Error § 24— absence of exceptions or assignments of error in record— appeal dismissed

Appeal is dismissed for failure to comply with the Rules of Appellate Procedure where appellants failed to place any exceptions or assignments of error in the record on appeal and seek to appeal rulings not only on a number of separate causes of action but also to argue rulings on their requests for discovery. App. Rules 10(a) and 11(b).

APPEAL by plaintiffs from *Lee, Judge.* Judgment entered 17 December 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 23 October 1985.

This is a case in which plaintiff tenants seek declaratory judgment that various provisions in their leases are invalid. Tenants live in a mobile home park in which the former owners rented spaces under month-to-month leases including provisions required by an underlying federal loan. Upon purchase of the mobile home park, the new owners paid off the federal loan and required tenants to sign new leases with higher rents, higher security deposits and certain other conditions. Tenants brought this action to declare invalid the new lease provisions. From summary judgment for defendants, plaintiffs appeal.

East Central Community Legal Services, by Celia Pistolis and Augustus S. Anderson, Jr., for plaintiff-appellants.

Stubbs, Cole, Breedlove, Prentis & Poe, by James A. Cole, Jr. and Terry D. Fisher, for defendant-appellees.

EAGLES, Judge.

Plaintiffs failed to place any exceptions or assignments of error in the record on appeal, and defendants argue that the appeal must accordingly be dismissed. Plaintiffs contend that the appeal itself effectively constitutes an exception to the judgment, bringing forward the question of whether the judgment is supported

by the findings of fact and conclusions of law. App. R. 10(a). Plaintiffs rely on *West v. Slick*, 60 N.C. App. 345, 299 S.E. 2d 657 (1983) (appeal brings forward question of whether evidence sufficient to withstand directed verdict), *aff'd in relevant part*, 313 N.C. 33, 326 S.E. 2d 601 (1985) and *Beaver v. Hancock*, 72 N.C. App. 306, 324 S.E. 2d 294 (1985) (appeal brings forward propriety of summary judgment on single negligence issue). In both of the cases cited, however, the appeal was limited to a single ruling on a single contention. Here, plaintiffs seek to appeal rulings not only on a number of separate causes of action but also to argue rulings on their requests for discovery. As defendants correctly point out, an appellant's failure to identify such disparate errors in the record frustrates effective and fair preparation of the record, *see* App. R. 11(b) (proposed record must contain assignments of error required by App. R. 9(a)(1)(xi)), and hinders effective consideration by the appellate courts. *See* App. R. 10, Drafting Committee Note (exceptions and assignments focus issues on appeal).

We note that in an earlier case certain of the claims asserted here were resolved adversely to parties situated similarly to appellants. *Cla-Mar Management v. Harris*, 76 N.C. App. 300, 332 S.E. 2d 495 (1985).

After careful review of the record before us, we agree with defendants that because of flagrant violations of our rules which preclude fair and effective appellate review, the appeal should be and is

Dismissed.

Judges WHICHARD and COZORT concur.

State v. Hege

STATE OF NORTH CAROLINA v. JOHN THOMAS HEGE, JR.

No. 8518SC362

(Filed 17 December 1985)

Criminal Law § 91— prison inmate—request for speedy trial—failure to serve on prosecutor

A prison inmate was not entitled to have a felonious larceny charge pending against him dismissed under N.C.G.S. 15A-711(c) for failure of the State to try him on the larceny charge within six months of his request to the clerk of court for a speedy trial where the inmate failed to serve a copy of the request on the prosecutor as required by the statute. The State did not waive the provisions of N.C.G.S. 15A-711(c) by the issuance of a handbook by the N. C. Department of Corrections instructing inmates that they must file the request for trial only with the clerk of superior court.

APPEAL by the defendant from *Hairston, Judge.* Judgment entered 7 November 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 October 1985.

The defendant was tried for felonious larceny. When his case first came on for trial the defendant failed to appear because he was serving time on an unrelated misdemeanor charge. While this case was still pending the defendant asked the superintendent of his prison unit how to get the case into court. He was shown the "Rules and Policies" handbook, compiled by the North Carolina Department of Corrections, which purports to govern the management and conduct of inmates in North Carolina. Rule 14 of this handbook instructs inmates who have criminal charges pending against them to write to the Clerk of Superior Court of the courts in which the charges are pending if they want speedy trials. The handbook advises prisoners that these cases will be tried within six months of such a request. On 19 February 1984, the defendant wrote to the Clerk of Superior Court of Guilford County, where this charge was pending, asking for a speedy trial. No copy of the request was sent to the prosecutor responsible for the case. On several occasions after the defendant's request the prosecutor requested temporary release of the defendant. On these occasions the defendant was brought from his prison unit to the Guilford County Jail but jail officials failed to bring the defendant to court. On 20 August 1984 the defendant was brought to the Guilford County Jail where he remained for 64 days before making a mo-

tion to dismiss the felonious larceny charge on 24 October 1984. The trial court denied the motion to dismiss. On 7 November 1984 the defendant was found guilty of felonious larceny and was sentenced to five years in prison. He appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Assistant Public Defender George R. Clary III for defendant appellant.

WEBB, Judge.

The sole question on this appeal is whether it was error not to dismiss this case for the failure of the State to bring the defendant to trial within six months of the date the request for a trial was delivered to the Clerk of Superior Court. The "Rules and Policies" handbook of the North Carolina Department of Corrections instructed the defendant that this would be the case. G.S. 15A-711 provides in part:

> (a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the prosecutor may make written request to the custodian of an institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.
>
> . . . .
>
> (c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within

six months from the date the request is filed with the clerk, the charges must be dismissed.

. . . .

This section requires that a prisoner must file a request for trial with the clerk and a copy of the request must be served on the prosecutor in the manner provided by G.S. 1A-1, Rule 5(b). No service on the prosecutor was had. The defendant did not comply with G.S. 15A-711(c) and he was not entitled to have the case dismissed under that section. The State did not waive the provisions of G.S. 15A-711(c) by the issuance of a handbook by the North Carolina Department of Corrections which instructs inmates that they must file the request for a trial only with the Clerk of Superior Court.

No error.

Judges JOHNSON and PHILLIPS concur.

ELLA MAE FRADY HARWELL, ADMINISTRATRIX OF THE ESTATE OF GEORGE E. FRADY, DECEASED, EMPLOYEE, PLAINTIFF v. GROVES THREAD, EMPLOYER, AND GENERAL ACCIDENT INS. CO., CARRIER, DEFENDANTS

No. 8510IC662

(Filed 17 December 1985)

Master and Servant § 99— workers' compensation—appeal by defendant and cross-appeal by plaintiff—attorney's fees denied—remanded

A workers' compensation case was remanded to the Industrial Commission where the award of compensation to plaintiff was upheld after an appeal by defendants and a cross-appeal by plaintiff, the Commission denied plaintiff attorney fees under N.C.G.S. 97-88, and language in the Commission's order was so ambiguous as to preclude review as to whether the Commission believed it lacked authority to award attorney fees where both the insurer and claimant appealed.

APPEAL by plaintiff from the Industrial Commission. Order entered 18 February 1985. Heard in the Court of Appeals 2 December 1985.

This is an appeal from an order of the Industrial Commission denying plaintiff's motion to recover the costs of legal representation in appeals from an opinion and award of the Industrial Commission entered 10 December 1980. In the 1980 opinion and award, the Industrial Commission concluded that plaintiff was entitled to compensation and that the plaintiff was last injuriously exposed while employed with Groves Thread Corporation rather than with United Spinners Corporation. Groves Thread Corporation and its insurer appealed and plaintiff cross appealed. The opinion and award of the Industrial Commission was ultimately upheld in *Frady v. Groves Thread*, 312 N.C. 316, 321 S.E. 2d 835 (1984). After the completion of the appeal in *Frady*, the plaintiff filed a motion with the Industrial Commission seeking an award of attorney's fees for the cost of representation during the appeals process. From an order denying her claim for attorney's fees, plaintiff appealed.

Charles R. Hassell, Jr. for plaintiff, appellant.

Kennedy Covington Lobdell & Hickman, by William C. Livingston, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiff's sole contention on this appeal is that the Industrial Commission refused to award attorney's fees pursuant to G.S. 97-88 under a misapprehension of the law. G.S. 97-88 states:

> *Expenses of appeals brought by insurers.* If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

Plaintiff argues that the Industrial Commission denied her claim for attorney's fees under the mistaken belief that the Com-

mission could not award attorney's fees in a case in which the plaintiff as well as a defendant insurer appealed. The pertinent part of the Commission's order denying attorney's fees is as follows:

> G.S. 97-88 specifically provides that an attorney fee may be assessed against the defendants when the "proceedings were brought by the insurer." Inasmuch as the appeals herein were entered by both plaintiff *and* the defendants, the Full Commission is of the opinion that it would be improper to assess the attorney fee for plaintiff's counsel under the provisions of G.S. 97-88. Plaintiff's motion for assessment of fees under the provisions of the cited statute is hereby, DENIED.

"[G.S. 97-88] was written to enable the Industrial Commission to award attorneys' fees in those cases it deems proper." *Taylor v. J. P. Stevens Co.*, 307 N.C. 392, 398, 298 S.E. 2d 681, 685 (1983). In its sound discretion, the Industrial Commission may award claimant attorney's fees in cases defendant insurer appealed. G.S. 97-88. However, the Industrial Commission may not award attorney's fees pursuant to G.S. 97-88 in cases in which *only* the claimant appealed. *Id.*

The language in the Commission's order regarding G.S. 97-88 is so ambiguous as to preclude review as to whether the Commission believed it lacked authority to award attorney's fees in this case where *both* the insurer and the claimant appealed. We cannot discern whether the Industrial Commission exercised its discretion in denying attorney's fees or believed it was compelled to deny attorney's fees due to a misapprehension of the law. We therefore remand this case to the Industrial Commission for a *discretionary* determination consistent with this opinion.

Reversed and remanded.

Judges EAGLES and MARTIN concur.

IN THE MATTER OF HERMAN LEE YOUNG

No. 8520DC791

(Filed 17 December 1985)

Infants § 17— juvenile proceeding—admissibility of confession—presence of parent or guardian—absence of finding

The confession of a twelve-year-old respondent was improperly admitted in a juvenile delinquency proceeding where the court made no factual finding that the confession itself was made in the presence of respondent's parent, guardian, custodian or attorney as required by N.C.G.S. 7A-595(b). The trial court's statement that respondent "together with his mother knew what they were doing" related only to respondent's waiver of his rights and did not constitute a factual finding on the question of compliance with N.C.G.S. 7A-595(b), and the cause must be remanded for a finding on compliance with the statute.

APPEAL by juvenile respondent from *Burris, Judge.* Disposition order entered 19 March 1985 in District Court, UNION County. Heard in the Court of Appeals 20 November 1985.

Juvenile petitions alleged that respondent, age twelve, is delinquent as defined in N.C. Gen. Stat. 7A-517(12) in that he (1) feloniously broke and entered a residence with intent to commit a felony therein, and (2) feloniously and with intent to kill assaulted an occupant of the residence with a deadly weapon inflicting serious injury. The court found that respondent was delinquent and ordered him committed to training school for a period not to exceed his eighteenth birthday.

Respondent appeals.

Attorney General Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

Joe P. McCollum, Jr., for respondent appellant.

WHICHARD, Judge.

The State presented evidence of a statement made by respondent during custodial interrogation. N.C. Gen. Stat. 7A-595(b) provides: "When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custo-

dian, or attorney." The record contains no finding as to compliance with this provision.

The court did make the following statement: "The next point, whether or not there was a waiver, which was knowingly, intelligently, understandingly and voluntarily made, got my attention but I am satisfied by the evidence according to the required standard that he together with his mother knew what they were doing." This statement, however, relates only to respondent's waiver of his rights. *See* N.C. Gen. Stat. 7A-595(d); *In re Riley*, 61 N.C. App. 749, 301 S.E. 2d 750 (1983). It contains nothing that can be construed as a factual finding that the confession itself was made in the presence of respondent's parent, guardian, custodian or attorney as required by N.C. Gen. Stat. 7A-595(b).

We thus remand for a finding on compliance with N.C. Gen. Stat. 7A-595(b).

Remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 DECEMBER 1985

COLVILLE v. HOUSE-AUTRY MILLS, INC. No. 8511SC831	Harnett (84CVS0535) (84CVS0536)	Affirmed
HAHN v. PIZZA HUT OF PATTON AVE. INC. No. 8528SC282	Buncombe (83CVS2849)	No Error
HAMILTON v. MATHERLY No. 8526DC898	Mecklenburg (83CVD4618)	Reversed & Remanded
IN RE DIGITAL DYNAMICS CORP. AND CARPHONICS, INC. No. 8526SC351	Mecklenburg	Affirmed
IN RE ELLIS No. 8522DC212	Davidson (80J87)	Affirmed
IN RE FLOWERS, DAVIS AND GRANT No. 857DC412	Edgecombe (84J4) (84J48) (84J89)	Affirmed
IN RE PITTMAN No. 8510SC566	Wake (84-J-107) (84-J-108)	Affirmed
JACQUES DE LOUX, INC. v. THORNE No. 8526DC829	Mecklenburg (84CVD8645)	Vacated & Remanded
KAPP v. KAPP No. 8521DC261	Forsyth (81CVD1955)	Affirmed
LONG v. LONG No. 8515DC243	Orange (78CVD677)	Affirmed
PRIDGEN v. GUARDIAN CARE NURSING HOME No. 855SC902	Pender (84CVS377)	Affirmed
STATE v. BLACKMON No. 853SC911	Pitt (84CRS17302)	No Error
STATE v. BROWN No. 8520SC897	Stanly (84CRS728)	No Error
STATE v. BUTLER No. 858SC744	Wayne (84CRS13060)	Reversed

STATE v. CHESSON No. 858SC784	Lenoir (84CRS12231)	No Error
STATE v. DENEHY No. 851SC792	Pasquotank (84CRS2254)	No Error
STATE v. DONNELL No. 8518SC808	Guilford (85CRS20419)	Affirmed
STATE v. FARROW No. 855SC939	New Hanover (82CRS17809) (82CRS17810)	No Error
STATE v. FRAZIER No. 8520SC842	Union (84CRS1180)	No Error
STATE v. GRANT No. 858SC906	Wayne (84CRS6534)	No Error
STATE v. GROOMS No. 8520SC905	Richmond (81CRS4942)	Vacated
STATE v. JAMES No. 8526SC625	Mecklenburg (82CRS69551) (82CRS15563)	No Error
STATE v. JOHNSON No. 8523SC774	Ashe (84CRS1814)	No Error
STATE v. McCASKILL No. 8527SC783	Gaston (84CRS2656)	No Error
STATE v. McKINNON No. 8525SC952	Catawba (83CRS18796) (83CRS19392) (83CRS19393)	Affirmed
STATE v. McMILLAN No. 8512SC798	Cumberland (83CRS50919)	Affirmed
STATE v. MOORE No. 852SC1001	Washington (82CRS617)	No Error
STATE v. PITTMAN No. 8518SC835	Guilford (84CRS37475)	No Error
STATE v. ROBERTSON No. 856SC846	Halifax (84CRS3823)	No Error
STATE v. SMITH No. 852SC923	Beaufort (84CRS7107) (84CRS7108) (84CRS7109) (84CRS7110) (84CRS7111) (84CRS7113)	No Error

STATE v. STEVENS No. 8514SC896	Durham (85CRS466)	No Error
STATE v. THOMPSON No. 8519SC982	Montgomery (84CR2675)	No Error
STATE v. WILLIAMS No. 8511SC459	Johnston (84CRS10152)	No Error
STIRLING v. PAUL AND MOYE No. 8510DC781	Wake (84CVD5451)	Affirmed
TOLLEY v. TOLLEY No. 8528DC900	Buncombe (83CVD1971)	Affirmed
UMFLEET v. CRAFTIQUE BUILDERS, INC. No. 853SC899	Carteret (84CVS346)	Affirmed
WENTZ v. CANNON MILLS COMPANY No. 8510IC414	Ind. Comm. (I-4053)	Affirmed
WORLEY v. WORLEY No. 8510DC879	Wake (84CVD4256)	Reversed & Remanded

Harwood v. Harrelson Ford, Inc.

CHRISTOPHER DAVID HARWOOD, BY HIS GUARDIAN AD LITEM, GARIOT HOMER HARWOOD, JR., PLAINTIFFS v. HARRELSON FORD, INC., AND DANIEL ERNEST MCKAY, DEFENDANTS

MARY ANN HARWOOD, GARIOT HOMER HARWOOD, JR., AND GINA MICHELLE HARWOOD, BY HER GUARDIAN AD LITEM, GARIOT HOMER HARWOOD, JR., PLAINTIFFS v. HARRELSON FORD, INC., AND DANIEL ERNEST MCKAY, DEFENDANTS

No. 8526SC302

(Filed 17 December 1985)

1. **Interest § 2— prejudgment interest statute—pending litigation—award improper**

The trial court erred in granting prejudgment interest to plaintiff where the action was instituted prior to enactment of the statute providing for prejudgment interest, and the statute was not applicable to pending litigation.

2. **Interest § 2; Rules of Civil Procedure § 41.1— prejudgment interest statute—pending litigation—voluntary dismissal—new action—award of prejudgment interest proper**

The trial court properly awarded prejudgment interest to three plaintiffs who originally instituted their actions on 13 August 1980, before amendment of N.C.G.S. 24-5 to allow prejudgment interest, where plaintiffs took a voluntary dismissal of their actions without prejudice on 29 April 1982; their actions were definitely and finally terminated when they filed their notice of dismissal; on 26 August 1982, after the effective date of the amendment, plaintiffs filed their subsequent complaint and completed service of process; and plaintiffs thus could receive the benefit of the amendment to N.C.G.S. 24-5.

APPEAL by defendants from *Snepp, Judge*. Judgment entered 24 October 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 October 1985.

On 14 August 1977, plaintiff, Gariot Homer Harwood, was driving a 1976 Oldsmobile in a westerly direction on North Carolina Highway Number 16. Passengers in the car were the following: his wife, plaintiff, Mary Anne Harwood and their children, minor plaintiffs, Gina Michelle Harwood and Christopher David Harwood. Defendant, Daniel Ernest McKay, was driving a 1975 Ford owned by defendant, Harrelson Ford, Inc., in an easterly direction on North Carolina Highway Number 16.

The vehicle operated by defendant crossed the center line resulting in a head-on collision with the vehicle operated by plain-

tiff, Gariot Homer Harwood. The collision took place approximately one and six-tenths (1 6/10) of a mile from the city limits of Charlotte, North Carolina.

On 13 August 1980, four (4) separate complaints were filed for each of the four (4) individual plaintiffs. (Mary Ann Harwood, 80CVS7965; Gariot Homer Harwood Jr., 80CVS7966; Gariot Homer Harwood as Guardian *ad litem* filed complaints on behalf of Gina Michelle Harwood, 80CVS7967 and Christopher David Harwood, 80CVS7968.) The complaints, *inter alia*, alleged that defendant McKay, while operating Harrelson Ford Inc.'s automobile and acting as its agent, was negligent in the operation of the automobile in the following respects: failing to use due care; failing to keep the vehicle under control; and failing to keep the vehicle on the right hand side of the road. Defendants answered each complaint separately. In each answer, defendants denied any negligence. Their second defense was that an electrical system failure in the vehicle driven by defendant McKay resulted in a power steering failure, and thus the accident was unavoidable. Defendants affirmatively alleged that McKay was faced with an emergency situation and that his actions were reasonable and prudent.

On 29 April 1982, a Notice of Dismissal without prejudice was filed in the following plaintiffs' cases: Mary Ann Harwood, 80CVS7965; Gariot Homer Harwood, Jr., 80CVS7966, and Gina Michelle Harwood, 80CVS7967. Rule 41(a)(1), N.C. Rules Civ. P. Plaintiff, Christopher David Harwood (80CVS7968) did not file a Notice of Dismissal.

On 26 August 1982, a new complaint was filed on behalf of plaintiffs, Mary Ann Harwood, Gariot Homer Harwood, Jr., and Gina Michelle Harwood (82CVS8783). Defendants answered and pursuant to Rule 42(a), N.C. Rules Civ. P., moved the court to consolidate case numbers 80CVS7968 and 82CVS8783. The court granted defendants' motion to consolidate the cases for trial.

The cases were tried before a jury. The jury returned verdicts in favor of the four plaintiffs as follows: Mary Anne Harwood, $127,000.00; Gariot Homer Harwood, Jr., $25,000.00; Gina Michelle Harwood, $30.00 and Christopher David Harwood, $5,000.00. The court, *inter alia*, ordered defendant to pay plaintiffs Mary Ann Harwood, Gariot Homer Harwood, Jr., and Gina Michelle Harwood prejudgment interest from 26 August 1982. (82CVS8783). Defendants were ordered to pay to plaintiff,

Christopher David Harwood, prejudgment interest from 13 August 1980. (80CVS7968).

On 23 January 1985, pursuant to Rule 60, N.C. Rules Civ. P., defendants made a motion to correct judgment by striking those portions of the judgment awarding plaintiffs prejudgment interest. Defendants' motion to correct judgment was denied on 28 January 1985. From the court's denial of motion to correct judgment defendants appeal.

Bailey, Patterson, Caddell & Bailey, by James A. Warren, Jr., for plaintiff appellees.

Walker, Palmer & Miller, by Douglas M. Martin, for defendant appellants.

JOHNSON, Judge.

[1] The sole issue presented by defendants' appeal is whether plaintiffs are entitled to prejudgment interest. We note at the outset that defendants assert and plaintiffs concede that plaintiff, Christopher David Harwood's action (80CVS7968) was pending litigation on 5 May 1981. When plaintiffs instituted their first actions on 13 August 1980, G.S. 24-5 did not give plaintiffs the right to prejudgment interest. Prior to amendment G.S. 24-5 was as follows:

> All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section.

Noticeably, G.S. 24-5 does not provide for prejudgment interest.

On 5 May 1981, the North Carolina General Assembly amended G.S. 24-5 as follows:

All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. *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 ours.)

The meaning of the statute is clear and unambiguous. Plaintiffs who institute actions may now recover prejudgment interest from tortfeasors such as defendant, when the claim is covered by liability insurance. The legislative history of the statute reveals the legislature's intent to make the statute *inapplicable to pending litigation.* "This act is effective upon ratification but *shall not apply to pending litigation.*" *See* 1981 N.C. Session Laws Ch. 327 sec. 3 (emphasis ours). In order to give the amendment effect to plaintiff, Christopher David Harwood's case (80CVS7968), we would have to retroactively apply the statute since he instituted his action 13 August 1980. Christopher David Harwood's action (80CVS7968) was instituted almost a year prior to the amendment and was pending upon ratification of the act amending G.S. 24-5. The trial court was in error and should not have granted prejudgment interest to this plaintiff.

[2] Plaintiffs Mary Anne Harwood, Gariot Homer Harwood and Gina Michelle Harwood, pursuant to Rule 41(a), N.C. Rules Civ. P., timely filed a voluntary Notice of Dismissal. Our interpretation of the effect of the court's allowance of the Rule 41(a)(1) voluntary dismissal without prejudice and the subsequent complaint filed by these three plaintiffs is dispositive of defendants' appeal.

Notice of Dismissal—No. 80CVS7965 (filed April 29, 1982)

> The plaintiffs, hereby give notice *that this action be and it is hereby dismissed* without prejudice to any rights of the Plaintiffs against the Defendants growing out of or connected with the things and matters set forth in the Complaint.
>
> The plaintiffs hereby stipulate that the cost of *this* shall (sic) *action* be taxed against the plaintiff.

Rule 41(a)(1), N.C. Rules Civ. P. is as follows:

> By Plaintiff; by Stipulation—Subject to the provisions of Rule 23(c) and of any statute of this State, *an action or any claim therein may be dismissed by the plaintiff without order of the court* (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein is dismissed without prejudice under this subsection, *a new action* based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time. (Emphasis ours.)

If plaintiffs in case 82CVS8783 had received a judgment in their actions filed 13 August 1980 (subsequently voluntarily dismissed) they, like plaintiff Christopher David Harwood, would not have been entitled to prejudgment interest since their actions would have been pending on the effective date of the act. However, Rule 41(a)(1) entitled plaintiffs to have their actions dismissed and commence a new action within one year from the date of their voluntary dismissal. The termination of plaintiffs' lawsuit instituted 13 August 1980 was final when plaintiffs filed their Notice of Dismissal. *See Danielson v. Cummings*, 300 N.C. 175, 265 S.E. 2d 161 (1980). In *Danielson*, the Court distinguished the finality of the termination of a lawsuit when the appeal process is

over, from the finality of terminating a lawsuit when a voluntary dismissal is filed. One principal reason noted by the Court for such a construction of Rule 41(a)(1), was to prevent plaintiff from indefinitely tolling the statute of limitations.

> The issue in *Rowland v. Beauchamp* therefore was the finality of the termination of the first lawsuit. There final termination only occurred when the appeal process was over. Here *the first action* was *definitely* and *finally terminated by plaintiff's voluntary dismissal* in open court when Judge Collier *ended the case* and dismissed the jury on 1 February 1977.

Id. at 180, 265 S.E. 2d at 164 (emphasis ours). In the case *sub judice* (82CVS8783), plaintiffs' first actions were definitely and finally terminated when all three complainants filed their Notice of Dismissal. On 26 August 1982, after the effective date of the amendment, plaintiffs filed their subsequent complaint and completed service of process in case number 82CVS8783.

Defendants' chief contention is that a strict construction of Rule 41(a)(1) allows plaintiffs to retroactively receive the benefit of the amendment to G.S. 24-5, which circumvents the legislature's intent. We disagree. The Legislature's purpose in amending G.S. 24-5 was to provide an incentive to insurance companies to expeditiously litigate actions they are involved in. *See Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984). The prejudgment interest is calculated from the filing of the lawsuit. Actions which were pending at the time G.S. 24-5 was amended cannot fairly be placed in the same category as those instituted after the effective date of the amendment. Applied to pending litigation, the amendment would serve more as a penalty than an incentive, since there would be no way for insurance companies to cure past delays in litigation. However, in the case *sub judice*, on 26 August 1982, when plaintiffs filed their complaint, insurance companies were aware of the legislature's expressed intent to encourage prompt resolution of lawsuits. Yet, over three years have passed since the three plaintiffs filed their lawsuit (82CVS8783) and their judgment is yet to be satisfied. We conclude that with respect to plaintiffs in case number 82CVS8783, the judgment of the trial court is consistent with the legislature's intent as expressed in G.S. 24-5. However, with respect to 80CVS7968 the trial court was in error.

82CVS8783 affirmed.

80CVS7968 remanded to the trial court to enter judgment consistent with this opinion.

Judges WEBB and PHILLIPS concur.

W. C. VARNELL v. HENRY M. MILGROM, INC., A NORTH CAROLINA CORPORATION AND BILLY MORGAN

No. 857SC399

(Filed 17 December 1985)

1. **Uniform Commercial Code § 8— sale of peanuts—Statute of Frauds applicable**

The Statute of Frauds applied where the parties' alleged oral agreement for the sale of peanuts involved products with a value in excess of $500. N.C.G.S. 25-2-201(1).

2. **Uniform Commercial Code § 8— contract for sale of peanuts—oral modification—Statute of Frauds applicable**

Where plaintiff alleged that he entered into a written contract with defendant whereby defendant agreed to buy all of his "quota peanuts" for $640 per ton, and the parties then orally modified their contract so that defendant agreed to buy all of plaintiff's peanuts for $600 per ton, there was no merit to plaintiff's contention that defendant waived its right to assert the Statute of Frauds by operation of N.C.G.S. 25-2-209(4), since a mere promise is insufficient to effect a waiver of the Statute of Frauds; the consistent legislative policy is that business contracts must be in writing to be effective; references in N.C.G.S. 25-2-209(5) to "waiver affecting an executory portion of the contract" and to "performance" and "retraction" made it reasonable to conclude that "waiver" is employed with reference to the terms of the contract, not the Statute of Frauds; and plaintiff alleged no conduct on either party's part, other than a handshake, consistent with the alleged oral agreement to waive the Statute of Frauds or consistent with the terms of the agreement itself.

3. **Attorneys at Law § 7— unfair trade practice—award of attorney fees—discretion of court**

In an action to recover for unfair trade practices, it was within the court's discretion to award attorney fees to the prevailing party, and no abuse of discretion was shown in the trial court's denial of attorney fees in this action.

APPEAL by plaintiff and defendants from *Brown (Frank R.), Judge*. Judgment entered 9 January 1985 in Superior Court,

EDGECOMBE County. Heard in the Court of Appeals 24 October 1985.

Plaintiff Varnell, a peanut farmer, entered into a written contract with defendant Henry M. Milgrom, Inc. (Milgrom) in 1981, whereby Milgrom agreed to purchase all Varnell's peanuts grown that year under the federal quota program ("quota peanuts"). The contract price was $640 per ton. According to Varnell, Milgrom thereafter, in October 1981, agreed through its agent, defendant Morgan, to purchase in addition to Varnell's quota peanuts all other peanuts produced by Varnell. The new price allegedly agreed upon for all peanuts was $600 per ton. Morgan and Milgrom thereafter refused to take delivery of any peanuts, and Varnell had to sell his peanuts elsewhere at prices substantially below $600 per ton.

In December 1981 Varnell filed this action, alleging that defendants' breach of the modified contract had caused him damages of $60,000. Plaintiff alleged that defendants' actions constituted unfair trade practices, entitling him to treble damages. Defendants denied any contract modification, pleading the Statute of Frauds. They also counterclaimed, alleging wrongful retention by Varnell of their peanut drying trailers. Milgrom tendered, and Varnell accepted, $16,000 as payment for Milgrom's failure to purchase the quota peanuts. In July 1982 partial summary judgment was granted for defendants on the claims based on the alleged oral modification of the contract. In an unpublished opinion plaintiff's appeal from that order was dismissed as interlocutory. 67 N.C. App. 358, 314 S.E. 2d 146 (1984).

On remand, the court heard the merits of the counterclaim and entered judgment for defendants. It reaffirmed the earlier partial summary judgment. The court denied defendants' motion for attorney fees. From judgment against him on the merits, plaintiff appeals; from the order denying attorney fees, defendants cross appeal.

Aycock, Harper, Simmons & Woodard, by Edward B. Simmons, for plaintiff.

Parker and Parker, by Rom B. Parker, Jr., for defendants.

EAGLES, Judge.

The Statute of Frauds, G.S. 25-2-201, provides that contracts for the sale of goods for the price of $500 or more are not enforceable unless evidenced by writing. The trial court expressly relied on G.S. 25-2-201 in denying plaintiff's claim based on the alleged oral modification. Plaintiff assigns error, arguing (1) the contract, an "output" contract, did not contain a price term and accordingly the statute did not apply and (2) defendants waived the statute by entering into the oral agreement.

I

Whether an output contract, *see* G.S. 25-2-306, is governed by G.S. 25-2-201 appears to be a new question in this State. Courts of other states which have considered the question have uniformly held that output contracts fall under the Statute of Frauds, without considering the $500 limit. *See Harris v. Hine*, 232 Ga. 183, 205 S.E. 2d 847 (1974) (all cotton produced on 825 acres); *Alaska Independent Fishermen's Marketing Association v. New England Fish Co.*, 15 Wash. App. 154, 548 P. 2d 348 (1976) (contract for fish catch); *Riegel Fiber Corp. v. Anderson Gin Co.*, 512 F. 2d 784 (5th Cir. 1975) (all acceptable cotton) (for limited purposes of Statute of Frauds, precision in quantity term immaterial).

[1] The alleged agreement occurred in October, after the peanut growing season, when the quantity and quality of the peanut harvest was certain. In fact, 1981 was a record year: for Edgecombe County, average yield per acre was 3095 pounds (about 1.55 tons), valued at $560 per ton. North Carolina Crop and Livestock Reporting Service, North Carolina Agricultural Statistics 10, 19 (1983). Plaintiff admitted activity as a peanut grower for twenty years, selling peanuts to defendants for most of that time. The written contract specified "[a]ll acres" of quota peanuts. Plaintiff claimed some $60,000 in damages. Under these circumstances, and mindful of the "good faith" obligation for output contracts in G.S. 25-2-306(1), we must conclude that the subject matter of the alleged oral agreement had a value of more than $500 and that the Statute of Frauds should apply. G.S. 25-2-201(1), 25-2-209(3).

II

The alleged agreement changed the price term of the original contract from $640 to $600 per ton, and the quantity term from "all quota peanuts" to "all peanuts," quota and otherwise. Although the damages claimed increased fourfold as a result, the record does not reveal whether the parties intended at the time of the alleged agreement to substitute a new contract for the original one or simply to modify it. No simple rule exists by which we can resolve this uncertainty. *See* 17 Am. Jur. 2d, Contracts, Section 459 (1964).

If the alleged oral agreement was a novation, then clearly the Statute of Frauds operates to bar evidence of it. "A novation is generally described as the substitution of a new contract for an existing valid contract by agreement of the parties." *Port City Electric Co. v. Housing, Inc.*, 23 N.C. App. 510, 512, 209 S.E. 2d 297, 299 (1974), *cert. denied*, 286 N.C. 413, 211 S.E. 2d 795 (1975). As a new contract, it must satisfy all the normal requisites of contractual validity including the Statute of Frauds. 58 Am. Jur. 2d, Novation, Sections 4-11 (1971); 66 C.J.S., Novation, Section 3 (1950); G.S. 25-2-201(1). Therefore, if the alleged oral agreement was a novation, the trial court properly granted partial summary judgment against plaintiff.

III

[2] Plaintiff urges that the alleged agreement was not a novation but was a modification and that defendants waived their defense of the Statute of Frauds. He relies on G.S. 25-2-209:

> (1) An agreement modifying a contract within this article needs no consideration to be binding.
>
> . . .
>
> (3) The requirements of the statute of frauds section of this article (Section 25-2-201) must be satisfied if the contract as modified is within its provisions.
>
> (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

Plaintiff contends that by entering into the alleged oral agreement, defendants waived their right to assert the Statute of

Frauds by operation of G.S. 25-2-209(4). This is also a question of first impression in North Carolina. Our pre-Code decisions offer no guidance, since no Statute of Frauds for the sale of goods existed in North Carolina after 1792. *See Odom v. Clark*, 146 N.C. 544, 60 S.E. 513, *aff'd*, 151 N.C. 735, 67 S.E. 1133 (mem.) (1908). We turn therefore to the decisions of other jurisdictions. G.S. 25-1-102(2)(c).

A

Most jurisdictions have held that a mere promise, as here, is insufficient to effect a waiver of the Statute of Frauds. They require something more: additional consideration, *see Ryder Truck Lines, Inc. v. Scott*, 129 Ga. App. 871, 201 S.E. 2d 672 (1973); that the promisee materially change his position in reliance on the oral agreement, *see Edelstein v. Carole House Apartments, Inc.*, 220 Pa. Super. 298, 286 A. 2d 658 (1971) (no change where co-maker agreed to assume entire note); or conduct by the party asserting the Statute of Frauds which acknowledges the existence of the oral agreement, *see Dangerfield v. Markel*, 252 N.W. 2d 184 (N. Dak. 1977) (continued delivery with delayed payments after alleged agreement that payments would be delayed) and *Fire Supply & Service, Inc. v. Chico Hot Springs*, 196 Mont. 435, 639 P. 2d 1160 (1982) (acceptance of rents paid according to allegedly modified schedule). *But see Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F. 2d 292 (3d Cir. 1973) (Code explicitly allows such oral waiver).

B

We follow the majority rule, and hold that on the facts alleged defendants did not waive the Statute of Frauds. The consistent legislative policy that business contracts be in writing to be effective supports our result. *See for example* G.S. 22-1, 22-2, 22-4, 25-2-201, 25-8-319, 25A-28, 57-7, 66-99, 75-4, 94-6, 95-47.25. In addition, the references in G.S. 25-2-209(5) to "waiver affecting an executory portion of the contract" and to "performance" and "retraction" make it reasonable to conclude that "waiver" is employed with reference to the terms of the contract, not the Statute of Frauds. *See* 2 R. Anderson, Uniform Commercial Code Section 2-209:45 (3d ed. 1982); *Double-E Sportswear, supra*, 488 F. 2d at 298 (Garth, J., concurring). The comments indicate that the clear intent of G.S. 25-2-209(4) is to give legal effect to "the par-

ties' actual later conduct." *Id.*, Official Comment. The subsection "is directed primarily toward *conduct* after formation of the contract which will constitute a waiver. . . ." *Id.*, North Carolina Comment. (Emphasis in original.)

C

"Conduct" involves more than a mere oral agreement. *See* Black's Law Dictionary 268 (5th ed. 1979); 2 R. Anderson, *supra*, Sections 2-209:36, 2-209:40; G.S. 25-2-208 and Official Comment. Plaintiff's pleadings alleged no conduct on either party's part, other than a handshake, consistent with the alleged oral agreement to waive the Statute of Frauds or consistent with the terms of the Agreement itself. Defendants breached the written contract by refusing to accept any peanuts *after* the date of the alleged oral agreement. Plaintiff did not plant additional peanuts in reliance on the alleged oral agreement, nor did he allege any other conduct tending to show reliance. When defendants refused to accept his peanuts, he properly sold them elsewhere. *See* G.S. 25-2-706. The question of the existence or non-existence of the alleged oral agreement is not affected by plaintiff availing himself of this remedy. We conclude that the facts alleged, taken in the light most favorable to plaintiff, demonstrate no conduct by defendants that would support plaintiff's claim of an oral waiver of the Statute of Frauds. Nowhere have defendants admitted the existence of the oral agreement. Therefore the Statute of Frauds applies, and partial summary judgment for defendants was proper. G.S. 25-2-201; *Lowe's Cos., Inc. v. Lipe*, 20 N.C. App. 106, 201 S.E. 2d 81 (1973); *Oakley v. Little*, 49 N.C. App. 650, 272 S.E. 2d 370 (1980).

D

Plaintiff argues that this result is overly harsh, and that it will encourage false denials of otherwise valid oral agreements. Harsh results may occur under the Statute of Frauds, but the mandate of the General Assembly is clear. Were we to rule otherwise, we would encourage false assertions of subsequent oral agreements. That is precisely the result the Statute of Frauds is intended to prevent.

IV

[3] Defendants assign error to the denial of their motion for attorney fees under G.S. 75-16.1:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, *in his discretion*, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as part of the Court costs and payable by the losing party, upon a finding by the presiding judge that: [various possible findings follow] (emphasis added).

Award of attorney fees under this section rests with the sound discretion of the trial judge. *Borders v. Newton*, 68 N.C. App. 768, 315 S.E. 2d 731 (1984). The judge's decision to deny attorney fees under the emphasized language is limited only by the abuse of discretion rule. *See Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E. 2d 177 (1971) (under similar language of G.S. 50-13.6); *Callicutt v. Hawkins*, 11 N.C. App. 546, 181 S.E. 2d 725 (1971) (under G.S. 6-21.1). Defendants argue that the court erroneously denied their claim "as a matter of law." *See Brandon v. Brandon, supra* (error to deny fees on such grounds). We find nothing indicating that basis for the ruling: the order simply reads in relevant part that defendants' claim "is hereby denied." On this record, we must presume that the order was correctly made, that is, in the discretion of the court. *Ogburn v. Sterchi Bros. Stores, Inc.*, 218 N.C. 507, 11 S.E. 2d 460 (1940). The assignment is accordingly overruled.

CONCLUSION

No error is asserted in the judgment on defendants' counterclaim. Plaintiff has failed to show error on the merits, and the trial court was within its discretion on the attorney fees question. The judgment is therefore

Affirmed.

Judges WHICHARD and COZORT concur.

J. TAYLOR UZZELL, JR., RICHARD M. HAGER, BUSINESS AND ESTATE CONSERVATION, INC. D/B/A BEC, INC. v. INTEGON LIFE INSURANCE CORPORATION, LEONARD T. TIPPETT, ROBERT L. BRANTLEY

No. 8511SC117

(Filed 17 December 1985)

1. **Insurance § 2; Fraud § 3— termination of insurance agency contract—no false representation**

The trial court properly entered summary judgment for defendants in plaintiffs' claim based on fraud and misrepresentations which induced them to terminate their old agency contracts, sacrifice substantial benefits, and enter into new agency contracts where plaintiffs claimed that defendants represented to them that, under the new contracts, they could channel business from other insurance brokers through their contracts with defendant but there was no showing that the asserted representation was false.

2. **Contracts § 34; Insurance § 2— termination of insurance agency contract—malicious interference with contract—insufficiency of evidence**

The trial court properly entered summary judgment for the individual defendant in plaintiffs' action for malicious interference with contract where plaintiffs alleged that they had agency contracts with defendant insurance company, the individual plaintiff was the insurance company's marketing general agent and had knowledge of the contracts, and the individual defendant intentionally induced defendant insurance company to terminate its agency contracts with plaintiffs; however, there was no genuine issue of material fact with respect to defendant's lack of justification, since the evidence was uncontroverted that defendant was responsible for recruiting agents in plaintiffs' area, part of his job was to recommend that certain persons be retained as agents or be terminated, and he acted within the scope of his authority in recommending to defendant insurance company that plaintiffs' contracts be terminated for violating the express policy that certain people not be allowed to sell defendant company's products and channel that business through plaintiffs' agency.

APPEAL by plaintiff from *Martin (John C.), Judge.* Judgment entered 25 May 1984 in Superior Court, LEE County. Heard in the Court of Appeals 18 September 1985.

Appellants J. Taylor Uzzell, Jr. (Uzzell) and Richard M. Hager (Hager) are insurance agents in Sanford, and appellant BEC, Inc. (BEC) is the corporation they formed to combine their insurance business. Appellee Integon Life Insurance Corporation (Integon) is an insurance company based in Winston-Salem, and appellee Leonard T. Tippett (Tippett) is Integon's marketing general agent for the Sanford area. (Defendant Robert L. Brantley is not involved in this appeal.)

Appellant Uzzell was an agent for Integon from June 1973 until July 1983. Uzzell had recruited appellant Hager to join Integon as an agent in March 1982. Until April 1983, both had been employed under the standard agent's contract with Integon. This contract provided, in addition to the payment of commissions on each policy sold, health benefits, corporate stock options, a pension plan and other benefits. While under this standard contract, Uzzell and Hager reported directly to appellee Tippett, whose job responsibilities included recommending to Integon the employment or termination of agents in the Sanford area.

In April 1983, both Hager and Uzzell surrendered their existing contracts with Integon in order to sign a new contract, termed a "general agent" contract. In effect, this new contract gave appellants higher commissions and greater independence in exchange for giving up the benefits provided by the standard contract. Like the old contracts, these new contracts were terminable at the will of either party. Uzzell and Hager were able, under the new contracts, to channel their combined business through their newly formed corporation, BEC, which had also entered into a general agent contract with Integon. The new contracts also enabled appellants to utilize other agents to sell Integon products and channel that business to Integon through BEC. However, this right was limited in that appellees had expressly retained the right to approve or disapprove the individuals used by BEC to sell Integon products in order to control the caliber of agents allowed to sell Integon products.

Soon after the signing of these new contracts, a dispute arose between the appellants and Tippett as to certain persons appellants were recruiting to sell Integon products. Tippett warned appellants that if they did not cease using these persons to sell Integon insurance, he would terminate their contracts. Not believing Tippett had such authority, appellants continued to use these persons while attempting to contact Tippett's superiors in Winston-Salem in order to clarify their positions vis-a-vis Tippett. Appellants' understanding of the new contracts was that their increased independence included no longer being responsible to Tippett. Appellants knew, however, that Tippett continued to earn commissions, called overwrites, on the policies they sold and was also required to repay Integon for overpayments of commissions,

called chargebacks, which could result from a client of appellants cancelling an Integon policy prematurely.

Tippett notified appellants on 23 June 1983 that he was terminating their contract effective 5 July 1983 because of their continued use of agents not approved by him to sell Integon products. Appellants still did not believe Tippett had the authority to cancel their contracts, so continued to use the unapproved brokers and continued their efforts to meet with Integon officials in Winston-Salem. Although Tippett did not have the unilateral authority to terminate appellants' contracts, his recommendation that the contracts be cancelled was forwarded to his superiors in Winston-Salem. On 2 August 1983 Buddy Daniel, Vice-President of Integon, notified appellants that their contracts had been cancelled effective 31 July 1983, per Tippett's recommendation.

On 8 August 1983 Tippett mailed letters to all Integon policyholders who bought their policies through either Hager or Uzzell advising those policyholders that appellants were no longer Integon agents, but assuring them that continued service of their policies would be provided by other Integon agents. Tippett also included in the letter a statement to the effect that anyone advising the policyholders to change insurance companies now would not be acting in the policyholders' best interests.

Appellants instituted this action raising several claims. Against appellee Integon, appellants claimed that its representatives had fraudulently induced them to surrender the benefits of their old contracts and to sign the new "general agent" contracts. They claimed Integon's representatives misrepresented the amount of autonomy they would have in selecting other agents to work with them particularly with respect to the use of licensed brokers not licensed by Integon. Appellants alleged this was a material fact inducing them to terminate their old contracts and enter into the new ones. Appellants claim damages resulting from the loss of benefits under the old contract. Appellants also alleged that the conduct of Integon representatives during this matter constituted unfair and deceptive trade practices in violation of G.S. 75-1.1.

Against appellee Tippett, appellants claimed Tippett wrongfully and maliciously interfered with their contracts with Integon. Also, appellants alleged that Tippett's letter of 8 August 1983

constituted an unfair and deceptive trade practice in violation of G.S. 75-1.1.

Appellees moved the trial court for summary judgment of all claims against them. After reviewing all evidence, including affidavits and depositions, and hearing arguments of counsel, the trial judge entered summary judgment for appellees for all of appellants' claims against them.

Harrington and Gilleland by Robert B. Gilleland for plaintiff-appellant Uzzell.

Cameron, Hager and Kinnaman, P.A. by Richard B. Hager for plaintiff-appellant Hager.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan by James K. Dorsett, III for defendant-appellee Integon Life Insurance Corporation.

Smith, Moore, Smith, Schell and Hunter by Alan W. Duncan for defendant-appellee Tippett.

PARKER, Judge.

At the outset, we note that appellants' claims based on G.S. 75-1.1 are not before this court. Appellants' brief made no argument and cited no authority in support of these claims; therefore, they are deemed abandoned. Rule 28(b)(5), Rules of App. Proc. Appellants assign as error (i) the entry of summary judgment for Integon on Hager and Uzzell's claims based on fraud and (ii) the entry of summary judgment for Tippett on BEC's claim premised on malicious interference with BEC's contract with Integon.

In order to prevail when moving for summary judgment, the moving party must establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law when all factual inferences arising from the evidence are taken in the light most favorable to the nonmoving party. *Speck v. North Carolina Dairy Foundation, Inc.*, 311 N.C. 679, 319 S.E. 2d 139 (1984).

Appellants' surviving claim against appellee Integon is based on fraud and misrepresentations inducing them to terminate their old contracts, sacrifice substantial benefits, and enter into the new contracts. The essential elements of fraud in the inducement

were set out by our Supreme Court in *Johnson v. Phoenix Mutual Life Insurance Company*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

> To make out a case of actionable fraud, plaintiffs must show: (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that defendant made the false representation with the intention that it should be relied upon by plaintiffs; (e) that plaintiffs reasonably relied upon the representation and acted upon it; and (f) that plaintiffs suffered injury.

300 N.C. at 253, 266 S.E. 2d at 615.

[1] Appellants' claim that James Perry, regional director for Integon, and appellee Tippett represented to them that the appellants, under their new contract, could channel business from other insurance brokers in Sanford through their contract with Integon. This, in effect, would have given appellants the authority to sell Integon insurance products through any person of their choice, so long as that person was duly licensed to sell insurance by the State of North Carolina. Appellants assert that this representation was material to their acceptance of the new contract and was relied upon by them when surrendering the benefits accumulated under their old contracts.

When the evidence available for consideration on the summary judgment motion is viewed in the light most favorable to appellants, it falls short of establishing the elements of fraud as outlined in *Johnson, supra.* Appellants have made no showing that the asserted representation was false. Even if such a representation were made, there were never any representations made as to specific individuals being approved to sell Integon products. The evidence shows that it was made clear throughout the discussions between the parties that Tippett and Integon would continue to require that persons selling Integon products be approved by Tippett before any business from them would be accepted. The general representation made by Integon that other persons could channel business through appellants for Integon was not false merely because Integon failed to approve specific individuals for selling Integon products. Moreover, the evidence is undisputed

that Tippett advised Uzzell and Hager, before they signed the new contracts, that he would not approve the person around whom most of the controversy centered.

Appellants in this case have failed to present a sufficient forecast of evidence to refute the appellees' showing that no genuine issue of material fact exists as to an essential element of appellants' claim for fraud. In a claim for relief based on fraud, summary judgment for defendant (appellees here) is proper where the forecast of evidence shows that even one of the essential elements of fraud is missing. *E.g., Briggs v. Mid-State Oil Co.*, 53 N.C. App. 203, 207, 280 S.E. 2d 501, 504 (1981). In the case at bar, defendant-appellees' forecast of evidence showed that there was no genuine issue of material fact as to the falsity of the representation. As this forecast was not refuted by an adequate forecast from plaintiff-appellants, defendant Integon was entitled to summary judgment as a matter of law on the claim for fraud. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975).

[2] The same is true of appellants' surviving claim for malicious interference with contract against defendant Tippett. The essential elements of this tort are that (i) a valid contract existed between plaintiff and a third person; (ii) defendant had knowledge of such contract; (iii) defendant intentionally induced the third person not to perform his contract with plaintiff; and (iv) that defendant acted without justification. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954). The facts viewed in the light most favorable to appellants establish the existence of the first three elements. However, there is no genuine issue of material fact as to the element of justification. The evidence is uncontroverted that Tippett was responsible for the recruiting of agents in the Sanford area. Part of his job was to recommend that certain persons be retained as agents or be terminated. Clearly, he acted within the scope of his authority in recommending to Integon that appellants' contracts be terminated for violating the express policy of Tippett that certain persons not be allowed to sell Integon products and channel that business through BEC. Appellants made no forecast of evidence to rebut Tippett's showing of justification—that use of these individuals was causing dissent among the other agents under Tippett and that the policies sold by those unapproved individuals were being cancelled after short periods, causing both personal financial loss on account chargebacks to

Tippett and business losses for Integon. Tippett had a legitimate business interest to protect by assuring that people selling Integon products under his jurisdiction were reputable, reliable and able to meet company standards. Appellants were warned by Tippett that he considered the use of these individuals as grounds for terminating appellants' contracts. The contracts, in writing, were terminable at will. There is no genuine issue of material fact as to the existence of justification for Tippett's actions. Appellee Tippett was entitled to summary judgment as a matter of law.

The trial court properly granted Tippett and Integon's motions for summary judgment.

Affirmed.

Judges JOHNSON and EAGLES concur.

HENRY M. DAVIS v. INEZ SIMMONS DAVIS

No. 8510DC596

(Filed 17 December 1985)

Divorce and Alimony § 19.5— consent decree—payment of medical expenses—no alimony

The trial court erred in entering an order *ex mero motu* declaring portions of previous consent judgments null and void and unenforceable *ab initio* and in striking them since the parties did not intend for plaintiff's payment of "all necessary and reasonable medical expenses incurred by defendant" to constitute alimony payments; a paragraph in the parties' deed of separation was clearly an express waiver of alimony payments by defendant; at no point in any of the proceedings did plaintiff dispute the validity of the separation agreement; so long as the separation agreement was performed, as it was in this case, alimony claims were barred; and with the consent of the parties, the trial court, which had general jurisdiction of all domestic matters, properly entered a consent judgment requiring plaintiff's payment of defendant's medical expenses, even though the judgment contained a provision which was outside of the pleadings.

APPEAL by defendant from *Sherill, Judge*. Order entered 14 March 1985 in District Court, WAKE County. Heard in the Court of Appeals 21 November 1985.

The parties were married on 8 July 1951, and lived together until 8 December 1977, when they separated. On 6 February 1978, the parties entered into a Deed of Separation which included the following pertinent provisions:

FOUR

It is understood and agreed that inasmuch as INEZ SIMMONS DAVIS is in good health and is capable of being gainfully employed and does not desire any payments to be made for her own support and maintenance, the said INEZ SIMMONS DAVIS, does hereby release HENRY M. DAVIS, SR. from any and all liability for the payment of any sums to her for support and maintenance.

. . . .

TWELVE

It is mutually agreed between the parties hereto that the Party of the Second Part [Henry M. Davis, Sr.] agrees and does hereby assume liability for the payment of all medical expenses incurred by the Party of the First Part [Inez S. Davis] by way of treatment by doctors, dentists and hospitalization for any and all illnesses and injuries. In this connection it is specifically agreed that the Party of the Second Part may and, will, if ever possible, keep in full force and effect hospital and medical insurance that will pay and defray all or as much as possible of the sums incurred for the medical, dental and hospitalization treatment of the Party of the First Part.

On 23 March 1979, plaintiff filed a complaint for an absolute divorce. An extension of time to file an answer was obtained by defendant on 2 May 1979; however, no answer was subsequently filed. On 13 June 1979, a divorce judgment, consented to and signed by the parties, was entered which contained the following pertinent finding of fact:

(7) That there are no claims for support or alimony pending between the parties.

The Court then ordered the following:

(2) That the plaintiff is ordered to assume liability for and pay on behalf of the defendant all necessary and reasonable

medical expenses incurred by the defendant by way of treatment by doctors, dentists and hospitals for any and all illnesses and injuries to the defendant upon the presentation of a bill from the doctor, dentist or hospital involved and upon being presented information from the doctor, dentist or hospital involved that the treatment was reasonable and necessary until the defendant shall die or remarry.

(3) That the plaintiff is ordered to keep in full force and effect hospital and medical insurance with the defendant as beneficiary so that the same will pay and defray all or as much as possible of the sums incurred for medical, dental and hospital treatment of the defendant until defendant shall die or remarry.

On 29 May 1981, plaintiff filed a motion in the cause to clarify the provisions in the divorce judgment concerning his payment of medical and insurance expenses. On 28 October 1981 a judgment, consented to and signed by the parties, was entered which contained the following pertinent provision:

(2) That there is specifically excluded from the definition of what is a "necessary and reasonable medical expense," the following items or procedures:

(a) any medicine or medical remedies purchased over the counter without a doctor or dentist prescription.

(b) cosmetic surgical procedures.

On 26 January 1984, plaintiff filed a motion in the cause seeking to modify the payment provisions in the previous consent judgments in that defendant willfully attempted to circumvent the provisions of the clarified consent judgment by obtaining prescriptions and billing plaintiff for nonprescription medicines and medically unnecessary appliances. In addition, plaintiff sought modification of the previous orders based on significant changes in the parties' circumstances. Plaintiff sought an order from the court modifying these previous orders and requiring defendant to assume exclusive responsibility for all her medical, dental, hospital and insurance expenses. On 28 March 1984, defendant filed a motion for summary judgment, and attached an affidavit and a copy of the parties' Deed of Separation entered into on 6 February 1978.

On 25 February 1985, defendant filed a verified response to plaintiff's motion in the cause and alleged the following:

> 6. The terms of the Deed of Separation entered into by the parties on or about the 6th day of February, 1978, are not subject to modification except by agreement of the parties.
>
> 7. The judgment of divorce of the parties entered June 13, 1979 contained additional findings of fact entered upon the stipulations of the parties and pursuant to the consent of the parties an Order was entered requiring the Plaintiff to maintain hospital and medical insurance and to assume liability for and pay all the Defendant's necessary and reasonable medical expenses.
>
> 8. Said judgment of divorce entered June 13, 1979 specifically found as fact that there were no claims for support or alimony pending between the parties. Therefore the portion of the Order entered upon the consent of the parties requiring the Plaintiff to assume liability for and pay Defendant's necessary and reasonable medical expenses is, therefore, not an order of the Court to pay alimony and is [sic] therefore is [sic] not subject to modification except by consent of the parties.
>
> 9. The provisions of said judgment of divorce requiring the Plaintiff to assume liability for and pay Defendant's necessary and reasonable medical expenses was modified pursuant to the consent of the parties by Consent Judgment entered October 28, 1981.
>
> 10. The said Consent Judgment was likewise not an Order of the Court for the Plaintiff to pay alimony, and is therefore not subject to modification except by consent of the parties.

On 6 March 1985, plaintiff's motion in the cause and defendant's motion for summary judgment came on for hearing. After examining the pleadings, orders and judgments in the record, and after hearing arguments of counsel but without taking any evidence, the court "acting on its own motion" entered the following pertinent conclusions of law:

> 2. The court interprets decretal Paragraphs 2 and 3 of the judgment entered herein on June 13, 1979, which ordered

plaintiff to pay defendant's necessary and reasonable medical expenses and to keep in full force and effect hospital and medical insurance coverage for defendant's benefit until defendant shall die or remarry, as an award of alimony to defendant.

3. The Court had no subject matter jurisdiction to order plaintiff to pay defendant's medical expenses or to maintain hospital and medical insurance coverage for defendant's benefit.

4. The parties could not, by agreement, confer subject matter jurisdiction upon the Court when the Court otherwise had no subject matter jurisdiction.

5. Decretal Paragraphs 2 and 3 of the judgment entered and filed June 13, 1979, which ordered plaintiff to pay defendant's necessary and reasonable medical expenses and to keep in full force and effect hospital and medical insurance coverage for defendant's benefit, are null and void and unenforceable.

6. The judgment entered on October 25, 1981 incorporating and interpreting decretal Paragraphs 2 and 3 of the judgment of June 13, 1979 is also null and void and unenforceable.

Based on these conclusions, the court set aside the payment provisions of the prior consent judgments as being null and void and unenforceable *ab initio*. Defendant appealed.

Tharrington, Smith and Hargrove, by J. Harold Tharrington and Kim C. Wetherill, for plaintiff-appellee.

Johnson, Gamble, Hearn and Vinegar by M. Blen Gee, Jr., for defendant-appellant.

PARKER, Judge.

In her first assignment of error, defendant contends the trial court erred in entering an order *ex mero motu* declaring portions of previous consent judgments null and void and unenforceable *ab initio* and in striking them. We agree.

We note preliminarily that this proceeding is not affected by the Supreme Court's decision in *Walters v. Walters*, 307 N.C. 381,

298 S.E. 2d 338 (1983), because that case has only prospective application and has no effect on consent orders entered prior to 1983.

The principle is well-established that "[a] consent judgment is a contract between the parties entered upon the record with the approval and sanction of the court," *Coastal Production Credit v. Goodson Farms*, 71 N.C. App. 421, 422, 322 S.E. 2d 398, 399 (1984), and "must be construed in the same manner as a contract to ascertain the intent of the parties." *Bland v. Bland*, 21 N.C. App. 192, 195, 203 S.E. 2d 639, 641 (1974). "This Court is not bound by the 'four corners' of a consent judgment, but the judgment should be interpreted in light of the surrounding controversy and purposes intended to be accomplished by it," *Roberts v. Roberts*, 38 N.C. App. 295, 300, 248 S.E. 2d 85, 88 (1978), and it is fundamental that "contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible." *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 639, 217 S.E. 2d 682, 693, *cert. denied*, 288 N.C. 393, 218 S.E. 2d 467 (1975).

Applying these principles, we conclude that the parties did not intend for plaintiff's payment of "all necessary and reasonable medical expenses incurred by defendant" to constitute alimony payments. Under this construction, all the contractual provisions quoted above can be read as being consistent with each other.

Paragraph four in the Deed of Separation is clearly an express waiver of alimony payments by defendant. At no point in any of these proceedings has plaintiff disputed the validity of the separation agreement, and so long as the separation agreement is performed, which it has been here, alimony claims are barred. G.S. 50-16.6(b); 2 Lee, North Carolina Family Law, § 148 (4th Ed. 1980).

In the 13 June 1979 consent judgment the court found as fact "[t]hat there are no claims for support or alimony pending between the parties," and ordered plaintiff to pay "all necessary and reasonable medical expenses incurred by the defendant." Plaintiff asserts that the court had no authority to enter such an order, even upon the consent of the parties, because no such issue was raised by the pleadings. Our Supreme Court, in *Edmundson v. Edmundson*, 222 N.C. 181, 22 S.E. 2d 576 (1942) rejected a

similar argument by quoting with approval this statement from the opinion in *Keen v. Parker*, 217 N.C. 378, 8 S.E. 2d 209 (1940):

> It is generally held that provisions in judgments and decrees entered by consent of all the parties may be sustained and enforced, though they are outside the issues raised by the pleadings, if the court has general jurisdiction of the matters adjudicated. 222 N.C. at 186, 22 S.E. 2d at 580.

Therefore, with the consent of the parties, the trial court, which has general jurisdiction of all domestic matters, properly entered this consent judgment even though it contained a provision which was outside of the pleadings. *Edmundson, supra. See also Whitesides v. Whitesides*, 271 N.C. 560, 157 S.E. 2d 82 (1967).

Similarly, we are not persuaded by the argument that the trial court did not have the authority, even with the consent of the parties, to order plaintiff to pay all of defendant's "necessary and reasonable medical expenses." In *White v. White*, 289 N.C. 592, 223 S.E. 2d 377 (1976), our Supreme Court held that an order, entered upon the consent of the parties, compelling a father to assume the burden of a four year college education of each of his children, though it exceeded the requirements of the common law, was valid when entered upon the consent of the parties. The Court stated:

> That the order is based on an agreement of the parties makes it no less an order of the court once it is entered. It is likewise no less an order of the court, once entered, notwithstanding that the portion of it here in question could not have been lawfully entered without defendant's consent. His consent made this portion of the order, once entered, lawful (citation omitted).

Accordingly, pursuant to the original consent judgment, as modified by the 28 October 1981 Order, plaintiff could, and did, consent to assume liability for all defendant's "necessary and reasonable medical expenses."

The trial court erred in entering judgment *ex meru motu* declaring portions of previous consent judgments null and void and unenforceable *ab initio* and in striking them. The order ap-

pealed from is vacated and this cause is remanded for summary judgment for defendant.

Judges ARNOLD and WELLS concur.

THAREE NELSON v. CHIN YUNG CHANG

No. 8520DC533

(Filed 17 December 1985)

1. **Malicious Prosecution § 13.2— lack of probable cause—sufficiency of evidence**

In an action for malicious prosecution lack of probable cause could be found from evidence that plaintiff took out three warrants against defendant; defendant was found not guilty of the first two charges and the third charge was voluntarily dismissed by the assistant district attorney; plaintiff brought witnesses to corroborate her assertion that she had been kicked and threatened by defendant, but defendant denied these charges; plaintiff's assertion that the fact that she relied on the advice of the magistrate in swearing out the warrants did not indicate probable cause; and the fact that plaintiff was not a native American and was unfamiliar with our system of jurisprudence did not excuse her lack of probable cause.

2. **Malicious Prosecution § 15— punitive damages—denial of motion to dismiss claim**

The trial court did not err in denying plaintiff's motions to dismiss defendant's claim for punitive damages for malicious prosecution where evidence of the parties' business dealings and evidence that plaintiff had defendant arrested on three occasions because of his business decisions showed a series of transactions conducted in a manner indicating a reckless and wanton disregard of defendant's rights and conducted under oppressive circumstances.

3. **Malicious Prosecution § 15— damages—sufficiency of evidence**

The trial court did not err in denying plaintiff's motion for judgment n.o.v. with respect to damages for malicious prosecution where the evidence tended to show that defendant was out of work for six months after plaintiff took out a warrant for trespass; his salary had been $600 per month; he incurred attorney fees of $300 in the defense of the criminal proceedings instituted by plaintiff; and the jury awarded him $4,500 on this issue, but he consented to a remittitur to the sum of $3,900, an amount consistent with the amount of damages as shown by the evidence.

4. **Trover and Conversion § 2— restaurant equipment—conversion—sufficiency of evidence**

Evidence was sufficient for the jury on defendant's counterclaim for conversion where it tended to show that defendant was the owner of certain

restaurant equipment which he previously purchased from plaintiff and which was brought from his old restaurant to plaintiff's restaurant, and when defendant went to the restaurant, with plaintiff's consent, to remove his equipment, he discovered that many items had been sold and traded by plaintiff, were worn out, were stolen or for other reasons could not be taken at that time and were, therefore, left in the restaurant where they remained at the time of trial.

APPEAL by plaintiff from *Beale, Judge*. Judgment entered 27 December 1984 in District Court, MOORE County. Heard in the Court of Appeals 19 November 1985.

This case results from a series of disputes between the parties concerning their respective interests in a business known as the Red Bamboo restaurant in Southern Pines. On 4 January 1984, plaintiff filed a complaint seeking injunctive relief and damages alleging that defendant assaulted her on 15 December 1983 and interfered with the operation of her restaurant. An *ex parte* temporary restraining order against defendant was entered on the same day which prohibited him from interfering with the restaurant's operation but did not prohibit him from entering upon the restaurant premises. Defendant subsequently answered and counterclaimed against plaintiff alleging (i) wrongful possession of certain property, (ii) malicious prosecution, (iii) abuse of process, (iv) conversion and (v) fraudulent misrepresentations.

The following issues were submitted to the jury:

1. Did the plaintiff Thayree [sic] Nelson institute criminal proceedings against the defendant for any of the below listed crimes with malice and without probable cause?

(a) Communicating Threats: YES

(b) Assault on a Female: YES

(c) Trespass: YES

2. What amount of damages, if any, is the defendant entitled to recover from the plaintiff for the malicious prosecution of the defendant for any one or more of the above enumerated crimes?

ANSWER: $4,500

3. What amount of punitive damages, if any, does the jury in its discretion award to the defendant for malicious prosecution?

ANSWER: $25,000

4. Did the plaintiff convert the property of the defendant?

ANSWER: YES

5. What amount of damages, if any, is the defendant entitled to recover from the plaintiff for conversion of property?

ANSWER: $5,500

6. What property, if any, is the defendant entitled to recover from the plaintiff?

ANSWER: Lights, Silverware, China.

From judgment entered in favor of defendant, plaintiff appealed.

Pollock, Fullenwider, Cunningham and Patterson, P.A. by Bruce T. Cunningham, Jr. for plaintiff appellant.

M. James Clarke II for defendant appellee.

PARKER, Judge.

[1] In her first assignment of error, plaintiff contends the court erred in denying her motion to dismiss the claim for malicious prosecution. In order to prove a cause of action for malicious prosecution, the claimant must show that the defendant (i) initiated the earlier proceeding, (ii) maliciously, (iii) without probable cause and that (iv) the proceeding terminated in the claimant's favor. *Jones v. Gwynne*, 312 N.C. 393, 323 S.E. 2d 9 (1984). Plaintiff contends defendant failed to present sufficient evidence of malice, lack of probable cause and damages. We disagree.

"Aside from express malice, which plaintiff may or may not be able to show at trial, implied malice may be inferred from want of probable cause in reckless disregard of plaintiff's rights." *Pitts v. Pizza, Inc.*, 296 N.C. 81, 86-87, 249 S.E. 2d 375, 379 (1978). "Hence, the case here must rise or fall on the question of probable cause. . . ." *Id.*

As stated further by the Court in *Pitts, supra*:

> In cases grounded on malicious prosecution, probable cause "has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury. (Citations omitted.) *Id.*

The evidence presented at trial, when viewed in the light most favorable to defendant as must be done on a counterclaim, revealed a direct conflict in the testimony. Plaintiff took out three warrants against defendant. Defendant was found not guilty of the first two charges and the third charge was voluntarily dismissed by the assistant district attorney. Plaintiff brought witnesses to corroborate her assertion that she had been kicked and threatened by defendant. Defendant denied these charges. Credibility is always a question for the jury, *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971), and "when the facts are in dispute the question of probable cause is one of fact for the jury." *Pitts, supra.* The trial court properly denied all plaintiff's motions to dismiss the claim for malicious prosecution.

We are not persuaded by plaintiff's assertion that the fact that she relied on the advice of the magistrate in swearing out the warrant indicates probable cause. As the Court stated in *Bassinov v. Finkle*, 261 N.C. 109, 134 S.E. 2d 130 (1964), the rule is

> "that advice of counsel, however learned, on a statement of facts, however full, does not of itself and as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury" on the issues of probable cause and malice. (Citations omitted.)

Similarly, we are not persuaded on this issue by the fact that plaintiff is not a native American. Plaintiff admitted in her complaint that she was a citizen and resident of North Carolina and alleged that the defendant was an "alien with a resident visa." Plaintiff is in no position to argue her lack of knowledge of our

system of jurisprudence, having operated at least two businesses in this state for at least five years, one of which was an incorporated business.

Plaintiff's argument that there was no proof of damages also fails. Defendant presented evidence from which the jury could find that he had suffered lost wages and incurred expenses, including attorney's fees, in connection with defending against the warrants. The assignment of error is overruled.

[2] In her next assignment of error, plaintiff contends the court erred in denying her motions to dismiss the claim for punitive damages with respect to the claim for malicious prosecution. As stated by our Supreme Court in *Jones v. Gwynne, supra*:

> In order for a plaintiff to recover punitive damages in a malicious prosecution action, he must "offer evidence tending to prove that the wrongful action of instituting the prosecution 'was done for actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of plaintiff's right.' " (Citations omitted.)

When the evidence presented is viewed in the light most favorable to defendant, it shows that plaintiff failed to sign a partnership agreement as promised, had the lease and ABC permit issued in her name, attempted to realize a substantial profit by selling her interest in the business to defendant and refused to provide security to guarantee her promise to buy defendant's interest. More specifically, when defendant refused to sign a sublease agreement she had prepared, plaintiff had him arrested. Shortly thereafter, when defendant called off a proposed sellout to plaintiff because of her failure to post security for her agreement, plaintiff had him arrested again. Several days later, after defendant removed some of his equipment from the restaurant, plaintiff had him arrested a third time. Although any one of these actions standing alone might not justify submission of the issue of punitive damages, we hold that this series of transactions was conducted "in a manner which showed the reckless and wanton disregard of [defendant's] rights," *Jones, supra*, and certainly was done under oppressive circumstances. The assignment of error is overruled.

[3] Next, plaintiff contends the court erred in denying her motion for judgment notwithstanding the verdict with respect to damages for malicious prosecution. We disagree.

Defendant testified that he was out of work for six months after plaintiff took out the warrant for trespass and that his salary had been $600.00 per month while working at the Red Bamboo. He also testified that he incurred attorney fees of around $300.00 in the defense of the three criminal actions. These fees are recoverable. *Stanford v. Grocery Co.*, 143 N.C. 419, 55 S.E. 2d 815 (1906).

The jury awarded defendant $4,500.00 on this issue. Counsel for plaintiff at trial stated that taking the defendant's version of the evidence, defendant's compensatory damages would amount to $3,900.00 for malicious prosecution. Defendant consented to a remittitur to the sum of $3,900.00, a practice which has been approved of by this Court. *Commission v. Holman*, 30 N.C. App. 395, 226 S.E. 2d 848, *cert. denied*, 290 N.C. 778, 229 S.E. 2d 33 (1976). The amount of $3,900.00 was consistent with the evidence of six months of lost salary at $600.00 per month, plus an additional $300.00 in attorney's fees. The assignment of error is overruled.

Next, plaintiff contends the court erred in allowing defendant, over objection and after denial of plaintiff's motion for directed verdict, to reopen his case and attempt to correct the omissions in damages pointed out by counsel for plaintiff. We disagree. "The purpose of the 'specific grounds' requirement of Rule 50(a) is to allow the adverse party to meet any defects with further proof and avoid the entry of a judgment notwithstanding the verdict at the close of the trial, on a ground that could have been met with proof had it been suggested earlier." *Byerly v. Byerly*, 38 N.C. App. 551, 553, 248 S.E. 2d 433, 435 (1978). The assignment of error is overruled.

[4] Next, plaintiff contends the court erred in denying her motions to dismiss the claim of conversion. Conversion is defined as the (i) unauthorized assumption and exercise of right of ownership (ii) over goods or personal chattels (iii) belonging to another (iv) to the alteration of their condition or the exclusion of the owner's rights. *Spinks v. Taylor*, 303 N.C. 256, 278 S.E. 2d 501 (1981). Defendant testified that he was the owner of certain restaurant equipment which he previously purchased from plaintiff and

which was brought from his old restaurant to the Red Bamboo. He supported this testimony with a handwritten list of the equipment prepared by the plaintiff which she gave to him when he purchased the equipment and cancelled checks showing payment to plaintiff for the equipment. When defendant went to the restaurant, with plaintiff's consent, to remove his equipment, he discovered that many items had been sold and traded by plaintiff, were worn out, were stolen or for other reasons could not be taken that night and were, therefore, left and still remain in the restaurant. We hold this evidence was sufficient to justify the submission of the conversion issue to the jury.

Finally, we reject plaintiff's sixth and final assignment of error that the court erred in denying her motion for judgment notwithstanding the verdict on the issue of conversion for the reasons stated above.

No error.

Judges ARNOLD and WELLS concur.

HOMELAND, INC. v. CHARLES E. BACKER AND MARIE B. BACKER v. CARLOS GOMEZ AND WIFE, BARBARA J. GOMEZ

No. 8512SC572

(Filed 17 December 1985)

1. **Landlord and Tenant § 17— termination of lease for waste—insufficiency of evidence**

In an action to terminate plaintiff's thirty-year lease with defendants, the trial court erred in granting directed verdict for plaintiff on the issue of defendants' causing or permitting waste to the leased premises where there was plenary evidence that defendants made extensive improvements to all the rental units on the property; since defendants had a thirty-year lease, they would be expected to change and improve the property in many ways; and the two houses which defendants moved could be replaced in their original positions before the lease terminated.

2. **Landlord and Tenant § 18; Estoppel § 8— termination of lease for nonpayment of rent—refusal to accept rent checks—estoppel—sufficiency of evidence**

In an action to terminate a lease on the ground of nonpayment of rent, evidence that defendants attempted to tender the rent and their checks were

refused by plaintiff should have gone to the jury to determine whether plaintiff's refusal of defendants' checks estopped plaintiff from terminating the lease on the ground of nonpayment, and it was error to separate the issues of nonpayment of rent and estoppel.

APPEAL by defendants from *Herring, Judge.* Amended judgment entered 4 October 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 November 1985.

This is a civil action wherein plaintiff lessor seeks to terminate its thirty-year lease with defendants on the grounds that defendants breached the terms of their lease agreement. Plaintiff is a close corporation, owned by members of the Fleishman family. The leased property, located on Bragg Boulevard in Cumberland County, consisted of thirty-two residential rental units, and a small building that had been used previously as a grocery store. The monthly rent for the property was $1,000.00.

The lease agreement provides, in pertinent part:

> 8. LESSEES shall not assign this lease or sublet any part of the demised property . . . without the written consent of LESSOR.
>
> 9. It is expressly agreed that if any monthly installment of rent as herein called for remain overdue and unpaid for a period of ninety (90) days LESSOR may at its option at any time during such default declare the lease terminated, canceled, and may re-enter and take possession of the said premises and it is further agreed that if LESSEES shall fail to comply with or abide by any other of the conditions of this lease agreement, LESSOR may, at its option, declare the lease terminated and canceled, re-enter the premises and take possession of the same.

On 1 September 1983 plaintiff filed a complaint alleging that defendants had breached the lease agreement by assigning, subletting, committing waste, and failing to pay the monthly rental since May 1983. Plaintiff requested that the court declare the lease terminated and award plaintiff possession of the premises, the rentals defendants had received from the subtenants, $15,000.00 for the reasonable value of the two houses defendants had removed, and $10,000.00 for alterations to the building sub-

leased to John P. Humphries d/b/a Red Barn Coin Center and Thrift Shop.

On 29 September 1983 defendants answered, alleging as affirmative defenses that at the time the parties entered into the lease agreement they contemplated and expected that defendants had the authority to sublease or assign the rental units on the property; that subsequent to the execution of the lease plaintiff knew, or with reasonable diligence should have known, of defendants' subleases; and that the assignees were liable for any waste.

The parties stipulated prior to trial that defendants subleased part of the leased property and assigned another portion of the property to Carlos and Barbara Gomez, John P. Humphries d/b/a Red Barn Coin Center and Thrift Shop, and Tart Auto Sales, Inc. The parties also stipulated that defendants had moved houses which had been located at 100 and 102 Fleishman Street.

At trial plaintiff introduced evidence tending to show that defendants breached the lease agreement. Defendants' evidence, which they contend on appeal was sufficient to withstand plaintiff's motion for directed verdict, tended to show the following: In 1972 Charles Backer made extensive repairs to the rental houses which had been in very poor condition. He spent $1,200.00 per house on electrical wiring; replaced floors and ceilings; installed insulation; repaired walls and plumbing; and repainted each house. He also brought 1,200 loads of fill dirt into the area at $20.00 per load. In 1973 Backer visited Maurice Fleishman, the secretary of Homeland, Inc., at that time, to discuss paragraph eight of the lease agreement which provided that he could not sublet the property. Fleishman assured Backer that there was no problem, and agreed to delete the paragraph. Backer crossed out the paragraph himself, and Fleishman said there was no need to retype the lease.

According to plaintiff, the alleged waste occurred when two houses, located at 100 and 102 Fleishman Street, were moved, and when Backer remodeled the Red Barn. Backer, however, introduced evidence which tended to show that these were improvements, rather than waste. According to Backer, the house at 100 Fleishman Street was on low land, and it flooded every time it rained. Backer moved the house to higher ground to prevent further flooding, and filled in the space where the house had been.

The house at 102 Fleishman Street was moved to another lot, at sublessee Tart's request. Tart paid Backer $5,000.00 for the house. The Red Barn was a building in disrepair next to John Humphries' coin shop. Humphries' coin shop had been there before Backer leased the property from plaintiff. There was a pile of junk between the coin shop and the Red Barn. Backer contracted with the owners of the Red Barn to lease it for $100.00 per month. He cleaned up the junk pile and remodeled the two buildings by joining them together, building a new front, and a new roof. According to Humphries, after these repairs and improvements, Maurice Fleishman told him, "Charley Backer sure is fixing that area up nice out there, isn't he?" Humphries also testified that on another occasion Fleishman said, "[Backer] sure fixed you a nice building."

Defendants' evidence regarding the issue of nonpayment of rent was as follows: Backer testified that he had always paid his rent, although occasionally the checks were a few days late. He personally delivered the March and April 1983 checks to Maurice Fleishman's office. On 27 April 1983 plaintiff's attorney wrote to defendants, notifying them that the subleases were in violation of the lease agreement, and that moving the two houses was an act of waste and in violation of G.S. 42-11. The letter stated that plaintiff elected to terminate the lease due to the violations, and would re-enter on or before 31 May 1983. Plaintiff demanded an accounting of the rentals received from the sublessees, and reimbursement of the fair market value of the two houses which had been moved. The letter stated that plaintiff had received but not negotiated the March and April 1983 rental checks. After receiving this letter Backer went to Maurice Fleishman's office with his check for May 1983 rent. Fleishman refused to accept the check and said to Backer, "Don't pay me another nickel."

On 29 August 1983 plaintiff's counsel sent a second letter to defendants, notifying them that none of the breaches and violations mentioned in the previous letter had been cured, and that the monthly rental payments for May, June, July and August had not been tendered, which constituted another breach of the lease agreement. In December 1983 the clerk of superior court tendered a check for $8,000.00 for Backer, which plaintiff refused.

At the close of all the evidence the trial judge granted plaintiff's motions for directed verdict on the issues of whether defend-

ants had breached paragraph nine of the lease by failing to pay the monthly rental and whether defendants had caused or permitted waste to the leased premises. The jury found that defendants' "waste" was to such an extent as to cause termination of the lease, and awarded plaintiff damages of $32,000.00 for unpaid rental payments, and $8,150.00 for "waste." Defendants appealed.

McCoy, Weaver, Wiggins, Cleveland & Raper, by John E. Raper, Jr., for plaintiff, appellee.

MacRae, Perry, Pechmann, Boose & Williford, by James C. MacRae and Reid, Lewis & Deese, by Renny W. Deese for defendants, appellants.

HEDRICK, Chief Judge.

Defendants assign error to the trial court's granting plaintiff's motion for directed verdict on the issues of waste and nonpayment of rent.

On a motion for directed verdict the trial court must consider the evidence in the light most favorable to the non-moving party, and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict in favor of the non-moving party. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979). A directed verdict in favor of the party with the burden of proof is proper only when the proponent has established a clear and uncontradicted prima facie case and the credibility of his evidence is manifest as a matter of law. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). Thus, the first question before us is whether plaintiff established a clear and uncontradicted prima facie case on the issue of defendants' waste.

[1] Waste, at common law, was any permanent injury with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the owner of an estate less than a fee. *Fleming v. Sexton*, 172 N.C. 250, 90 S.E. 247 (1916). Specifically in reference to the lessor-lessee situation, waste has been defined as an implied obligation in every lease on the part of the lessee to use reasonable diligence to treat the premises in such a manner that no injury is done to the property. *Casualty Co. v. Oil Co.*, 265 N.C. 121, 143 S.E. 2d 279 (1965). The remedy and judgment for waste, as set forth in G.S. 1-533 is that "the judgment may be for

damages, forfeiture of the estate of the party offending, and eviction from the premises."

In the instant case the evidence does not conclusively show that defendants committed waste. On the contrary, there was plenary evidence that defendants made extensive improvements to all the rental units on the property. Since defendants had a thirty-year lease, they would be expected to change and improve the property in many ways. The two houses that Backer moved could be replaced in their original positions before the lease terminated. We find that plaintiff has failed to establish a clear and uncontradicted prima facie case on the issue of waste. Therefore the trial court erred in entering a directed verdict for plaintiff, and the question of whether defendants committed waste should be determined by the jury.

[2] Additionally, we do not find that plaintiff's evidence was sufficient to justify a directed verdict on the issue of nonpayment of rent. Defendants introduced evidence which tended to contradict plaintiff's evidence, and raised a question of estoppel. Backer testified that he tendered his check for the May 1983 rent, and it was refused by plaintiff. Backer was told that plaintiff would not accept any further payments and he was subsequently notified that the lease was terminated. This evidence, that Backer attempted to tender the rent and his checks were refused by plaintiff, should have gone to the jury to determine whether plaintiff's refusal of defendants' check estopped plaintiff from terminating the lease on the grounds of nonpayment. Plaintiff has not established a clear and uncontradicted prima facie case on the issues of nonpayment and estoppel, and the trial court erred in granting plaintiff's motion for a directed verdict. Moreover, we find that the court erred in separating the issues of nonpayment of rent and estoppel, and they should be submitted to the jury as one issue.

In conclusion, we find that the trial court erred in granting plaintiff's motions for directed verdict and such error prejudiced defendants' case as to the remaining issues, requiring a new trial on all issues.

Reversed and remanded.

Judges EAGLES and MARTIN concur.

MASTROM, INC. AND THE MUTUAL FIRE, MARINE & INLAND INSURANCE COMPANY v. CONTINENTAL CASUALTY COMPANY

No. 8526SC330

(Filed 17 December 1985)

Insurance § 150— professional accounting services covered—no coverage for fraudulent investment activities

Damages caused by fraudulent investment activities of plaintiff insured were not covered under an accountant's professional liability policy as damages "arising out of the performance of professional services for others in the insured's capacity as an accountant or notary public."

APPEAL by plaintiffs from *Snepp, Judge.* Judgment entered 30 October 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 October 1985.

Plaintiffs appeal from an order dismissing their action against defendant insurer on an accountants' professional liability policy.

Craighill, Rendleman, Ingle & Blythe, by James B. Craighill, for plaintiff-appellants.

Golding, Crews, Meekins, Gordon & Gray, by Harvey L. Cosper, Jr. and Ned A. Stiles, for defendant-appellees.

EAGLES, Judge.

The dispositive question on appeal is whether damages caused by fraudulent investment activities of Mastrom, the insured, were covered under an accountant's professional liability policy as damages "arising out of the performance of professional services for others in the insured's capacity as an accountant or notary public." We conclude that this policy language does not cover the conduct alleged, and affirm the judgment dismissing the action.

I

Mastrom, Inc. did business providing a range of accounting, tax, and financial management services, primarily to doctors and dentists. Mastrom also provided similar services to Thermal Belt Air Service (TBAS), to which several of Mastrom's corporate directors had close ties. Those same directors induced Mastrom clients to invest in unsecured notes of TBAS. Beginning in 1978,

lawsuits were brought by seven of these clients, alleging that Mastrom's directors fraudulently concealed the true financial condition of TBAS, which has since become bankrupt. Mastrom made demand on defendant insurer Continental Casualty to defend it in these actions, relying on its "Accountants Professional Liability" policy, and defendant refused. Plaintiff Mutual Fire, which provided Mastrom with excess liability insurance, then took over the defense of Mastrom in that litigation and eventually reached settlements with the complaining investors. Mastrom and Mutual then brought this action.

Defendant relied on the following policy language in obtaining dismissal in the trial court:

> [Defendant] . . . agrees with the insured . . . as follows:
>
> I. COVERAGE
>
> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any act or omission of the insured, any predecessor in business of the Named Insured or any other person for whose acts or omissions the insured is legally responsible, and arising out of the performance of professional services for others in the insured's capacity as an accountant or notary public and the company shall have the right and duty to defend any suit against the insured seeking such damages.
> . . .

II

The duty of an insurer to defend its insured is based on the coverage contracted for in the insurance policy. *See Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 176 S.E. 2d 751 (1970). Provisions of insurance policies are generally to be construed in favor of coverage and against the insurer. *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 280 S.E. 2d 907 (1981). This principle applies, however, only when the terms of the policy are ambiguous. *First Nat'l Bank v. Nationwide Ins. Co.*, 303 N.C. 203, 278 S.E. 2d 507 (1981). As applied to the present facts, the policy language is not ambiguous in excluding coverage for the conduct at issue. We reach this result even under the liberal treatment we give to plaintiffs' allegations, *i.e.*, that the allegations of their complaint must be treated as true on appeal of a

judgment of dismissal under G.S. 1A-1, R. Civ. P. 12(b)(6). *See Lupo v. Powell*, 44 N.C. App. 35, 259 S.E. 2d 777 (1979).

III

The crux of this appeal involves what type of professional services defendant agreed to insure by the policy language, "arising out of professional services for others in the insured's capacity as an accountant." The insurance policy clearly is not a general liability policy. Although Mastrom offered a wide range of services, defendant agreed only to assume liability for damages arising out of the firm's accounting services.

An accountant is a "[p]erson skilled in keeping books or accounts; in designing and controlling systems of account; in giving tax advice and preparing tax returns." Black's Law Dictionary 18 (5th ed. 1979). Our statutes define all the various classes of accountants as persons who engage in the "public practice of accountancy." G.S. 93-1(a)(1), (3), (4). They define that practice in G.S. 93-1(a)(5):

> A person is engaged in the "public practice of accountancy" who holds himself out to the public as a certified public accountant or an accountant and in consideration of compensation received or to be received offers to perform or does perform, for other persons, services which involve the auditing or verification of financial transactions, books, accounts, or records, or the preparation, verification or certification of financial, accounting and related statements intended for publication or renders professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems, or the recording, presentation or certification and the interpretation of such service through statements and reports.

See also 1 C.J.S. Accountant (1936); 1 Am. Jur. 2d Accountants Section 1 (1962). Accounting is a skilled profession embracing the matters described in G.S. 93-1(a)(5), *supra*. *See Duggins v. N.C. State Bd. of Certified Public Accountant Examiners*, 294 N.C. 120, 240 S.E. 2d 406 (1978); 1 Am. Jur. 2d, Accountants, Section 2 (1962). Nowhere do we find any definition of "accountant" broad enough to include the sale of securities, nor any definition of "accountant" as one who offers a general range of financial services.

We note that the sale of securities is regulated by statute elsewhere. G.S. 78A-1 *et seq.*; 15 U.S.C. Section 77a *et seq.*

We are aware that certain "gray areas" exist, particularly with respect to tax law, where the professional services of accountants can become difficult to distinguish from other professional services. *See Bancroft v. Indemnity Ins. Co.*, 203 F. Supp. 49 (W.D. La.) (accountant advising client on tax consequences of sale), *aff'd*, 309 F. 2d 959 (5th Cir. 1962). Nothing about the instant transactions, which involve the promotion and sale of TBAS securities as a profit-making venture unrelated to taxes, brings these transactions into any of the "gray areas." By the clear language of the policy, then, defendant could and did properly refuse to defend these actions.

IV

Plaintiffs attempt to avoid this result by directing our attention to the language "arising out of." They cite *Fidelity & Casualty Co. v. N.C. Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E. 2d 113, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 840 (1972). There we held that the words "arising out of" are words of much broader significance than "caused by," but mean "originating from," "incident to," or "having connection with." Since Mastrom acquired information about the investors' financial condition in the course of its professional accounting services and used that information to identify the investors as potential buyers of TBAS securities, plaintiffs argue that the sales "arose out of" the accounting services and therefore were covered under the policy. We disagree.

In *Fidelity & Casualty v. Farm Bureau*, we were interpreting an automobile liability policy in light of the established purpose of our mandatory financial responsibility laws to provide broad protection for the public and the substantial case law from other jurisdictions reaching a similar result (that persons loading truck were "using" truck). Those considerations do not apply here. More importantly, the policy here is to be construed as a whole, having reference to the purposes of the entire contract. *Blake v. St. Paul Fire & Marine Ins. Co.*, 38 N.C. App. 555, 248 S.E. 2d 388 (1978). The policy provisions must be interpreted reasonably consistent with their plain intent. *Huffman v. Occidental Life Ins. Co.*, 264 N.C. 335, 141 S.E. 2d 496 (1965). We find nothing in this

policy, an accountant's professional liability policy and not a general liability policy, that reasonably suggests an agreement to cover other activities which might arise out of the mere acquisition of information about clients by accountants. Under the construction urged by plaintiffs, defendant could be required to provide general liability coverage for virtually any client claim as long as the client's first contacts with Mastrom were services. That result would be absurd and untenable. The policy clearly requires a real causal connection between the accounting services rendered and the damages.

V

Defendant relies on, and plaintiffs seek to distinguish, the case of *Smith v. Travelers Indem. Co.*, 343 F. Supp. 605 (M.D.N.C. 1972). There the court rendered summary judgment for the professional malpractice insurer, which claimed that its insured attorney's investment activities did not "arise out of" his professional capacity. The insured attorney, licensed in Virginia, sought out the plaintiff in North Carolina. The attorney suggested that he be allowed to invest plaintiff's money. The attorney never advised plaintiff on legal matters. Plaintiff simply felt that an attorney ought to know more about investment matters than other people. The court found this transaction outside the scope of the attorney's professional activities.

With respect to the transactions here, Mastrom independently promoted the sale of TBAS securities. No client asked Mastrom to investigate the purchase of TBAS, but instead Mastrom initiated the complained-of transactions for its own business purposes. No connection, other than the mere collection of information, existed between any professional accounting services rendered by Mastrom and the sale of TBAS securities. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974), cited by plaintiffs as controlling over *Smith*, involved questions of principal and agent and a long-term course of conduct approved by the principal. Accordingly it is not controlling as to the insurer-insured relationship here.

CONCLUSION

The policy language unambiguously excluded coverage for Mastrom's sale of TBAS securities. The court accordingly ruled

correctly in dismissing the complaint for failure to state a cause of action. Because we reach this result, we need not reach the questions (1) of the applicability of the policy language excluding coverage for fraudulent acts or (2) of the period of coverage.

Affirmed.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. BIENVENIDO DIAZ

No. 852SC671

(Filed 17 December 1985)

Narcotics § 4.1— trafficking in marijuana—insufficiency of circumstantial evidence

In a prosecution for trafficking in excess of ten thousand pounds of marijuana, the trial court erred in denying defendant's motion to dismiss where there was no direct evidence that defendant actually possessed or transported marijuana, that he rented a car and drove it to the crime scene, or that he fled from the scene during the police officers' raid; rather, in order to convict defendant on theories of acting in concert and constructive possession, the jury would have had to build inference upon inference, and this it could not do.

APPEAL by defendant from *Brown (Frank), Judge*. Judgment entered 1 February 1985 in Superior Court, HYDE County. Heard in the Court of Appeals 31 October 1985.

On 14 May 1984, defendant was charged in a proper bill of indictment with trafficking in excess of ten thousand (10,000) pounds of marijuana in violation of G.S. 90-95(h)(1)(d). From a judgment imprisoning defendant for a term of thirty-five (35) years and imposing a two hundred thousand dollar ($200,000.00) fine, defendant appealed.

Attorney General Thornburg, by Kaye R. Webb, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant appellant.

PARKER, Judge.

In his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss the charge against him at the close of the State's evidence because the evidence was insufficient to convince a rational juror beyond a reasonable doubt of his participation in a drug smuggling operation on the night of 1 May 1984. We agree.

On defendant's motion to dismiss, the question for the court is whether there is substantial evidence of every element of the offense, *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984), and the Court must determine from all the evidence, taken in the light most favorable to the State, whether there is substantial evidence that the crime charged has been committed and that the offense was committed by the person accused. *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983).

The State's evidence tended to show that on 1 May 1984, law enforcement officers had Carlos Sosa and Herberto Tellez under surveillance at the Holiday Inn in Williamston, North Carolina. At 6:05 p.m., Sosa, operating a tractor-trailer, and Tellez, operating a Ryder Rental truck, left the Holiday Inn and drove to the coast around Long Shoal River. Law enforcement officers thereafter positioned themselves at the head of Fifth Avenue, a private road running between Highway 264 and the Pamlico Sound near Long Shoal River.

Around 1:00 a.m., voices could be heard at the intersection of Highway 64 and Fifth Avenue. Outboard motors in the direction of the river also could be heard. A few minutes later, the tractor-trailer and a Buick Regal came out of Fifth Avenue and turned left on Highway 264. The truck, operated by Sosa, which was stopped by officers, contained 517 bales of marijuana weighing approximately 28,170 pounds. The Buick Regal was stopped and it was occupied by Rolando Tudela, Juan Hernandez, Louis Concepcion and Reineeil Fonseca.

A search of the Buick Regal revealed a Hertz Rental Agreement in the name of Bienvenido Diaz, an airline ticket and a Florida driver's license revocation notice in the name of Alberto Jimenez, a wallet containing a Social Security card and driver's license of Louis Concepcion, and a business card in the name of Juan Hernandez.

Thereafter, the officers went down Fifth Avenue where they met the Ryder Rental truck operated by Tellez. That truck contained 238 bales of marijuana weighing approximately 14,270 pounds. As officers continued toward the river, persons ran toward the marsh and into the water and were told to stop. Approximately ten other persons were taken into custody during this raid. Several other suspects were arrested at various locations in the general vicinity of Long Shoal River over the next several days.

On 5 May 1984, Hyde County Sheriff Roland Dail was driving along Highway 264 in Dare County when he spotted the defendant walking toward Manteo on the right side of Highway 264, approximately five miles north of the Long Shoal River.

At trial, on voir dire, Dail testified he stopped defendant because "it was obvious to me from looking at Mr. Diaz that he didn't have a bit more business being there than I did in Cuba and that he was obviously one of the people involved in this drug deal." Before the jury, Dail testified that he noticed defendant "was Hispanic looking," and that defendant told him he had been out in the swamp for several days and nights. The area where defendant was walking was "just swamp, marsh and woods all the way up," and was approximately ten to fifteen miles from the nearest inhabited area.

Defendant offered no evidence. The court submitted to the jury possible verdicts of (i) guilty of trafficking by possessing or by transporting in excess of 10,000 pounds of marijuana, or (ii) not guilty. The court instructed the jury on theories of guilt according to "acting in concert" and "constructive possession." The jury returned a verdict of "guilty as charged."

"Trafficking in marijuana consists of either selling, manufacturing, delivering, transporting, or possessing 'in excess of 50 pounds (avoirdupois) of marijuana.'" *State v. Goforth*, 65 N.C. App. 302, 305, 309 S.E. 2d 488, 491 (1983); G.S. 90-95(h)(1). "It is not necessary for defendant to do any particular act constituting at least part of the crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he was acting together with another who did the act necessary to constitute a crime pursuant to a common plan or purpose to com-

mit a crime." *State v. Begley*, 72 N.C. App. 37, 40, 323 S.E. 2d 56, 57-58 (1984).

Moreover, "[t]he doctrine of constructive possession applies when a person lacking actual physical possession nevertheless has the intent and capability to maintain control and dominion over a controlled substance." *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E. 2d 36, 41 (1984). Constructive possession has been found when the narcotics were (i) on property in which the defendant had some exclusive possessory interest and there is evidence of his or her presence on the property; (ii) or property of which defendant, although not an owner, had sole or joint physical custody; or (iii) in an area which the defendant frequented, usually near his or her property. *Id.*

In our judgment the State has failed to produce substantial evidence that the crime charged had been committed and that the offense was committed by defendant. The State presented no direct evidence that defendant actually possessed or transported marijuana. Under the evidence presented at trial, "[t]he State is thus met head-on by our rule that in circumstantial evidence cases inferences may not be built upon inferences in order for the fact-finder to reach the ultimate facts upon which guilt must be premised." *State v. LeDuc*, 306 N.C. 62, 78, 291 S.E. 2d 607, 617 (1982). In *LeDuc*, our Supreme Court held that defendant's motion to dismiss should have been granted where defendant was charged with conspiring with others to possess 22.4 pounds of marijuana. The Court addressed an argument similar to the one presented here as follows:

> [T]here is no direct evidence that defendant chartered the boat, participated in its navigation, or was ever aboard at the time marijuana was being transported. The jury could, of course, reasonably infer from other evidence adduced that all of these things were true. It could infer, from similarity in the signatures of the Florida driver's license shown to the owners of the trawler, that defendant was the same Milan LeDuc who arranged for and executed the charter. It could infer from defendant's fingerprints found aboard the vessel, the places where these prints were found, and defendant's Coast Guard license application, that defendant had participated in navigating the trawler and was on board at the

time marijuana was being transported. It is only by building on these inferences, however, that the jury might then further infer that defendant participated in an unlawful agreement to possess marijuana. *Id.* at 77-78, 291 S.E. 2d at 616-17.

In the instant case, there is no direct evidence that defendant rented the Buick Regal, drove it to the Long Shoal River site, or fled from the scene during the police officers' raid. Nor was there any direct evidence that defendant participated in any of the criminal operations in progress on the night of 1 and 2 May 1984. The jury could have inferred from the presence of the rental agreement in the car that defendant, in fact, rented the vehicle, and then infer further that defendant drove the vehicle to the Fifth Avenue location. It could infer from defendant's location when he was apprehended and his statement that he had been lost in the woods for several days that defendant fled from the scene when the law enforcement officers arrived. By inferring that defendant was present at the scene, the jury could then infer that defendant "acted in concert" with another to commit a crime pursuant to a common plan or purpose. By inferring that defendant was "acting in concert" because of his presence at the scene of the crime, the jury could then further infer that defendant "constructively possessed" the marijuana in either of the stopped vehicles which were being driven away from the smuggling site by independent drivers. Only by building on these inferences, however, could the jury then infer that defendant participated in the unlawful smuggling operation. As in *LeDuc*, this evidence was insufficient to carry the case to the jury.

In addition, the following language from *Baize, supra*, is instructive:

> We have found no acting in concert case in which the State was allowed to leap, in one single bound, the double hurdles of constructive presence *and* constructive possession. To allow the State to do so on the facts of this case would effectively permit the State to stack inference upon inference . . . . 71 N.C. App. at 530, 323 S.E. 2d at 42.

"If the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. . . . This is true even though the suspicion so

aroused by the evidence is strong.' " *LeDuc*, 306 N.C. at 75, 291 S.E. 2d at 615, quoting *In re Vinson*, 298 N.C. 640, 657, 260 S.E. 2d 591, 602 (1979).

Because we conclude defendant's motion to dismiss should have been granted, we need not discuss the remaining assignments of error.

We, therefore, vacate the judgment of conviction.

Vacated.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. JOHN THOMAS KNOX

No. 8527SC306

(Filed 17 December 1985)

1. **Criminal Law §§ 50.1, 66— memory variables affecting eyewitness identification—expert evidence inadmissible**

The trial court in a robbery case did not err in excluding testimony by a psychology professor at UNC-C whom defendant offered to provide expert evidence on memory variables affecting eyewitness identification where defendant contended that the victim may have unconsciously transferred his recollection of seeing defendant during the robbery into an inaccurate memory of defendant as one of the perpetrators; defendant sought to support this theory by the expert witness's testimony; the witness admitted that he had never interviewed the victim; and the court properly determined that the testimony was not of sufficient probative value and would serve only to confuse the jury. N.C.G.S. 8C-1, Rules 403 and 702.

2. **Criminal Law § 138.28— sentence—prior conviction as aggravating factor—exclusion of joinable offense**

In a prosecution of defendant for common law robbery and malicious throwing of acid, the trial court, in sentencing defendant, erred in finding "acid thrown after robbery" as a non-statutory aggravating factor, since the robbery and malicious throwing of acid were joinable offenses under N.C.G.S. 15A-926(a), and N.C.G.S. 15A-1340.4(a)(1)(o) provides that prior convictions which may be used as an aggravating factor do not include any crime that is joinable with the crime for which defendant is currently being sentenced.

APPEAL by defendant from *Friday, Judge.* Judgments entered 25 July 1984 in Superior Court, LINCOLN County. Heard in the Court of Appeals 16 October 1985.

Defendant was tried for common law robbery and malicious throwing of acid. The State's evidence tended to show, in pertinent part, that:

Three men entered an antique shop owned and operated by Bill Spake. They had visited the shop a few days earlier and spoken briefly with Spake. At their second encounter all three approached Spake, and one of them offered to sell him some items. Spake was then knocked down, beaten, and robbed of his personal belongings. As the three prepared to leave one of them threw acid in Spake's face.

Defendant testified that two individuals had approached him and offered to pay him to drive them somewhere. They did not tell him where they were going but directed him to Spake's shop. When they arrived the two brought some things into the shop while defendant stayed in the car. A few minutes later defendant entered the shop and witnessed his companions holding Spake on the floor and pouring something on his face. Defendant tried to leave, but his companions followed him and entered his car. All three drove off together.

The jury returned a verdict of guilty on both offenses. From judgments of imprisonment, defendant appeals.

Attorney General Thornburg, by Special Deputy Attorney General Guy A. Hamlin, for the State.

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

WHICHARD, Judge.

I.

[1] Defendant contends the court erred in granting the State's motion to suppress the testimony of Dr. Gary Thomas Long, a professor of psychology at the University of North Carolina at Charlotte whom defendant offered to provide expert evidence on memory variables affecting eyewitness identification. Defendant sought through Dr. Long's testimony to challenge the accuracy of

the victim's recollection of defendant as one of the perpetrators of the crimes. He maintains that the victim mistakenly identified him as a perpetrator and that he did not participate in the crimes, though he admits he was present and was seen by the victim during the robbery. His theory, which he sought to support by Dr. Long's testimony, is that the victim may have unconsciously transferred his recollection of seeing defendant during the robbery into an inaccurate memory of defendant as one of the perpetrators.

Dr. Long, testifying on voir dire, admitted that he had never interviewed the victim. His testimony was not victim or case specific; rather, he testified generally about memory variables affecting the accuracy of eyewitness identification. In particular, he stated that some studies indicate that certain psychological variables can hinder ability to receive, store, and recall information accurately.

Defendant contends this testimony should have been admitted under N.C. Gen. Stat. 8C-1, Rule 702 (testimony by experts). The court excluded the testimony on the ground that it was not of sufficient probative value and would serve only to confuse the jury. It stated that the testimony "would be of more value . . . if [the witness] had interviewed [the victim] and had some reason to base his opinion on." Under the specific facts presented, we find no error.

Expert testimony is properly admissible when it "can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Bullard*, 312 N.C. 129, 139, 322 S.E. 2d 370, 376 (1984). The test for admissibility is whether the jury can receive "appreciable help" from the expert witness. 7 J. Wigmore, *Evidence* Sec. 1923 at 29 (Chadbourn rev. 1978). Applying this test requires balancing the probative value of the testimony against its potential for prejudice, confusion, or undue delay. *See* N.C. Gen. Stat. 8C-1, Rule 403. Even relevant evidence may be excluded if its probative value is outweighed by the danger that it will confuse or mislead the jury. *Brown v. Allstate Insurance Company*, 76 N.C. App. 671, 673, 334 S.E. 2d 89, 90 (1985) (citing Rule 403). The court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Bullard* at 140, 322 S.E. 2d at 376. *See also*

United States v. MacDonald, 688 F. 2d 224, 227-28 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726 (1983) ("absent extraordinary circumstances" appellate court will not intervene where trial court appraises probative and prejudicial value of evidence under Rule 403).

Defendant argues that Dr. Long's testimony had substantial probative value in that it provided the only rational explanation for the discrepancy between defendant's testimony and the victim's testimony apart from requiring the jury to find that one or the other was lying. The testimony, however, only remotely addressed this discrepancy. On voir dire Dr. Long testified generally about the phenomenon of "unconscious transference," which he stated occurs when the receipt of new information alters memory of an event so that the person later remembers it differently from his or her original memory. He did not discuss how unconscious transference would apply to the facts of this case or to similar circumstances, however. Specifically, he did not testify as to how the victim might unconsciously have transferred his recollection of seeing defendant during the robbery into an inaccurate memory of defendant as one of the perpetrators, which was defendant's theory of the case. The court thus properly could find that the probative value of the evidence was weak and that it would not be of significant assistance to the jury.

We therefore hold that the court, in the exercise of its discretion under Rule 403, properly could exclude the proffered evidence. Assuming error, *arguendo*, we hold it non-prejudicial. Not every erroneous ruling on the admissibility of evidence will result in a new trial. *State v. Galloway*, 304 N.C. 485, 496, 284 S.E. 2d 509, 516 (1981), *citing* 1 Stansbury's *North Carolina Evidence* Sec. 9. The burden is on appellant to show both error and a reasonable possibility "that had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. 15A-1443; *Galloway* at 496, 284 S.E. 2d at 516. The proffered evidence was too remote from the specific facts of this case to challenge the reliability of the victim's recollection any more effectively than cross-examination would have. We thus do not believe its introduction would have prompted a different result.

This decision should not, however, be interpreted to prohibit evidence such as that offered here. Criminal defendants have in-

creasingly presented expert testimony on the reliability of eyewitness identification, and some courts have held its exclusion reversible error. *See State v. Chapple*, 135 Ariz. 281, 660 P. 2d 1208 (1983); *People v. McDonald*, 37 Cal. 3d 351, 690 P. 2d 709 (1984). *See generally* E. Loftus, *Eyewitness Testimony* (1979); W. Sobel, *Eyewitness Identification: Legal and Practical Problems* (Doyle rev. 1985); J. Monahan and L. Walker, *Social Science in Law: Cases and Materials* at 229, 257-73 (1985); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969 (1977). We hold only that exclusion of such evidence as it was presented here, given the specific facts of this case, was within the court's discretionary power under Rule 403.

II.

[2] In sentencing for the malicious throwing of acid the court found as a statutory aggravating factor that defendant had prior convictions for criminal offenses punishable by more than sixty days confinement. *See* N.C. Gen. Stat. 15A-1340.4(a)(1)(o). It also found as a non-statutory aggravating factor the following: "acid thrown after robbery." It then imposed the maximum prison term of ten years, N.C. Gen. Stat. 14-30.1 and 14-1.1(8), seven years in excess of the presumptive, N.C. Gen. Stat. 15A-1340.4(f)(6).

Defendant contends that use of the fact that the acid was thrown after the robbery to aggravate his sentence for the malicious throwing of acid is prohibited by N.C. Gen. Stat. 15A-1340.4 (a)(1)(o), which provides that prior convictions which may be used as an aggravating factor "do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." We agree. The robbery and the malicious throwing of acid clearly were joinable offenses under N.C. Gen. Stat. 15A-926(a), which permits joinder of "offenses . . . based on the same act or transaction or on a series of acts or transactions connected together." *See State v. Lattimore*, 310 N.C. 295, 299, 311 S.E. 2d 876, 879 (1984). "To permit the trial judge to find as a non-statutory aggravating factor that the defendant *committed* the joinable offense would virtually eviscerate the purpose and policy of the statutory prohibition." *Id.; see also State v. Westmoreland*, 314 N.C. 442, 448-50, 334 S.E. 2d 223, 227-28 (1985). While the finding here was that the acid was

thrown *after* the robbery rather than that defendant had *committed* the robbery, the clear purpose was to find the acid throwing incident aggravated by the fact that it occurred in conjunction with the robbery. As in *Lattimore* and *Westmoreland*, the aggravating factor was based on joined offenses of which defendant had been contemporaneously convicted. *See Westmoreland* at 449-50, 334 S.E. 2d at 227-28.

We thus hold that N.C. Gen. Stat. 15A-1340.4(a)(1)(o), as interpreted and applied in *Lattimore* and *Westmoreland*, governs, and that use of the fact that the acid throwing occurred after the robbery as an aggravating factor to enhance defendant's sentence in the acid throwing case was improper. That case thus must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

In No. 84CRS574 (common law robbery), no error.

In No. 84CRS1607 (malicious throwing of acid), remanded for resentencing.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. MASON BRASWELL

No. 8529SC366

(Filed 17 December 1985)

1. **Constitutional Law § 45— right to appear pro se—motion not timely**

Defendant's motion to dismiss counsel and to be allowed to proceed *pro se* was not timely made where defendant's resentencing hearing was scheduled for 20 July 1984; at that hearing the State was granted a continuance; the resentencing hearing was continued to 24 September 1984; at that hearing defendant requested that his attorney be discharged and that the hearing be continued so that he could prepare himself to proceed *pro se*; and defendant had ample time and opportunity prior to 26 September 1984 to request discharge of counsel and to be allowed to proceed *pro se*.

2. **Criminal Law § 138.6— assault with deadly weapon—sentence—defendant acting under provocation—no evidence of mitigating factor**

The trial court in a sentencing hearing did not err by failing to find as a mitigating factor that defendant acted under strong provocation where the

evidence tended to show that during a campfire birthday party the intoxicated victim twice tripped over defendant's girlfriend, and defendant either pulled a gun out and shot the victim or was beating the victim with a gun when it discharged, but there was no evidence that the victim challenged or threatened defendant.

APPEAL by defendant from *Owens, Judge.* Judgment entered 4 October 1984 in Superior Court, HENDERSON County. Heard in the Court of Appeals 17 October 1985.

This is the second appeal of this case to this Court. In the first appeal, *State v. Braswell*, 67 N.C. App. 609, 313 S.E. 2d 216 (1984), the Court found no error in the trial in which defendant was convicted of assault with a deadly weapon inflicting serious injury. However, the Court remanded the case for a new sentencing hearing because of error the trial judge made in the application of factors it found in aggravation. At the resentencing hearing the trial judge again found a factor in aggravation and that the factor in aggravation outweighed any factor in mitigation. The court imposed a sentence greater than the presumptive term. From the imposition of sentence defendant has perfected this appeal.

Attorney General Lacy H. Thornburg, by Associate Attorney General Kathryn L. Jones, for the State.

Appellate Defender Adam Stein, by First Assistant Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

JOHNSON, Judge.

Defendant brings forward two assignments of error: (1) that the trial court erred in the denial of his motion to dismiss his court appointed counsel and to allow him to proceed *pro se*; (2) that the trial court erred in failing to find a statutory mitigating factor that defendant contends was supported by a preponderance of the evidence.

[1] The Sixth Amendment of the United States Constitution prohibits the State from forcing counsel on an unwilling criminal defendant who asserts his right to proceed *pro se* in a criminal trial. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965). This right also extends to sentencing proceedings. *See McConnell*

v. Rhay, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed. 2d 2 (1968); *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967). However, this right must be timely asserted. *See United States v. Dunlap*, 577 F. 2d 867 (4th Cir.), *cert. denied*, 39 U.S. 858, 99 S.Ct. 174, 58 L.Ed. 2d 166 (1978).

In the instant case defendant's motion to dismiss counsel and to be allowed to proceed *pro se* was not timely made. The resentencing hearing was scheduled for 20 July 1984. It is not clear from the record or transcript exactly when counsel was appointed to represent defendant except that counsel was assigned sometime between the date the case was remanded from this court and the scheduled 20 July 1984 sentencing hearing. At the 20 July hearing all parties were present and ready to proceed. The State sought to prove defendant's prior convictions as a factor in aggravation by offering into evidence record of defendant's alleged prior convictions. The documents were not certified and did not show whether defendant was represented or waived counsel at the time of the convictions. Defendant objected to the introduction of these documents on the grounds that he did not waive counsel, was not represented by counsel, and was indigent with respect to any prior convictions. The court treated defendant's objection as a motion to suppress under G.S. 15A-980. Thereupon, the State's motion for a continuance pursuant to G.S. 15A-1340(e) was granted. The resentencing hearing was continued to 24 September 1984.

On 26 September 1984 the case was again brought before the court for resentencing. All parties appeared. At this hearing defendant requested (1) that his attorney be discharged and (2) that the hearing be continued so that defendant could go through the transcript and prepare himself to proceed *pro se*. As grounds to discharge counsel, defendant stated that his attorney had not communicated with him since 20 July 1984. The court denied both motions and proceeded with the hearing.

The transcript clearly shows that defendant had ample time and opportunity prior to 26 September 1984 to request discharge of counsel and to be allowed to proceed *pro se*. There is no evidence that there was any disagreement between defendant and counsel, that counsel was not prepared to proceed with the hearing, or that there was any great need for additional communica-

tion between defendant and counsel between 20 July and 26 September 1984. Defendant and his counsel were well aware since 20 July 1984 that the State would be seeking to prove prior convictions as a factor in aggravation. Also, on 20 July and 26 September 1984 the State had a witness present to testify at the sentencing hearing. In light of defendant's statement that he would need time to prepare to proceed *pro se*, it would appear that if the court allowed defendant to proceed *pro se*, another continuance of the rehearing would have been necessary. Considering the timing of defendant's motion to discharge counsel, together with defendant's request for a continuance to allow defendant time to prepare to proceed *pro se*, we find that defendant did not timely assert his right to proceed *pro se*. This assignment of error is without merit.

[2] Defendant's final argument is that the trial court erred by failing to find as a statutory mitigating factor that he acted under strong provocation. We disagree.

Defendant's burden to establish this mitigating factor is analogous to that of a party with the burden of persuasion seeking a directed verdict. *See State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

> [D]efendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. Thus when a defendant argues as in the case at bar that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict.

Id. at 219, 306 S.E. 2d at 455.

G.S. 15A-1340.4(a)(2)(i) provides that an offense must be mitigated if "defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating." We hold that the trial court was correct in not finding that defendant acted under strong provocation.

In the case *sub judice* the evidence tended to show that during a campfire birthday party the victim, while intoxicated tripped over defendant's girlfriend. Friends of the victim were attempting to help the victim walk but were unable to do so. When they went to get help the victim tripped over defendant's girl-

friend again. Defendant either pulled a gun out and shot the victim or was beating the victim with a gun. The victim was shot in the head and suffered paralysis from the neck down.

Defendant contends that the legislature intended G.S. 15A-1340.4(a)(2)(i) to be applicable in a case where defendant's illegal conduct is a result of emotions provoked by the victim. We find no authority to support such a proposition. It is true that the legislature "had in mind circumstances that morally shift part of the fault for the crime from the criminal to the victim." *State v. Martin*, 68 N.C. App. 272, 276, 314 S.E. 2d 805, 807 (1984). This Court has construed the meaning of the statute to require "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).

In the case *sub judice* defendant has failed to carry his burden to prove by uncontradicted evidence that he was strongly provoked. There is no evidence that the victim challenged or threatened him.

Affirmed.

Judges WEBB and PHILLIPS concur.

DAVIE JEAN BLANTON v. MOSES H. CONE MEMORIAL HOSPITAL, INC.

No. 8518SC339

(Filed 17 December 1985)

Hospitals § 3— corporate negligence—prospective application of doctrine

Pursuant to *Jones v. New Hanover Hospital*, 55 N.C. App. 545, the doctrine of corporate negligence is to be applied prospectively to causes of action arising after 20 January 1967, the date charitable immunity was abolished, rather than from 5 February 1980, the filing date of *Bost v. Riley*, 44 N.C. App. 638.

APPEAL by plaintiff from *Davis, James C., Judge*. Order entered 8 January 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 October 1985.

Plaintiff Davie Jean Blanton instituted this civil action seeking damages from defendant Moses H. Cone Memorial Hospital. Plaintiff's complaint contained the following allegations: From 12 September 1978 through 17 November 1978, Dr. Helen M. Stinson negligently performed a series of three surgical operations on plaintiff at defendant hospital as part of a subcutaneous mastectomy. The hospital negligently permitted Dr. Stinson to perform the surgeries and to use its facilities when its agents knew or should have known that Dr. Stinson was not medically qualified to perform such surgery. In particular the hospital was "corporately negligent" in (1) failing to enforce the standards of the Joint Commission on Accreditation of Hospitals relating to the quality of patient care, (2) granting clinical privileges to Dr. Stinson to perform surgery for which she was not qualified, (3) failing to ascertain that Dr. Stinson was amply qualified by training to perform a subcutaneous mastectomy, (4) failing to monitor and oversee the treatment and care of plaintiff by Dr. Stinson on its premises, (5) permitting its employees to follow instructions of Dr. Stinson which were dangerous and contrary to the welfare of plaintiff, (6) permitting an unqualified practitioner to perform a mastectomy utilizing its premises and facilities without requiring that she be supervised or assisted by a properly qualified member of its medical staff, and (7) permitting Dr. Stinson to perform an operation on its premises that was not medically indicated. As a result of the hospital's negligence, plaintiff suffered severe permanent injuries. Plaintiff seeks damages for pain, suffering, and permanent injury.

Prior to trial, defendant hospital moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The trial court granted the motion to dismiss.

From the order entered by the trial court, plaintiff appeals to this Court.

Clark & Wharton, by David M. Clark and John R. Erwin, for plaintiff appellant.

Henson, Henson & Bayliss, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant appellee.

The North Carolina Academy of Trial Lawyers, by James B. Maxwell, as amicus curiae.

ARNOLD, Judge.

The trial court granted the 12(b)(6) motion on the ground that *Jones v. New Hanover Hospital*, 55 N.C. App. 545, 286 S.E. 2d 374, *disc. rev. denied*, 305 N.C. 586, 292 S.E. 2d 570 (1982), barred all claims of corporate negligence arising before 5 February 1980, the filing date of the decision in *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980). Plaintiff contends that the trial court misconstrued the meaning of *Jones* and improperly dismissed her cause of action. We agree.

In *Bost* this Court *expressly* recognized for the first time the doctrine of "corporate negligence," which involves the violation of a duty owed directly by the hospital to the patient, as a basis for liability apart and distinct from *respondeat superior*. The *Bost* opinion clearly stated, however, that the doctrine of corporate negligence had been *implicitly* accepted and applied in a number of previous decisions. Despite this wording in *Bost*, defendant maintains the court below was correct in concluding that *Jones* limits the liability for corporate negligence to causes of action arising after 5 February 1980, the filing date of *Bost*.

In *Jones*, the plaintiff sought to hold the defendant hospital liable under a theory of corporate negligence for acts occurring in 1961.

> Prior to 20 January 1967, a charitable hospital in North Carolina was liable to a patient for injuries caused by the negligence of the hospital's employees or servants only (1) if the hospital was negligent in the hiring or retention of the employee or servant or (2) if the hospital provided defective equipment. The doctrine of charitable immunity for hospitals along with its exceptions was abolished effective 20 January 1967 by the North Carolina Supreme Court's decision in *Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967). (Citations omitted.)

55 N.C. App. at 547, 286 S.E. 2d at 376.

The plaintiff in *Jones* conceded that defendant hospital was entitled to raise the defense of charitable immunity in that action. The issue therefore presented in *Jones* was

> whether, under the *pre-Rabon decisions*, North Carolina recognized a doctrine of corporate negligence in suits by patients against charitable hospitals separate and distinct from the two well-recognized exceptions to the defense of charitable immunity. (Emphasis added.)

Id. at 548, 286 S.E. 2d at 376. The *Jones* court was thus concerned with applying the corporate negligence doctrine expressly recognized in *Bost* to a cause of action arising in 1961, a time when defendant hospital was protected by the doctrine of charitable immunity.

It was within this context that the *Jones* court made the following statement concerning corporate negligence and the *Bost* decision:

> We conclude as defendant Hospital concluded in its brief: . . . (3) the doctrine of corporate negligence, . . . adopted by this Court in *Bost*, is different in principle and in application from the limited doctrine of corporate negligence recognized in *Rabon*, and it should be applied prospectively, not retroactively.

Id. at 550, 286 S.E. 2d at 378.

The issue in the present case thus becomes: what did the *Jones* court intend when it stated that corporate negligence was to be applied "prospectively"? Put another way, corporate negligence is to be applied prospectively from what date? There are two possibilities: either 20 January 1967, the filing date of the *Rabon* decision or 5 February 1980, the filing date of the *Bost* decision. We interpret *Jones* to mean that corporate negligence is to be applied prospectively to causes of action arising after 20 January 1967, the date charitable immunity was abolished. We reach this decision based upon the following rationale.

First, *Bost* itself does not limit the application of the doctrine of corporate negligence to causes of action arising after 5 February 1980. In fact *Bost* acknowledges that the doctrine had been implicitly accepted and applied in a number of previous decisions.

Second, we find it significant that the date of the *Bost* decision is never mentioned in *Jones*—especially since the only date indicated as a benchmark of liability is 20 January 1967, the date of *Rabon*. We are confident that had the *Jones* court intended cor-

porate negligence to be applied prospectively from the *Bost* filing date, the court would have plainly stated its intention in clear and unambiguous language.

Finally, a holding that the *Jones* court intended to apply the doctrine of corporate negligence only to causes of action arising subsequent to *Bost* would, in effect, resurrect until 1980 the doctrine of charitable immunity. Such a ruling would provide an anomalous result.

We further note that the precise issue before the *Jones* court was "whether, under the *pre-Rabon cases*, North Carolina recognized a doctrine of corporate negligence separate from the two well-recognized exceptions to the defense of charitable immunity." (Emphasis added.) 55 N.C. App. at 549, 286 S.E. 2d at 377. Given the issue addressed, even if the *Jones* court did intend to state that the application of corporate negligence is limited to causes of action arising subsequent to the *Bost* decision, any such discussion of the application of the doctrine other than *prior* to 20 January 1967 is extraneous to the issue in that case and is therefore mere dictum not binding upon this Court in the case at bar.

For the foregoing reasons, we hold that *Jones v. New Hanover Hospital*, 55 N.C. App. 545, 286 S.E. 2d 374, *disc. rev. denied*, 305 N.C. 586, 292 S.E. 2d 570 (1982), does not limit the doctrine of corporate negligence to a prospective application from 5 February 1980, the filing date of *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980). We further hold that plaintiff's complaint sufficiently establishes a cause of action for which relief can be granted under the doctrine of corporate negligence. We therefore reverse the lower court's order of dismissal pursuant to Rule 12(b)(6) and remand the case for proceedings consistent with this opinion.

Reversed and remanded.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. JOHNNIE LEE JONES

No. 8523SC733

(Filed 17 December 1985)

1. **Criminal Law § 143.10— revocation of probation—failure to make required payments—sufficiency of evidence**

The trial court's finding as a fact "[f]rom evidence presented" that while on probation defendant "willfully and without lawful excuse violated the terms and conditions of the Probation Judgment" by failing to make the required payments was sufficient to show that the trial court considered and evaluated defendant's evidence, which consisted only of defendant's unsworn statement that, "I've just been out of work."

2. **Criminal Law § 143.12— revocation of probation—punishment other than imprisonment—consideration of alternatives not required**

Where the trial court inquired of defendant his reasons for nonpayment of funds required by his probationary judgment and found from the evidence presented that defendant's failure to pay was willful and without lawful excuse, the court was not required to consider alternate means of punishment other than imprisonment.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 17 September 1984 in Superior Court, WILKES County. Heard in the Court of Appeals 7 November 1985.

Attorney General Lacy H. Thornburg by Associate Attorney Kathryn L. Jones for the State.

Dennis R. Joyce for the defendant appellant.

COZORT, Judge.

On 18 November 1981 in the Superior Court of Carteret County, defendant pled guilty to felonious breaking or entering and felonious larceny, and he was sentenced to not less than five years nor more than seven years. The sentence of imprisonment was suspended and the defendant was placed on probation for a period of five years with certain standard conditions, plus the condition that defendant pay $76.00 in court costs and restitution in the amount of $1,700.00. Defendant was to pay the court costs and $30.00 on or before 23 November 1981 and $30.00 a month beginning on 5 December 1981 until paid in full. At the 10 October 1983 term of Carteret County Superior Court, however, defendant's probation was modified to require him to pay $300.00 on or before

1 November 1983 and to make $30.00 monthly payments beginning on 5 November 1983.

On 13 September 1984 defendant's probation officer submitted to the court a verified Violation Report. The report stated that defendant had violated the modified terms of probation in that "[f]rom November 5, 1983 until September 5, 1984, the defendant should have paid $330.00, but . . . he has paid only $90.00 and is currently $240.00 in arrears of his payments."

Defendant's probation violation hearing was held before Judge Rousseau at the 17 September 1984 Criminal Session of Wilkes County Superior Court. Defendant waived his right to counsel in open court and signed a written waiver of right to assigned counsel.

At the revocation hearing the probation officer placed the Probation Judgment before the trial court and then summarized the contents of the verified Violation Report. The court inquired into the time of defendant's transfer to the Wilkes County probation officer and the reasons for defendant's move from Carteret County to Wilkes County. Then the following exchange took place:

> COURT: Well, do you want to testify about your failure to pay this money?
>
> MR. JONES: I've just been out of work, sir. If I just had some time to catch up the payments.
>
> COURT: Anything else?
>
> MR. JONES: No, sir.
>
> COURT: The Court finds that he willfully violated the terms of his probation and Orders the sentence into execution.

A written Order Revoking Probation and a Judgment and Commitment Upon Revocation of Suspension of Sentence [hereinafter "Judgment and Commitment"] were entered on 17 September 1984.

Defendant's only exception is to the statement by the trial court at the probation revocation hearing that "[t]he Court finds that he willfully violated the terms of his probation and Orders

the sentence into execution." Defendant has taken no exception to the entry of the Order Revoking Probation and the Judgment and Commitment.

Defendant contends that the trial court erred "in revoking defendant's probation for failure to timely pay the imposed fine and restitution when there was no evidence that the probationer was at fault in his failure to pay or that alternate means of punishment were inadequate." In support of this contention defendant argues that the trial court failed to make findings of fact which show that it (1) considered and evaluated defendant's evidence of his inability to pay and (2) considered alternate measures of punishment other than imprisonment. For the reasons stated below, we affirm.

[1] In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation the burden is upon the defendant to "offer evidence of his inability to pay money according to the terms of the [probationary] judgment." *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E. 2d 423, 426 (1983); *see also* G.S. 15A-1345(e) and 15A-1364(b). Here the only conceivable evidence offered by the defendant as to his inability to pay is his unsworn statement to the trial court that "I've just been out of work, sir." If defendant fails to offer evidence of his inability to pay money in accordance with the terms of the probationary judgment, "then the evidence which establishes that defendant has failed to make payments as required by the terms of the judgment is sufficient within itself to justify a finding by the judge that defendant's failure to comply was without lawful excuse." *Id.* When a defendant does put on evidence of his inability to pay, however, he is entitled to have his evidence considered and evaluated by the trial court, *State v. Smith*, 43 N.C. App. 727, 732, 259 S.E. 2d 805, 808 (1979), and the "trial judge has a duty . . . to make findings of fact which clearly show that he did consider and did evaluate the defendant's evidence." *State v. Williamson*, 61 N.C. App. 531, 535, 301 S.E. 2d 423, 426 (1983).

In this case, considering the 17 September 1984 Order Revoking Probation and the Judgment and Commitment together, the trial court found as a fact "[f]rom evidence presented" that while on probation defendant "willfully and without lawful excuse

violated the terms and conditions of the Probation Judgment" by failing to make the payments as required. Assuming without deciding, that defendant's unsworn statement to the trial court that "I've just been out of work" constituted presenting evidence of his inability to pay, the trial court's finding "[f]rom evidence presented" was sufficient to show that the trial court considered and evaluated defendant's evidence. *See State v. Williamson*, 61 N.C. App. 531, 301 S.E. 2d 423 (1983). Thus, unlike in *State v. Young*, 21 N.C. App. 316, 321, 204 S.E. 2d 185, 188 (1974), it is clear that the trial court did *not* proceed "under an erroneous assumption that the fact of failure to comply required revocation of probation" and that the trial court "considered defendant's evidence and found that defendant had offered no evidence worthy of belief to justify a finding of a legal excuse for failure to comply with the judgment."

[2] As to defendant's second point, due process does not *generally* require a sentencing court to indicate that it has considered alternatives to incarceration before revoking probation. *Black v. Romano*, 471 U.S. ---, 85 L.Ed. 2d 636, 105 S.Ct. --- (1985). Here the trial court was not required to consider alternate means of punishment other than incarceration. While under *Bearden v. Georgia*, 461 U.S. 660, 76 L.Ed. 2d 221, 103 S.Ct. 2064 (1983), the trial court must inquire into the reasons for the defendant's failure to pay, it is not required to consider alternate means of punishment other than imprisonment unless and until it finds that the "probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so." 461 U.S. at 672, 76 L.Ed. 2d at 233, 103 S.Ct. at 2073. Here the trial court inquired of the defendant his reasons for nonpayment and found from the evidence presented that defendant's failure to pay was "willfully and without lawful excuse." Thus, contrary to what defendant suggests, the trial court was not required to consider alternate means of punishment other than imprisonment.

Affirmed.

Judges ARNOLD and MARTIN concur.

THOMAS A. CARVER AND WIFE, WILLIE R. CARVER v. C. PAUL ROBERTS AND HOME SAVINGS AND LOAN ASSOCIATION OF DURHAM, GARNISHEE AND THIRD PARTY PLAINTIFF v. CHARLES B. NYE AND WIFE, MARY J. NYE, THIRD PARTY DEFENDANTS

No. 8514SC345

(Filed 17 December 1985)

Vendor and Purchaser § 6.1— sale of house by builder-vendor—fraudulent concealment of material defects—sufficiency of complaint

Plaintiffs' complaint was sufficient to state a claim for fraudulent concealment of material defects where plaintiffs alleged that a house built and sold to them by defendant was built on a lot filled with stumps and other debris, that no vapor barrier or crushed rock separated the concrete slab on which the house was built from the earth, and that these conditions violated the N. C. Uniform Residential Building Code; these allegations were sufficient to allege material defects in the house not reasonably discoverable to plaintiffs; it was specifically alleged that defendant knew of the defects and concealed their existence from plaintiffs when he sold them the house; these allegations were sufficient to support the requisite elements that the concealment was calculated and intended to deceive plaintiffs; and plaintiffs alleged that they sustained damages as a result of the concealment.

APPEAL by plaintiffs from *Farmer, Judge.* Orders entered 18 September 1984 and 7 November 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 October 1985.

In this civil action, plaintiffs seek recovery of money damages from defendant, C. Paul Roberts (hereinafter "Roberts"), arising out of his sale to them of a newly constructed single family residence. Plaintiffs allege that Roberts, who was the builder and seller, represented to them that the house was constructed in a workmanlike manner and in conformity with applicable building codes; that in fact the house was built on "disturbed soil" which had been filled with tree stumps and other debris; that the house was built on a concrete slab which was in direct contact with the earth, having no vapor barrier or crushed rock thereunder in violation of the North Carolina Uniform Residential Building Code; that Roberts knew of these defects in construction and did not disclose the defective conditions to plaintiffs; and that the defects were not discoverable by plaintiffs in the exercise of reasonable diligence. Plaintiffs alleged damages in the amount of $45,000.00.

Roberts moved to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b)(6) and filed an answer generally denying the material allegations of the complaint. When the action was called for trial, Roberts requested a ruling on the motion to dismiss. The trial court allowed the motion and dismissed the complaint. Plaintiffs thereafter filed a motion pursuant to Rules 15(b), 59 and 60, requesting relief from the order dismissing their complaint and seeking leave to amend. Plaintiffs' motions were denied. Plaintiffs appeal from both orders.

Randall, Yaeger, Woodson, Jervis & Stout, by Robert B. Jervis for plaintiff appellants.

B. J. Sanders for defendant appellee C. Paul Roberts.

Mount, White, Hutson & Carden, P.A., by James H. Hughes for garnishee and third party plaintiff.

MARTIN, Judge.

Plaintiffs contend by this appeal that the trial court erred by granting Roberts' Rule 12(b)(6) motion to dismiss. Plaintiffs apparently concede that the allegations of their complaint were insufficiently particular to allege fraud by misrepresentation, under previous decisions of this court in *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674 (1981) and *Coley v. North Carolina Nat'l Bank*, 41 N.C. App. 121, 254 S.E. 2d 217 (1979). They argue, however, that their complaint was sufficient to allege a cause of action for fraudulent concealment of a material defect. We agree.

Fraud may be committed by suppression of the truth as much as by a false representation. Our Supreme Court has stated:

> It is a practically universal rule, and it is the law in this State, that under circumstances which make it the duty of the seller to apprise the buyer of defects in the subject matter of the sale known to the seller but not to the buyer, *suppressio veri* is as much fraud as *suggestio falsi.*

Brooks v. Ervin Constr. Co., 253 N.C. 214, 217, 116 S.E. 2d 454, 457 (1960) (quoting *Brooks Equip. & Mfg. Co. v. Taylor*, 230 N.C. 680, 55 S.E. 2d 311 (1949)). Where a material defect is known to the seller, and he knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's

diligent attention or observation, the seller has a duty to disclose the existence of the defect to the buyer. *Id.*

In order to survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint for fraud must allege with particularity all material facts and circumstances constituting the fraud. *Coley v. North Carolina Nat'l Bank, supra.* The requisite elements of fraud include: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Brickwell v. Collins*, 44 N.C. App. 707, 710, 262 S.E. 2d 387, 389, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 622 (1980). Intent and knowledge may be averred generally. G.S. 1A-1, Rule 9(b). While the facts constituting the fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used. "It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts." *Brooks Equip. & Mfg. Co. v. Taylor, supra* at 686, 55 S.E. 2d at 315.

Applying the foregoing rules to the allegations contained in plaintiffs' complaint, we find the complaint sufficient to state a claim for fraudulent concealment of material defects. Plaintiffs allege that the house was built on a lot filled with stumps and other debris, and that no vapor barrier or crushed rock separated the concrete slab from the earth under the house. Plaintiffs allege that these conditions violated the North Carolina Uniform Residential Building Code. These allegations are sufficient to allege material defects in the house, not reasonably discoverable to plaintiffs. It is specifically alleged that Roberts, as builder and seller, knew of the defects and concealed their existence from plaintiffs when he sold them the house. These allegations are sufficient to support the requisite elements that the concealment was calculated and intended to deceive plaintiffs. Fraudulent intent need not be specifically alleged if there are facts alleged from which a fraudulent intent may be reasonably inferred. *See Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957); *Stone v. Doctors' Lake Milling Co.*, 192 N.C. 585, 135 S.E. 449 (1926). That plaintiffs were, in fact, deceived by Roberts' failure to disclose the defective conditions may be reasonably inferred from their

purchase of the house. Finally, plaintiffs allege that they have sustained damages as a result of the concealment.

For the foregoing reasons, we reverse the trial court's order dismissing the complaint and remand this action for trial. In light of our ruling, we find it unnecessary to consider plaintiffs' other assignment of error relating to the denial of their motion to amend the complaint.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. TOMMY McNEILL, JR.

No. 8516SC438

(Filed 17 December 1985)

Weapons and Firearms § 2— possession of firearm by felon—exclusion of home—common areas of apartment not included

In N.C.G.S. 14-415.1(a), the statute prohibiting possession of a handgun by a felon, the exception applying to a person in his own home does not encompass common areas of an apartment house such as stairways, hallways and porches.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 30 January 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 22 October 1985.

Defendant was indicted for possession of a handgun within five years of conviction of a felony, in violation of G.S. 14-415.1(a). The State's evidence tended to show that on 30 September 1984, Officer Robert L. Moore of the Lumberton Police Department went to a house on Washington Street in response to a disturbance call. When he arrived, he observed defendant and Ophelia Brown fighting in the corridor between the two apartments in the house. Officer Moore observed a shiny object in defendant's right rear pocket. He arrested defendant and removed a .32 caliber pistol from his rear pocket. Officer Moore testified that defendant lived in an apartment on one side of the house; another person

lived in the other apartment. Defendant had been convicted of possession of LSD, a felony, on 30 June 1980.

Defendant's evidence tended to show that he and Ophelia Brown had been arguing, that she had pointed her pistol at him, and that he had taken it from her and put it in his pocket. As he was putting his key in his apartment door, Officer Moore arrested him.

The jury returned a verdict of guilty and the court entered a judgment sentencing defendant to the presumptive term of two years. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Q. Towns, for the defendant.

MARTIN, Judge.

Defendant assigns error to the denial of his motion to dismiss the charge, contending that the evidence was insufficient to show a violation of G.S. 14-415.1(a) because his possession of the handgun fell within an exception to the statute. We disagree and find no error in the trial.

G.S. 14-415(a) provides as follows:

> It shall be unlawful for any person who has been convicted of any crime set out in subsection (b) of this section to purchase, own, possess, or have in his custody, care or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c), within five years from the date of such conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.
>
> Every person violating the provisions of this section shall be punished as a Class I felon.
>
> Nothing in this subsection would prohibit the right of any person to have *possession of a firearm within his own home* or on his lawful place of business. (emphasis added).

The first paragraph of the subsection creates a substantive criminal offense, complete and definite in its description. The third paragraph creates an exception to the offense by excluding from its prohibition the possession of a firearm within one's own home or on his lawful place of business.

Defendant's principal contention is that he was within the statutory exception because he was in the hallway of the duplex house where he resided when he was found in possession of the handgun. We must, therefore, determine whether the exception applies to the common areas of a residential building containing more than one apartment. We hold that it does not. By using the words "within his own home" in the exception, as opposed to some broader terminology, the Legislature clearly expressed its intent to limit the applicability of the exception to the confines and privacy of the convicted felon's own premises, over which he has dominion and control to the exclusion of the public. The manifest purpose of the statute would be defeated if the exception was extended to include common areas of apartment houses to which other tenants and their invitees have access. Therefore, we hold that the exception to G.S. 14-415.1(a), applying to a person in his own home, does not encompass common areas of an apartment house, such as stairways, hallways and porches. *White v. United States*, 283 A. 2d 21 (D.C. 1971); *Hines v. United States*, 326 A. 2d 247 (D.C. 1974); *People v. Wilson*, 332 N.E. 2d 6, 29 Ill. App. 3d 1033 (1975); Annot., 57 A.L.R. 3d 938, 957 (1974 & Supp. 1985).

When a statute creates a substantive criminal offense, complete and definite in its description, and by another provision in the same statute, or by another statute, a certain case or class of cases is excepted, a defendant who is charged with the substantive offense and seeks to avail himself of the exception has the burden of bringing himself within the exception. *State v. Dobbins*, 277 N.C. 484, 178 S.E. 2d 449 (1971); *State v. Connor*, 142 N.C. 700, 55 S.E. 787 (1906). All of the evidence in this case, including defendant's own testimony, shows that defendant was in the common hallway of the duplex, outside his apartment, at the time he was observed to be in possession of the handgun. Therefore, defendant has failed to bring himself within the protection provided by the exception to G.S. 14-415.1(a) and his motion to dismiss was properly denied.

Defendant also attempts to argue that the trial court erred by failing to instruct the jury that in order to convict him, the State was required to prove beyond a reasonable doubt that he was not within his own home when he possessed the handgun. We note initially that defendant did not request the instruction or object to the instruction given by the court. He has, therefore, failed to preserve the issue for review. Rule 10(b)(2), N.C. Rules of Appellate Procedure. He nevertheless contends that he has a right to appellate review of the instruction because the trial court committed "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

We find no error in the court's instructions. Absent any evidence that defendant was within the exception of the statute, the State was required to prove only that the defendant possessed a handgun within five years of his conviction of a felony specified in G.S. 14-415.1(b). Defendant's location at the time of the offense would be a substantive issue, requiring negative proof by the State and an instruction by the court, only upon some positive evidence by defendant that defendant's location was within the exception to the statute. *See State v. Dobbins, supra.*

No error.

Judges ARNOLD and WELLS concur.

TONY RAY PARKER, PLAINTIFF-EMPLOYEE v. BURLINGTON INDUSTRIES, INC., DEFENDANT-EMPLOYER, AND AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER

No. 8510IC251

(Filed 17 December 1985)

Master and Servant § 55.4— workers' compensation—injury not arising out of employment

The Industrial Commission properly concluded that plaintiff was not injured by an accident arising out of and in the course of his employment where plaintiff was overcome by fumes while cleaning a tote tank; it was not a part of plaintiff's job to clean the tank; and the tank was not to be cleaned and the cleaning of it did not further the business of defendant.

APPEAL by plaintiff from an opinion and award of the Industrial Commission filed 18 September 1984. Heard in the Court of Appeals 15 October 1985.

Plaintiff filed a claim in this case for workers' compensation benefits as a result of injuries he sustained on 29 October 1980 while employed by Burlington Industries, Inc. Deputy Commissioner Dianne Sellers found facts which were supported by the evidence which we summarize as follows. On 29 October 1980 the plaintiff had been employed by Burlington for approximately six years and was employed on that date as a mixer. In August 1980 the plaintiff was rescheduled to work on the third shift. He was adamant that he be transferred back to the first shift, telling the production department manager that he was suffering from headaches, depression and inability to sleep because he was working on the third shift. The production department manager told the plaintiff he could not be transferred to the first shift. In September 1980 the plaintiff complained almost daily to his foreman about being on the third shift. In early October the plaintiff asked his foreman if he could get off the third shift if he obtained a doctor's excuse. Approximately two weeks before the incident he asked if having an accident would get him off the third shift.

On 29 October 1980 the plaintiff was found unconscious lying on the bottom of a tote tank measuring 5½ feet in height and 3½ feet square. The top of the tote tank was found slightly ajar thereby preventing light from entering the tote tank and allowing toxic fumes to accumulate. The plaintiff was hospitalized as a result of his injuries. Deputy Commissioner Sellers rejected plaintiff's testimony that he had cleaned the tote tanks before and was cleaning the tote tank at the time of the injury. She found as facts based on the defendants' evidence that plaintiff had not been instructed to clean the tote tank. She found further that Burlington had no need for the tote tank to be cleaned because the same compounds were repeatedly used in the tanks.

Deputy Commissioner Sellers found the plaintiff did not sustain an injury by accident arising out of and in the course of his employment. She also found that "[w]hatever injuries he might have sustained were proximately caused by his willful intention to injure himself." Deputy Commissioner Sellers denied recovery.

The full Commission struck the finding of fact by Deputy Commissioner Sellers as to the plaintiff's willful intention to injure himself. It concluded that "at the time complained of plaintiff was not about his work." The full Commission adopted the opinion and award of Deputy Commissioner Sellers as amended and denied compensation to the plaintiff. The plaintiff appealed.

Hunter, Hodgman, Greene, Goodman & Donaldson, by Robert S. Hodgman, and Street, Welborn and Stokes, by Marquis D. Street, for plaintiff appellant.

Tuggle, Duggins, Meschan & Elrod, P.A., by Arthur A. Vreeland, for defendant appellees.

WEBB, Judge.

The facts found by Deputy Commissioner Sellers and adopted by the full Commission are supported by the evidence. We are limited to determining whether the conclusions were correct that at the time of the incident the plaintiff was not about his work and was not injured by an accident "arising out of and in the course of" his employment. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). In order to be compensable under the Workers' Compensation Act an injury must be caused by an accident "arising out of and in the course of" employment. G.S. 97-2(6). The words "arising out of and in the course" of employment have been interpreted many times. *See Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982); *Hensley v. Caswell Action Committee*, 296 N.C. 527, 251 S.E. 2d 399 (1979); *Hartley v. Prison Dept.*, 258 N.C. 287, 128 S.E. 2d 598 (1962); *Taylor v. Dixon*, 251 N.C. 304, 111 S.E. 2d 181 (1959); *Diaz v. United States Textile Corp.*, 60 N.C. App. 712, 299 S.E. 2d 843, *disc. review denied*, 308 N.C. 386, 302 S.E. 2d 250 (1983) and *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968).

We believe that under the rule as written in these cases the plaintiff's injury arose from his employment. It arose from a hazard incident to the employment and not from a hazard common to the public. The question is whether it was in the course of his employment. The rule as applied to this case is that if an employee does something which he is not specifically ordered not to do by a then present superior and the thing he does furthers the business of the employer although it is not a part of the

employee's job, an injury sustained by accident while he is so performing is in the course of employment. This has been characterized as "being about his work." The Industrial Commission in this case has adopted the findings of fact of the Deputy Commissioner that it was not a part of the plaintiff's job to clean the tote tank. It has also adopted the finding of fact that the tote tank was not to be cleaned and the cleaning of it did not further the business of Burlington. If we accept the contention of the plaintiff that he was cleaning the tote tank at the time he was overcome by fumes it was not a part of his job and did not further the business of Burlington. The Industrial Commission was correct in concluding the plaintiff was "not about his work." On the facts found we cannot hold the Industrial Commission was erroneous in its conclusion.

The appellant also contends he was denied due process of law because he was not notified of the defense which would be used by the defendants before the hearing. In denying the claim the defendant American Motorists Insurance Company sent a letter to the defendant in which he was notified that he did not follow company procedures while cleaning the tank, that he attempted to perform the job in an area in which this type of work is not allowed and that there may have been a certain amount of "horseplay" involved. No other defense was advanced by the defendants prior to the hearing. We hold that the plaintiff was not prejudiced. Whatever defense the defendants may have relied upon the burden was on the plaintiff to prove he was injured by an accident arising out of and in the course of employment. This he failed to do.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

GENERAL MOTORS CORPORATION, PONTIAC MOTOR DIVISION AND OLDSMOBILE DIVISION v. SAMUEL LEE KINLAW D/B/A KNOX OLDS-PONTIAC; R. W. WILKINS, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES; AND ROBERT A. PRUETT, IN HIS OFFICIAL CAPACITY AS HEARING OFFICER FOR THE DIVISION OF MOTOR VEHICLES

No. 8510SC217

(Filed 31 December 1985)

1. **Statutes § 5— later statute clarifying earlier statute—earlier statute controlling**

Provisions of G.S. 20-305(6) (1983) did not substantively change G.S. 20-305(6) (1978), but merely clarified the original intent, and provisions of the later statute could therefore be considered in determining whether petitioner properly failed to renew its franchise agreement with respondent, though the earlier statute controlled.

2. **Automobiles § 5— franchise agreement—poor sales due to uncontrollable factors**

Evidence was sufficient to support a determination by the Commissioner of Motor Vehicles that respondent's poor sales performance was primarily due to economic or market factors beyond his control and petitioner's failure to renew its franchise agreements with respondent dealership was therefore without cause where the evidence tended to show that, as a result of rising interest rates, the cost of maintaining a large inventory rose dramatically; one local bank's financing of automobiles, automobile dealers, and automobile agencies dropped off by as much as 40% during the years in question; during the same period, other dealerships in the area significantly reduced their inventories; the county had a high unemployment rate and there were various layoffs and shut-downs; and petitioner's distribution system was partially responsible for respondent's poor sales performance because the system made it impossible for respondent to stock cars in periods of high demand.

3. **Automobiles § 5— franchise—5 year term—improper exercise of authority by Commissioner of Motor Vehicles**

The Commissioner of Motor Vehicles exceeded his authority in ordering petitioner to enter into a five year motor vehicle dealer sales agreement with respondent. G.S. 20-305(6) (1978).

APPEAL by petitioner from *Preston, Judge*. Order entered 20 November 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 25 September 1985.

By agreements dated 1 June 1980 and 1 November 1980 petitioner granted respondent Samuel Kinlaw (respondent) a two-year franchise for the sale and service of Oldsmobile and Pontiac vehi-

cles. The agreements allowed respondent to operate Knox Olds-Pontiac, a dealership previously operated by his father.

Respondent entered the two-year agreements reluctantly. Having managed the dealership for several years prior to his father's death, he believed he had proven himself capable of operating it successfully and that he thus should have been allowed to enter a standard five-year franchise agreement.

In March 1982 petitioner notified respondent that, due to his dealership's poor sales performance, it was not willing to enter a standard five-year agreement at the expiration of the two-year successor agreements, but instead would extend existing agreements for an additional year. Respondent's sales performance did not improve, however, and as a consequence petitioner notified respondent that existing agreements would not be renewed and by their terms would expire 31 May 1983.

Pursuant to N.C. Gen. Stat. 20-305(6) (1978), respondent requested that the Commissioner of Motor Vehicles conduct a hearing to determine whether good cause existed for petitioner's failure to renew the franchise agreements. Attributing respondent's poor sales performance to prevailing economic conditions and other factors beyond respondent's control, the Commissioner found petitioner's failure to renew to be without cause. Accordingly he ordered, in pertinent part,

> that the Oldsmobile Division and the Pontiac Division of The General Motors Corporation shall not terminate the present motor vehicle dealer sales agreement (franchise) with Samuel L. Kinlaw d/b/a Knox Olds-Pontiac [and]
>
> that the Oldsmobile Division and the Pontiac Division of General Motors shall enter into a regular five (5) year motor vehicle dealer sales agreement with Samuel L. Kinlaw d/b/a Knox Olds-Pontiac.

Pursuant to N.C. Gen. Stat. 150A-43 *et seq.*, petitioner sought judicial review of the Commissioner's findings and order. From an order of the superior court affirming the Commissioner's order, petitioner appeals.

Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., for petitioner appellant.

Manning, Fulton & Skinner, by Howard E. Manning and Charles E. Nichols, Jr., for respondent appellee.

WHICHARD, Judge.

Petitioner contends the evidence is not sufficient to support the Commissioner's finding that the failure to renew the franchise agreements was without "good cause." Review of a decision by the Commissioner of Motor Vehicles is governed by N.C. Gen. Stat. 150A-51. *See* N.C. Gen. Stat. 20-300. An agency decision may be reversed or modified if it is "[u]nsupported by substantial evidence . . . in view of the entire record as submitted." N.C. Gen. Stat. 150A-51(5). This standard of review is known as the "whole record" test. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). When, in applying this test, reasonable but conflicting views emerge from the evidence, this Court cannot replace the agency's judgment with its own. It must, however, "take into account whatever in the record fairly detracts from the weight" of the evidence which supports the decision. *Id.* Ultimately it must determine whether the decision has a rational basis in the evidence. *In re Rogers*, 297 N.C. 48, 65, 253 S.E. 2d 912, 922 (1979).

Respondent instituted this proceeding 14 April 1983 by filing a petition pursuant to N.C. Gen. Stat. 20-305 (1978), which provides:

> It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:
>
> (6) Notwithstanding the terms of any franchise agreement to terminate, cancel, or refuse to renew the franchise of any dealer, without good cause, and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least 60 days prior to the effective date of such termination, cancellation, or the expiration date of the franchise, setting forth the specific grounds for such action, and (ii) the Commissioner has determined, if requested in

writing by the dealer within such 60-day period, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise . . . provided that in any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's decision . . . .

[1] Effective 6 August 1983, N.C. Gen. Stat. 20-305(6) was amended. 1983 Sess. Laws ch. 704, sec. 25. Rather than substantively changing the statute, many portions of the amendments merely clarified the original intent. *See* N.C. Gen. Stat. 20-305(6) (1978); N.C. Gen. Stat. 20-305(6) (1983). *See also Childers v. Parker's Inc.*, 274 N.C. 256, 260, 162 S.E. 2d 481, 483 (1968) ("In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it."). Much of N.C. Gen. Stat. 20-305(6) (1978) has not been judicially interpreted and, although the statute as amended does not affect litigation pending at the time of its enactment, 1983 Sess. Laws ch. 704, sec. 25, portions of the amendments are helpful in ascertaining the intent of the legislature in enacting the original version. *See Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E. 2d 566, 570 (1977) ("In interpreting statutes, the primary duty of this Court is to ascertain and effectuate the intent of the Legislature. [L]ight may be shed upon [that] intent . . . by reference to subsequent amendments which . . . may be interpreted as clarifying it.").

N.C. Gen. Stat. 20-305(6) (1983) reads, in pertinent part,

a. Notwithstanding the terms, provisions or conditions of any franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation or nonrenewal when:

1. There is a failure by the new motor vehicle dealer to comply with a provision of the franchise which provision is both reasonable and of material significance to the franchise relationship . . . .

2. If the failure by the new motor vehicle dealer, defined in 1 above, relates to the performance of the new motor

> vehicle dealer in sales or service, then good cause shall be defined as the failure of the new motor vehicle dealer to comply with reasonable performance criteria established by the manufacturer if the new motor vehicle dealer was apprised by the manufacturer in writing of such failure; and . . . the new motor vehicle dealer's failure was *not* primarily due to economic or market factors within the dealer's relevant market area which were beyond the dealer's control.
>
> b. The manufacturer shall have the burden of proof under this section.

We find the above provisions indicative of legislative intent in the original enactment of N.C. Gen. Stat. 20-305(6) (1978), and we therefore consider them in analyzing the Commissioner's decision. Thus, to prove that poor sales performance constitutes good cause for its failure to renew respondent's franchise agreements, petitioner must demonstrate that:

1. Respondent failed to comply with a provision of the franchise agreements which required satisfactory sales performance;

2. Petitioner's performance standards are reasonable; and

3. Respondent's failure was not due primarily to economic or market factors beyond his control.

The "Dealer Sales and Service Agreement," which outlines the rights and obligations of petitioner and respondent, provides that respondent "is responsible for: (a) actively and effectively selling . . . new Motor Vehicles to customers of Dealer; and (b) actively and effectively promoting, through Dealer's own advertising and sales promotion activities, the purchase and use of new Motor Vehicles . . . ." Thus, nothing else appearing, respondent's poor sales performance could constitute good cause for petitioner's nonrenewal.

[2] Having reviewed the record as a whole, however, we find substantial evidence to support the Commissioner's determination that petitioner's failure to renew the agreements was without cause. The Commissioner found that during the period in question respondent's sales performance was affected by high interest rates, rising unemployment, and a general economic recession.

Respondent testified that as a result of rising interest rates the cost of maintaining a large inventory rose dramatically. The manager of the sales finance department for Wachovia Bank testified that his department's financing of automobiles, automobile dealers, and automobile agencies dropped off by as much as forty percent during 1980, 1981 and 1982. A salesman for Knox Olds-Pontiac testified that during the same period other dealerships in the area significantly reduced their inventories. The director of Industrial and Agricultural Development for Robeson County testified regarding the county's generally high unemployment rate and various industrial layoffs and shut-downs, all of which could have affected the demand for new automobiles. According to respondent, to remain in business under these economic conditions he had to reduce inventory, cut back on sales staff, and in general "pull back and hold in . . . ."

In addition, the Commissioner determined that petitioner's distribution system was partially responsible for respondent's poor sales performance. Respondent testified that Robeson County is generally an agricultural community; as a result, consumers tend to purchase cars in the fall after having received money for their crops. During the months of August, September and October petitioner distributes its new model cars according to a "controlled distribution" system. The number of cars a dealer receives is based on the number sold by that dealer from January through July. Thus, respondent was unable to stock cars in periods of high demand.

Petitioner maintains that its evidence refutes the proposition that respondent's sales performance was the result of poor economic conditions. Petitioner's evidence establishes that from 1979-82 respondent's sales were below national, regional, and local sales figures, while the sales of two nearby Oldsmobile/Pontiac dealerships, affected by economic conditions similar to those affecting respondent's dealership, were above the same sales standards. In addition petitioner's evidence established that during all relevant periods more Oldsmobiles and Pontiacs were purchased in respondent's area of primary responsibility than were sold by respondents. Thus, according to petitioner, respondent was not fully servicing the demand for Oldsmobiles and Pontiacs within his area of primary responsibility.

Petitioner assesses the performance of its dealerships by comparing an individual dealer's market penetration with national, regional and local levels of market penetration. A dealership's market penetration is determined by dividing the number of cars it sold by the total number of cars sold in its area of primary responsibility. Petitioner's national, regional, and local market penetrations are comparisons between the number of all cars sold in a given market and the number of Oldsmobiles and Pontiacs sold in the same market.

Throughout its dealings with respondent, petitioner maintained that respondent had to achieve a market penetration in its area of primary responsibility equal to national and regional (North and South Carolina) levels. These levels do not necessarily reflect economic conditions affecting an individual dealership. Further, a dealership's performance relative to other dealerships cannot adequately be assessed based on national, regional, and local penetration levels alone. For example, in 1981 Oldsmobile's national market penetration was 9.9, *i.e.*, approximately ten out of every one hundred cars sold nationwide in 1981 were Oldsmobiles. While Oldsmobile's national penetration was 9.9, the market penetration achieved by individual dealerships varied. Petitioner did not present any evidence regarding the number of dealerships below national or regional penetration levels. Assuming an even distribution, in any given year one-half of all petitioner's dealers have market penetration below national and regional levels. Petitioner failed to identify any acceptable level below national and regional levels. The Commissioner thus could find petitioner's standards unreasonable. Petitioner's method of assessing sales performance could enable it to terminate half its franchise agreements. Accordingly, the success of two nearby dealerships in achieving national and regional levels of market penetration, while respondent did not, is not dispositive.

Petitioner asserts that, rather than poor economic conditions, respondent's attitude toward not having received a standard five-year dealership agreement accounted for the dealership's poor sales performance. It points to respondent's testimony:

> Well, then I got a letter notifying me that they were going to extend it for another year, and I called Gary and I told him, I said, Gary, I said, this is not what we discussed. I said,

you promised me that you were either going to terminate me on May 31st of '82 or you were going to give me my normal Five-Year Sales Agreement. *I explained to Gary, I said, if you'll go ahead and do this we can get the show on the road, but just another year's extension is going to be doing it the same way. In other words, we're going to pull back and hold in* . . . .

Respondent repeatedly insisted that he was entitled to a five-year franchise agreement and maintained that if given a five-year agreement he would implement petitioner's requests that he stock more cars, hire more salespersons, and launch a new advertising program. It is clear from respondent's testimony, however, that given the extant economic conditions he did not consider petitioner's requests prudent. He was thus willing to take the risks involved in financially extending himself in a recessionary period only if he had the protection from termination he believed a five-year contract would afford. While in view of N.C. Gen. Stat. 20-305(6) respondent was perhaps mistaken in believing a five-year contract would provide greater protection from termination than his two-year agreements, the Commissioner nonetheless could find that he was not required to implement measures he reasonably considered improvident under the circumstances.

Petitioner contends the Commissioner was influenced by arbitrary and capricious factors. An agency decision infected by consideration of arbitrary and capricious matters which substantially affect a party's rights violates N.C. Gen. Stat. 150A-51(6) and cannot be affirmed. *A&T University v. Kimber*, 49 N.C. App. 46, 51-52, 270 S.E. 2d 492, 495 (1980).

The Commissioner made numerous findings of fact regarding the sales performance of Knox Olds-Pontiac during the period 1976-79. Petitioner maintains that these findings are not relevant to a determination of whether good cause for terminating respondent's franchise existed, since respondent did not enter into the franchise agreements until June and November of 1980. However, petitioner presented testimony which established that a dealer's supply of new cars is based on sales made by that dealership in the preceding year. Thus, the Commissioner could examine the number of cars ordered by, delivered to, and sold by Knox Olds-Pontiac prior to respondent's franchise agreement to

determine the extent to which respondent's poor sales performance was a function of factors beyond respondent's control.

In addition petitioner maintains the Commissioner's determination is infected by his unsupported findings that petitioner "insisted" and "demanded" that respondent take certain steps to improve sales performance. Petitioner admits that its agents repeatedly "*recommended*" that respondent increase inventory, employ more salespersons, and launch a new advertising program. Petitioner's Charlotte zone manager testified that respondent's failure to implement the above recommendations was a primary factor in the decision to terminate respondent's franchise agreements. We find that the Commissioner's choice of words to state his findings is supported by substantial evidence in the record.

Petitioner also objects to the Commissioner's finding that it "began planning to terminate the Knox Olds-Pontiac dealership as early as February 1981." The finding, however, is supported by substantial evidence. By letter dated 12 February 1981 the following information was circulated among petitioner's management personnel:

> The Interim Selling Agreement for the above dealer [respondent] expires on May 31, 1982. It is important that we maintain a record of routine contacts with Sam Kinlaw showing that we have covered the sales and registration requirements for Oldsmobile with him.
>
> We should also recite any agreement or lack of agreement which he would or would not cooperate with. Of course, include in your report his agreement or refusal to order adequate cars for his market.

In addition, a salesman for respondent testified that early in 1981 petitioner's district manager told him petitioner was trying to find someone to take over the dealership.

For the foregoing reasons, we hold the superior court's affirmance of the Commissioner's order proper insofar as that order found petitioner to have failed to renew respondent's franchise agreements without cause and directed that the agreements not be terminated.

[3] Petitioner next contends the Commissioner exceeded his authority in ordering it to enter "a regular five (5) year motor vehicle dealer sales agreement" with respondent. We agree. The Commissioner has "only such authority as is properly conferred upon [him] by the Legislature." *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 173, 118 S.E. 2d 792, 796 (1961); *Insurance Co. v. Lanier, Comr. of Insurance*, 16 N.C. App. 381, 384, 192 S.E. 2d 57, 58-59 (1972). In addition to the powers expressly vested in an agency by statute, those powers reasonably necessary for the agency to function properly are implied from the legislature's general grant of authority. *In re Community Association*, 300 N.C. 267, 280, 266 S.E. 2d 645, 654-55 (1980); *Insurance Co.*, 16 N.C. App. at 384, 192 S.E. 2d at 58.

Neither N.C. Gen. Stat. 20-301 (1978), which delineates the powers of the Commissioner, nor N.C. Gen. Stat. 20-305(6) (1978), pursuant to which this proceeding was initiated, expressly vests the Commissioner with the power to order parties to enter into a contract. Further, the proper functioning of the Department of Motor Vehicles under Article 12 of the General Statutes, "Motor Vehicle Dealers and Manufacturers Licensing Law," does not require that the Commissioner hold such power. N.C. Gen. Stat. 20-305(6) requires the Commissioner, upon a dealer's request, to determine whether there is "good cause" for a franchisor's nonrenewal of a dealership agreement. Once the Commissioner determines that good cause does not exist, the franchisor's attempts to terminate relations with the dealership are in violation of Article 12 and the Commissioner may seek to enjoin the franchisor's actions by initiating a proceeding pursuant to N.C. Gen. Stat. 20-301(d). Thus, the franchise continues in effect until termination for good cause is effected pursuant to N.C. Gen. Stat. 20-305(6) (1983) or until both parties consent to cancellation. The statutory prohibition on franchise termination except for cause remains intact. *See* Note, *Adjusting the Equities in Franchise Termination: A Sui Generis Approach*, 30 Clev. St. L. Rev. 523, 547 (1981). It is not necessary that the Commissioner have the power to order parties to enter into contracts to enable the agency to function properly.

A similar result was reached in *Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1, 15, 243 S.E. 2d 793, 803 (1978), *modified in part on other grounds*, 296 N.C. 357, 250 S.E. 2d 250 (1979).

There this Court found that the notice requirements for termination pursuant to N.C. Gen. Stat. 20-305(6) had not been met. As a result the franchise agreement was held to remain in effect until notice was perfected.

In ordering the parties to enter a five-year contract the Commissioner exceeded the authority vested in him by the General Assembly. Accordingly, the superior court should have vacated that portion of the Commissioner's order. The franchise agreements continue in effect until petitioner makes a proper termination pursuant to N.C. Gen. Stat. 20-305(6) (1983) or until the parties mutually agree to terminate. Petitioner may again seek to terminate the agreements by complying with the notice provisions of N.C. Gen. Stat. 20-305(6) (1983).

The order of the superior court, except for its affirmance of those portions of the Commissioner's order requiring petitioner to enter "a regular five (5) year motor vehicle dealer sales agreement" with respondent, is affirmed. Insofar as the order affirms the portions of the Commissioner's order requiring petitioner to enter "a regular five (5) year motor vehicle dealer sales agreement" with respondent, it is reversed, and the cause is remanded with instructions to modify the order by vacating those portions.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. PATRICK MARK McKOY AND LAWRENCE L. HARRISON

No. 8512SC193

(Filed 31 December 1985)

Criminal Law § 34.1— defendant's guilt of other offenses—inadmissibility to show disposition to commit offense

In a prosecution for felonious breaking or entering and felonious larceny, the trial court erred in allowing the prosecutor to question an accomplice who had entered into a plea bargain about other break-ins he had committed with either of the defendants, since such evidence would have been admissible if offered for some purpose other than to show that, because defendants were peo-

ple of criminal character, it was more probable that they committed the crime for which they were on trial, but the State made no effort in this case to explain the permissible purpose for which the evidence was offered; ten months elapsed between the incident for which defendants were being tried and the time the accomplice made his statement to police; in that statement the accomplice denied participating in other breakings and enterings with defendants; the answers the accomplice gave on the stand were confusing and unresponsive; and the probative value, if any, of the evidence was slight and the only ascertainable purpose was to attribute a criminal disposition to defendants.

Chief Judge HEDRICK dissenting.

APPEAL by defendants from *Brewer, Judge.* Judgments entered 5 October 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 September 1985.

Defendants were convicted by a jury of felonious breaking or entering and felonious larceny pursuant to a breaking or entering. Both defendants were sentenced to active terms of imprisonment, and both defendants appealed.

Attorney General Thornburg, by Associate Attorney General Doris J. Holton, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Leland Quintin Towns, for defendant-appellant McKoy.

James R. Parish for defendant-appellant Harrison.

PARKER, Judge.

The incident for which defendants were charged occurred on 26 July 1983. Defendants were indicted on 20 August 1984. The State's primary evidence was the testimony of one Thomas "Luke" Bowens, who was granted consideration as to sentencing on several charges pending against him in exchange for his testimony. Bowens testified that on 26 July 1983, he and the two codefendants had been at an arcade in a shopping center in Spring Lake, North Carolina. The three walked out behind the arcade, discussing their financial woes. Bowens testified that defendant Harrison was carrying a blue athletic bag and said he had a pair of bolt cutters. As the trio walked along behind the shopping center, they came upon the storage building for the Maxway Store located in the shopping center. Bowens took Harrison's bolt cutters and a screwdriver and broke into the building. The build-

ing was primarily used to house merchandise that had been put on layaway by Maxway customers. Bowens entered the building, looked around, returned to the door and said "yo, we just got paid"; he then began handing microwave ovens and television sets to defendants. They took fourteen ovens and four television sets in all. After hiding the stolen items, the three split up. Bowens arranged for the sale of the items, and the three got back together to divide the money. Bowens testified that each person's share was approximately $600.

On 5 April 1984, Bowens was arrested for an unrelated crime. During the investigation of Bowens, the police realized that he could be a valuable source of information regarding a number of break-ins in the area and about a "fence" known as Sid. Bowens then entered into a plea arrangement in which he was promised no more than six years active time if he would cooperate and give information and ultimately testify about these other break-ins. Bowens agreed and as part of this arrangement made a statement concerning the Maxway break-in, which implicated the defendants and which was essentially the same as his trial testimony. Detective A. F. Payne of the Spring Lake Police Department took the statement and, at trial, read it into evidence.

The State's theory of the case was concerted action. Although the State's witness, Bowens, did the actual breaking and entering (his testimony conflicted as to whether defendants actually entered the shed), the State argued that defendants were equally guilty as they too possessed the requisite guilty knowledge and intent.

The sole argument[1] advanced by both defendants is that the trial judge erred in allowing the prosecutor to question Bowens about other break-ins he had committed with either of the defendants. Defendants assert that this was inadmissible evidence of character under G.S. 8C-1, Rule 404.

1. Defendant McKoy has asked this Court to consider an additional argument in his brief not assigned as error in the record on appeal. A motion to amend the record on appeal was denied by a panel of this Court. The issue raised by defendant McKoy has been decided adversely to him by this Court on numerous occasions and is currently before our Supreme Court for consideration. Therefore, we decline to consider this issue.

On direct examination of Bowens by the prosecutor, the following exchange took place:

Q. Had the three of you done anything like this before?

MR. MELVIN: Objection, your Honor.

COURT: Overruled.

(Witness shaking head.)

COURT: You may answer.

A. Answer?

COURT: Yes.

A. What you mean?

Q. Had you and Mr. Harrison and Mr. McKoy or any of you broken into places like this before?

MR. MELVIN: Objection.

COURT: Overruled.

A. No.

Q. Had you broken into anything—at homes or anything with these two, either of these two fellows before.

MR. MELVIN: Objection.

COURT: Overruled.

COURT: You may answer.

A. (Shook head negatively.) No.

Despite the negative response to this line of questioning, the prosecutor pursued it again on redirect, resulting in the following confusing exchange.

Q. Who broke into the pawn shop with you?

MR. MELVIN: Objection.

COURT: Overruled.

Q. Who went into the pawn shop with you?

A. The best of my knowledge? Harrison.

Q. The defendant, Mr. Harrison?

A. Yes.

Q. And you also broke into a house at 206 Holland Drive, home of Isabel Rodriguez, didn't you?

A. Who?

Q. You did.

A. Not that I can remember of.

Q. And you took a General Electric black and white television set, a Zenith nineteen inch color television set, and a Pioneer stereo, that was back in March of 1983?

A. Oh—I know what you're talking about.

Q. Okay.

A. No. They wasn't with me.

. . . .

Q. Do you remember Mr. McKoy being with you?

A. Not really.

Q. You don't remember breaking into a house with Mr. McKoy?

A. I remember breaking into a house. Not with him.

. . . .

Q. Now, Mr. Bowens, you remember back earlier in the year, when you were about to be tried for breaking into the Boulevard Pawn Shop?

A. Yes.

Q. That's the same pawn shop you said Mr. Harrison and you broke into—

MR. MELVIN: Objection, your Honor.

COURT: Overruled.

Q. —is that right?

A. Yes.

Q. And your lawyer and I had some discussions that resulted in a plea bargain for you, isn't that correct?

A. Yeah.

Q. Now, is that the plea bargain in which you were to plead guilty and get six years?

A. About that pawn shop?

Q. Um-hum.

A. I got probation for that pawn shop. Oh, you got the wrong pawn shop here.

Q. That's the pawn shop that you broke into.

A. Sir, I'm going to be honest with you. The way this went down, I don't know which charge I got tried for and which business I broke into. It was some of them.

Q. You broke into some of them?

A. Yeah.

Q. And you broke in with a lot of different people?

A. Quite—

Q. Are you sure that—and are you sure that you broke into this place with Mr. Harrison?

A. If that's what's on that paper, it has to be.

Q. Do you remember going in there with him?

A. Which pawn shop?

COURT: Repeat your question, Mr. Ammons.

Q. The pawn shop that you broke into with Mr. Harrison, do you remember which pawn shop that was?

A. (Pause.) I think so.

Q. Which pawn was it?

A. It's three Braggs. Bragg—I broke in all three of them with different people.

Q. In any event, do you remember pleading guilty in the case in which you broke into a pawn shop with Mr. Harrison?

MR. MELVIN: Objection, your Honor. He's answered that.

COURT: Overruled.

A. (Pause.) I remember pleading guilty to the pawn shop that I broke into. See, I broke into Bragg by myself, too, now.

Q. That's not the one you broke into with Mr. Harrison?

A. I don't think it is.

The trial of this case took place on 1 October 1984; therefore, the North Carolina Rules of Evidence codified in Section 8C-1 of the General Statutes and effective beginning 1 July 1984 were applicable. Rule 404(b), G.S. 8C-1 reads as follows:

> (b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

This rule is identical to Rule 404(b) of the Federal Rules of Evidence, except for the addition of the word "entrapment," which is not relevant here. The first sentence of Rule 404(b) creates a presumption that evidence of other crimes is inadmissible, but the second sentence allows its admission upon a showing by the State that this evidence is reasonably necessary for a specific permissible purpose. The only requirement for such evidence to be admissible is that it be offered for purposes other than to show that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial. *See United States v. Diggs*, 649 F. 2d 731 (9th Cir.), *cert. denied*, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed. 2d 387 (1981). Clearly, then, the purpose for which the evidence is offered is of the utmost importance. McCormick on Evidence, Sec. 188 (3d ed. 1984). The connection between the evidence and its permissible purpose should be clear, and the issue on which the evidence of other crimes is said to bear should be the subject of genuine controversy. *Id.*, Sec. 190.

Evidence of other crimes may be extremely prejudicial as it focuses attention of the jurors on the defendant as a person deserving punishment rather than on the evidence necessary to prove the charge for which the defendant is being tried. Therefore, the probative value must be weighed against this potential for prejudice. As the Advisory Committee's Note to the Federal Rule states:

> Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.

Moreover, the prohibition on evidence of other crimes is said to have constitutional implication as due process requires that a person be convicted, if at all, of the particular crime charged and not for other crimes or simply because of who he is. *See United States v. Foskey*, 636 F. 2d 517, 523 (D.C. Cir. 1980).

In the case before us, the State has made no effort to explain the permissible purpose for which the evidence was offered. Ten months lapsed between the incident for which defendants were being tried and the time Bowens made his statement to the police. Moreover, in that statement Bowens denied participating in other breakings and enterings with defendants. The answers Bowens gave on the stand were confusing and unresponsive. Under these circumstances, the probative value, if any, of the evidence was slight and the only ascertainable purpose was to attribute a criminal disposition to defendants. We do not agree with the State that the challenged testimony was not prejudicial since Bowens answered the questions negatively. The manner in which

the prosecutor led the witness was tantamount to the prosecutor testifying. By convicting defendants, the jury obviously believed some part of the State's evidence. This Court cannot speculate as to the weight given by the jury to inadmissible testimony.

In our view the evidence was inadmissible and prejudicial to defendants and defendants are, therefore, entitled to a

New trial.

Judge BECTON concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

My colleagues in their majority opinion have awarded both defendants new trials finding that the trial judge erred to each defendant's prejudice in allowing the district attorney to ask the State's witness if he and the defendants had broken into places other than the Maxway Store and if he had broken into a pawn shop with defendant Harrison.

The assignment of error upon which defendant McKoy relies is set out in the record as follows: "The trial court erred in allowing the State to question Thomas Bowen with respect to whether he, the defendant, and co-defendant Harrison had participated together in other break-ins because such testimony amounted to evidence suggesting prior criminal conduct." Defendant McKoy's assignment of error is based on his exception to the following:

Q: Had the three of you done anything like this before?

MR. MELVIN: Objection, your Honor.

COURT: Overruled.

(McKoy Exception No. 1)

(Witness shaking head.)

COURT: You may answer.

A: Answer?

COURT: Yes.

A: What do you mean?

Q: Had you and Mr. Harrison and Mr. McKoy or any of you broken into places like this before?

MR. MELVIN: Objection.

COURT: Overruled.

(McKoy Exception No. 2)

A: No.

Q: Had you broken into anything—at homes or anything with these two, either of these two fellows before.

MR. MELVIN: Objection.

COURT: Overruled.

(McKoy Exception No. 3)

COURT: You may answer.

A: (Shook head negatively.) No.

Since the witness testified that defendant McKoy had not committed other crimes with him, the witness, it is inconceivable to me that defendant McKoy suffered any prejudice from the questions to which he now takes exception. Under the circumstances of this case, however, it is my opinion that the trial court did not err in overruling defendant's general objections to the question excepted to. By feeding defendants out of the same spoon, the majority has overlooked the fact that the court might have committed prejudicial error with respect to one defendant and not with respect to the other. Although it is not true in the present case, it is possible for one defendant to be entitled to a new trial without awarding a new trial to the other defendant.

By Assignments of Error Nos. 1, 2 and 3, defendant Harrison contends that the trial court erred in allowing the State's witness to testify about other crimes allegedly committed by Harrison. Defendant Harrison's assignments of error are based on exceptions to the court's allowing the district attorney to question the witness Bowens as to whether he and Harrison had broken into a pawn shop. I note that when the State's witness first testified on direct, no evidence of Bowens' having committed other crimes with either defendant was admitted. He was, however, asked on direct whether he, Bowens, had broken into the Cash Pawn Shop.

Defendant's objection to this question was sustained. On cross-examination by defendants the witness was asked about numerous other crimes, including breaking or entering, that he had committed. In particular, he was asked by defendants' counsel whether he had broken into a pawn shop. On redirect examination, the district attorney began to question the witness about his having broken into a pawn shop with defendant Harrison. To this line of questioning, defendant Harrison interposed a general objection. The witness was allowed to answer the question and ultimately testified that he did break into a pawn shop with Harrison. In my opinion, the court did not err in overruling defendant's objection because defendant had "opened the door" with respect to this line of questioning when he brought out the fact that the witness had indeed broken into a pawn shop.

It must be noted that defendant merely interposed a general objection to the district attorney's question about the witness breaking into a pawn shop with defendant Harrison. Rule 404(b) of the rules of evidence provides as follows:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

G.S. 8C-1, Rule 404(b). A general objection, if overruled, "is no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible." *State v. Ward*, 301 N.C. 469, 477, 272 S.E. 2d 84, 89 (1980).

In the present case, the evidence that the witness had committed another crime with defendant Harrison might have been admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." G.S. 8C-1, Rule 404(b). Had defendant desired to have the court make a ruling as to the specific reason or purpose the evidence was being offered, he should have interposed a specific objection, whereupon the trial judge could have conducted a voir dire to determine whether the probative value of the evidence outweighed its prejudicial effect. We then would have had some-

thing to review on appeal. In my opinion, the State was not under the burden of qualifying the testimony objected to under the circumstances of this case. In any event, however, I disagree with the majority that the trial judge erred in overruling defendant's general objection to the testimony. Furthermore, it is my opinion that under the circumstances of this case, no conceivable prejudice resulted from the admission of this evidence.

I am particularly concerned with the final paragraph of the majority opinion, because it seems to place the burden on the State to prove on appeal that the trial court did not err, while the contrary is the rule. The burden is on the appellant, not only to show error, but to show prejudicial error. Stated in another way, the trial court's rulings are presumed to be correct. The statement by the majority that "the State has made no effort to explain the permissible purpose for which the evidence was offered," carries the implication that the State, either at trial or on appeal, should explain for what purpose the evidence was admissible. In my opinion, this assertion by the majority ignores well established rules with respect to the conduct of both trials and appeals. Other portions of the final paragraph of the majority opinion seem to be passing on the credibility of the witness Bowens, which, of course, is for the jury, not for the appellate court.

I vote to find no error with respect to the trial of both defendants.

STATE CAPITAL INSURANCE COMPANY, APPELLEE v. NATIONWIDE MUTUAL INSURANCE COMPANY, APPELLEE, AND HOWARD E. ANDERSON AND PAULA C. ANDERSON, AND MILTON LOUIS McKINNON, APPELLANTS

No. 8510SC239

(Filed 31 December 1985)

1. Insurance § 68.4— deer hunter—shooting—injury during use of vehicle—coverage under automobile liability policy

Defendant Nationwide's automobile liability policy provided coverage for injuries sustained by one defendant who was shot by the other defendant as he reached into his truck to get a gun for the purpose of shooting a deer, since G.S. 20-279.21(b)(2), incorporated as a matter of law into Nationwide's policy,

provided for coverage for damages sustained in the use of a motor vehicle; such use need not be the proximate cause of the injury, but coverage will be extended if there is a reasonable causal connection between the use and the injury; defendant frequently used the truck for hunting, the transportation of firearms being an integral part of that activity; and at the time of the accident, defendant was reaching into the cab for the rifle in order to shoot deer and was therefore actually engaged in a use of the truck.

2. Insurance § 143— hunting accident—coverage under homeowner's liability policy

One defendant's injuries sustained in a hunting accident were not excluded from coverage under the other defendant's homeowner's liability policy on the ground that they arose out of the use of a motor vehicle, since the exclusion would apply only if the relationship between the injury and the use was one of proximate cause, but neither the use of the truck for hunting and the transportation of firearms nor the mere fact that at the time of the injury insured was removing his rifle from the cab was the proximate cause of the gun's discharge.

APPEAL by defendants Howard E. Anderson and Paula C. Anderson from *Barnette, Judge*. Judgment entered 19 December 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 15 October 1985.

Plaintiff, State Capital Insurance Company (hereinafter "State Capital"), brought this declaratory judgment action seeking a determination of its rights and liabilities, and those of defendant Nationwide Mutual Insurance Company (hereinafter "Nationwide"), with respect to injuries sustained by defendant McKinnon when he was accidentally shot by defendant Howard Anderson. At all times pertinent to this action, defendants Anderson were insured by a homeowner's insurance policy issued by State Capital, which included coverage for personal liability; Howard Anderson was also insured by an automobile liability policy issued by Nationwide.

All parties waived a jury trial and stipulated that the evidence would consist of deposition testimony of defendants Howard Anderson and McKinnon and a witness to the accident, Dale North. In addition, the policies issued by State Capital and Nationwide were stipulated into evidence. The trial judge made findings of fact which generally disclose the following events: On 13 November 1982 Howard Anderson and Milton McKinnon were deer hunting at a hunting club in Warren County. Anderson was driving his 1975 Chevrolet truck; McKinnon was riding with him.

The truck was routinely used for hunting and had a gun rack fastened to the back of the cab; Anderson had placed two guns in the gun rack and had placed a Winchester 30-30 rifle on a quilt in the storage space behind the truck's seat, as was his practice when the gun rack was full. Anderson stopped his truck, got out, and walked over to another truck to talk with some other hunting companions. While he was talking, Anderson spotted a deer and ran to his truck and reached behind the seat to get his Winchester rifle. By that time, McKinnon had also gotten out of the truck and was standing near the back of the truck. As Anderson touched the stock of his rifle in order to pull it out of the truck, it discharged. The bullet passed through the rear wall of the truck and struck McKinnon in the right thigh.

State Capital's policy contained the following provision:

SECTION II—EXCLUSIONS

1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:

. . . .

e. arising out of the ownership, maintenance, use, loading or unloading of:

. . . .

(2) a motor vehicle owned or operated by, or rented or loaned to any insured; . . . .

Nationwide's automobile liability policy provided, in pertinent part:

Part B

LIABILITY COVERAGE

INSURING AGREEMENT

We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident.

. . . .

FINANCIAL RESPONSIBILITY REQUIRED

When this policy is certified as future proof of financial responsibility, this policy shall comply with the law to the extent required.

Having found the facts recited above, the trial court concluded that McKinnon's injury "arose out of the use, loading and unloading of the pickup truck within the terms of the exclusion" contained in State Capital's homeowner's policy and, therefore, that State Capital did not provide coverage. The court further concluded that McKinnon's injury "did not arise out of an automobile accident within the insuring language of Part B of the automobile liability policy" issued by Nationwide and, therefore, that Nationwide did not provide coverage. From the entry of judgment declaring that neither insurance carrier provided coverage, defendants Anderson appealed.

Young, Moore, Henderson & Alvis, P.A., by R. Michael Strickland and A. Bradley Shingleton for plaintiff appellee State Capital Insurance Company.

Moore, Ragsdale, Ray & Foley, P.A., by Peter M. Foley and Arthur W. O'Connor, Jr. for defendant appellee Nationwide Mutual Insurance Company.

Manning, Fulton & Skinner, by Emmett Boney Haywood and Charles E. Nichols, Jr. for defendant appellants Howard E. Anderson and Paula C. Anderson.

MARTIN, Judge.

Although appellants except to several of the court's findings of fact, we have reviewed the deposition testimony and are of the opinion that all of the court's findings of fact are supported by competent evidence. The findings of fact are therefore binding upon us. *Williams v. Pilot Life Ins. Co.*, 338 N.C. 38, 218 S.E. 2d 368 (1975). Conclusions of law drawn by the court from the facts found, however, involve legal questions and are always reviewable *de novo* on appeal. *Davison v. Duke University*, 282 N.C. 676, 194 S.E. 2d 761 (1973). Thus, our consideration will be limited to the question of whether the trial court erred in its conclusions that neither the State Capital homeowner's policy nor the Nationwide automobile liability policy provided coverage to Howard An-

derson for his accidental shooting of McKinnon. For the reasons which follow, we hold that coverage is provided by both policies. Accordingly, we reverse the judgment of the trial court.

THE NATIONWIDE AUTOMOBILE LIABILITY POLICY

[1] Nationwide's policy insured Howard Anderson against liability "because of an auto accident." In holding that no coverage was provided by the Nationwide policy, the trial court concluded that McKinnon's injury "did not arise out of an automobile accident within the insuring language" of the policy. The trial court went on to say that "[i]f the insuring language of said policy extended coverage to damages *arising out of the use* of an automobile, coverage for the accident . . . would exist." (emphasis added).

In fact, Nationwide's policy does extend coverage to liability for damages arising out of the use of Anderson's vehicle. G.S. 20-279.21(b)(2) requires that every motor vehicle liability policy, certified as proof of financial responsibility, "[s]hall insure the person named therein . . . against loss . . . for damages *arising out of* the ownership, maintenance or *use* of such motor vehicle. . . ." (Emphasis added.) It is well established that the coverage required by the statute is, as a matter of law, made a part of every motor vehicle liability policy issued in this state. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977). When the insuring language of the policy conflicts with the coverage mandated by the statute, the provisions of the statute will control. *Id.* The question presented with respect to Nationwide's policy, then, is whether McKinnon's injury arose out of the use of Anderson's truck.

The provisions of a compulsory motor vehicle liability insurance statute are liberally construed. *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 155 S.E. 2d 128 (1967). The words "arising out of the use" of a vehicle have been construed to provide broad coverage.

> The words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms effecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by *acts done in connection with or arising out of such use. They are words of much*

> *broader significance than "caused by."* They are ordinarily understood to mean . . . "incident to," or "having connection with" the use of the automobile. . . . (Citations omitted.)
>
> The parties do not, however, contemplate a general liability insurance contract. There must be *a causal connection* between the use and the injury. This causal connection may be shown to be an injury *which is the natural and reasonable incident or consequence of the use*, though not foreseen or expected, but the injury *cannot* be said to arise out of the use of an automobile if it was *directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile.* (Citation omitted.)

Fidelity & Casualty Co. of N.Y. v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 198-99, 192 S.E. 2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 840 (1972) (emphasis added). In summary, for purposes of determination of whether an injury is covered by policy or statutory language extending coverage to loss "arising out of the use" of a motor vehicle, the use need not be the *proximate cause* of the injury in the narrow legal sense. Coverage will be extended if there is a reasonable *causal connection* between the use and the injury. On the other hand, where the cause of the injury is distinctly independent of the use of the vehicle, no causal connection can be said to exist, and coverage will not be afforded.

This court has previously had occasion to consider whether or not injuries sustained as a result of the discharge of a firearm in or about a motor vehicle arose out of the use of the motor vehicle. Our decisions have depended, in large measure, upon the circumstances under which the shooting occurred. In *Raines v. St. Paul Fire & Marine Ins. Co.*, 9 N.C. App. 27, 175 S.E. 2d 299 (1970), the son of the named insured was sitting in the driver's seat of a parked automobile playing with a gun. The gun discharged, killing another occupant of the automobile. Our court held, under those circumstances, that no causal connection was shown to exist between the use of the automobile and the discharge of the firearm. Therefore, no coverage was afforded under the automobile liability policy. In *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 237 S.E. 2d 341, *disc. rev. denied*, 293

N.C. 589, 239 S.E. 2d 263 (1977), an occupant of one automobile intentionally shot into another automobile during the course of a high speed chase resulting from a custody dispute. The minor child, who was an occupant of the second vehicle, was struck by the projectile. Our court concluded that there was no causal connection between the intentional shooting and the use of the automobile. Likewise, in *Wall v. Nationwide Mut. Ins. Co.*, 62 N.C. App. 127, 302 S.E. 2d 302 (1983), our Court found no causal relationship between the use of the insured automobile and the intentional shooting of the plaintiff by an occupant thereof. Plaintiff's injury was held to have resulted from a cause not associated with the normal use of the automobile.

A different result was reached, however, in *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206, *disc. rev. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977). In *Walker*, the insured, Lewis, owned a truck which he frequently used for hunting trips and the transportation of firearms for hunting. On the date of the accident, Lewis had returned from hunting and had left his hunting rifle mounted in a gun rack which was permanently attached to the cab of the truck. Walker was helping Lewis transport some trash to a nearby depository, after which the two of them planned to go hunting again. As Lewis got into the truck and placed the key in the ignition, the rifle discharged and injured Walker, who was standing outside the truck. Because the transportation of guns was one of the uses to which the truck had been put, the Court reasoned that the accidental discharge of the rifle was a natural and reasonable consequence of, and therefore causally connected to the truck's use. Therefore, coverage was provided by the automobile liability policy.

We believe that the holding in *Walker* controls the question of Nationwide's coverage in the case *sub judice*. Anderson frequently used the insured truck for hunting; the transportation of firearms was an integral part of that activity. At the time of the accident, Anderson was reaching into the cab for the rifle in order to shoot a deer. In doing so, he was actually engaged in a use of the truck. Thus, the truck was more than a mere situs of the shooting, as contended by Nationwide. The shooting was "incident to" the use of the truck and not due to "some independent act . . . wholly disassociated from" its use. The requisite causal connection between McKinnon's injury and the use of the truck

being present, we hold that the injury arose out of the use of the truck so as to be within the coverage provided by the automobile liability insurance policy.

THE STATE CAPITAL HOMEOWNER'S LIABILITY POLICY

The personal liability and medical payments coverages of the State Capital homeowner's policy insured Anderson against liability for damages for bodily injury, but excluded coverage for bodily injury "arising out of the ownership, maintenance, use, loading or unloading" of a motor vehicle. The trial court concluded that "since the accident *occurred* while defendant Anderson was unloading the firearm from the pickup truck and arose out of the regular use of the truck" McKinnon's injury was not covered.

At first glance, it might appear that since McKinnon's injury was causally connected to the use of the truck, so as to be within the coverage of the automobile liability policy, it must follow that the injury is not within the coverage of the homeowner's policy because of the exclusion of injuries "arising out of the use" of the vehicle. Such a conclusion, however, would ignore established rules of construction applicable to insurance policies and compulsory insurance statutes. The two policies are not construed in light of each other: each policy is a separate contract of insurance between the company issuing it and the insured, and requires separate and independent analysis in light of that relationship. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967). In construing Nationwide's Automobile Policy, we were obliged to follow the rule requiring provisions of insurance policies and compulsory insurance statutes which *extend coverage* to be liberally construed in favor of the insured to provide coverage wherever, by reasonable construction, it can be. See *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967); *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966). On the other hand, clauses which provide for an exception to, or *exclusion from*, the coverage provided by the policy are not favored and any ambiguity in the terms will be construed strictly against the insurer. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). These rules must guide us in our consideration of the exclusionary clause of State Capital's policy.

[2] Applying the applicable rule to the terms "arising out of the use" of a vehicle as contained in our compulsory automobile liability insurance statute, we concluded that an injury arose out of the use of a vehicle if it was *causally connected* to such use. However, the term "arising out of" is susceptible to more than one meaning and, therefore, when used in an insurance contract, is subject to construction by the courts. When the term "arising out of" is employed to exclude an event from coverage under a homeowner's liability policy, the "causal connection" definition is inapplicable; in order to bring the event within the exclusionary provision of the policy it is required that the relationship between the injury and the use be one of *proximate cause*, rather than merely causally connected. *Travelers Ins. Co. v. Aetna Casualty and Surety Co.*, 491 S.W. 2d 363 (Tenn. 1973). *See generally* Annot., 6 A.L.R. 4th 555 (1981 & Supp. 1985).

It is clear from the facts found by the trial court that although McKinnon's injury was causally connected to the use of the truck, neither (1) the use of the truck for hunting and the transportation of firearms nor (2) the mere fact that at the time of the injury Anderson was removing the rifle from the cab was the *proximate cause* of the gun's discharge. Although the trial court made no findings as to negligence or proximate causation, it is obvious that if McKinnon's injury was proximately caused by Anderson's negligence, such negligence consisted, at least in part, of the manner in which Anderson handled the rifle. As such, it falls within the coverage provided by the homeowner's policy.

State Capital argues that in *Reliance Ins. Co. v. Walker*, *supra*, this Court held that a homeowner's policy, containing an identical exclusion, did not provide coverage for the accidental shooting. This argument is incorrect. In *Walker*, the Court expressly noted that the issue of coverage under the homeowner's policy was simply not before it.

In summary, we hold that both State Capital and Nationwide provide coverage, up to the policy limits, for Anderson's liability, if any, to McKinnon. Accordingly, the judgment of the trial court is reversed and this case is remanded to the Superior Court of Wake County for entry of judgment in accordance with this opinion.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. HARVEY LEE MOXLEY AND BOBBY JOE MOXLEY

No. 8523SC321

(Filed 31 December 1985)

1. **Constitutional Law § 63— death qualification of jury**

The trial court did not err in permitting a murder case to be tried capitally and in permitting death qualification of the jury.

2. **Criminal Law § 165— prosecutor's jury argument—failure to object**

Defendants could not complain of alleged errors in the prosecutor's final argument where neither defendant lodged any objections at trial during this argument, and the prosecutor's reference to impeachment evidence as substantive evidence did not constitute prejudicial error.

3. **Criminal Law § 113.7— acting in concert—burden of proof on self-defense—instruction proper**

The trial court's instruction on acting in concert in a homicide case did not shift or reduce the State's burden of proof on self-defense.

4. **Criminal Law § 113.7— acting in concert—instruction proper**

Evidence in a prosecution for homicide was sufficient to support an instruction on "acting in concert" where it tended to show that one defendant and the victim were involved in an incident wherein defendant was cut with an object across his arm; after defendant was cut and tending to his wound, the other defendant approached the victim, reached in his back pocket and made stabbing or slashing motions at the victim; the victim went to the ground and was kicked by the unhurt defendant while he was down; and both defendants then continued to kick the victim while he was down.

5. **Homicide § 31.6— voluntary manslaughter—severity of sentence**

The trial court did not abuse its discretion in sentencing defendant, who was convicted of voluntary manslaughter, to a term of 15 years imprisonment where the trial judge found one aggravating factor and five mitigating factors and sentenced him to 9 years beyond the presumptive term, since a trial judge need not justify the weight he attaches to any factor and may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa.

6. Homicide § 21.9— defendant as aggressor—use of excessive force—sufficiency of evidence

Evidence in a homicide prosecution was sufficient to go to the jury on the question of whether defendant was the aggressor or whether he used excessive force where there was testimony from at least two witnesses that defendant reached into his back pocket, that defendant made striking or slashing motions at or toward the victim, that the victim went down, and that defendant kicked him while he was down.

7. Homicide § 15— appearance of victim—evidence admissible

There was no merit to defendant's contention in a homicide prosecution that evidence regarding the victim's physical appearance at the scene and in the hospital was irrelevant, inflammatory and constituted prejudicial error; furthermore, defendant waived his objection to the evidence when similar evidence was admitted without objection.

8. Criminal Law § 46.1— flight by defendant—instruction proper

The trial court properly instructed on flight of defendant where the evidence tended to show that both defendants went to a nearby town soon after the incident occurred and remained there continually for two and one-half weeks until the police located them there.

9. Homicide § 31.6— voluntary manslaughter—sentence—prior criminal record as aggravating factor

The trial court did not err in considering defendant's prior criminal record as an aggravating factor, and there was no merit to defendant's contention that the court should not have considered a prior murder conviction on 6 June 1972 because it was so old.

Judge BECTON concurring in the result.

APPEAL by defendants from *Pope, Judge.* Judgment entered 15 August 1984 in Superior Court, WILKES County. Heard in the Court of Appeals 21 October 1985.

Defendants were charged in proper bills of indictment with the murder of James Richard Ferguson. The cases were consolidated for trial, and defendants were found guilty of voluntary manslaughter. Harvey Lee Moxley was sentenced to fifteen (15) years imprisonment; Bobby Joe Moxley was sentenced to twenty (20) years imprisonment. Defendants appealed.

Attorney General Thornburg by Charles H. Hobgood, Assistant Attorney General, for the State.

Appellate Defender Stein, by Louis D. Bilionis, Assistant Appellate Defender, for Harvey Lee Moxley, defendant appellant.

Paul W. Freeman, Jr., for Bobby Joe Moxley, defendant appellant.

PARKER, Judge.

I

Common Issues

1. Death Qualification of Jurors

[1] Defendants contend the court erred in permitting the case to be tried capitally and in permitting death qualification of the jury where the evidence was insufficient to obtain either a murder conviction or the death penalty. We disagree.

Prior to trial, both defendants filed motions for a pretrial hearing to determine the existence of aggravating circumstances as set forth in G.S. 15A-2000(e)(9) as establishing a basis for the imposition of the death penalty. Both motions were denied by Judge Pope. Defendants contend the denial of their motions violated their right to a fair trial. Our Supreme Court, in *State v. Murray*, 310 N.C. 541, 544-45, 313 S.E. 2d 523, 527 (1984), addressed a similar argument as follows:

> [T]he defendant contends that the procedure of "death qualifying" the jury in the guilt-innocence phase of his trial deprived him of his right to a fair trial. Although the defendant received a life sentence in this case, his trial began as a capital case and the jury was selected pursuant to G.S. 15A-2000 (a)(2). The defendant maintains that the procedure of death qualifying a jury results in a guilt prone jury. We have found this argument to be without merit on numerous occasions, and we now reaffirm our previous holdings (citations omitted).

The assignment of error is overruled.

2. Improper Closing Arguments by Prosecution

[2] Defendants contend the prosecutor's final argument violated their right to a fair trial because he (i) urged the jury to use as substantive evidence testimony that was only admitted for impeachment purposes, (ii) misstated a critical fact and (iii) unfairly cast improper aspersions on the character of the defendant. Both defendants candidly admit in their briefs that neither lodged any objections at trial during this argument. Although we agree it was improper for the State to allude to this testimony as substan-

tive evidence during closing argument when it was not offered for that purpose, *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980), when reviewed in the context in which it was made, use of this evidence did not constitute prejudicial error. The judge called the prosecutor to the bench on her own motion after this erroneous statement was made, and the prosecutor made no further reference to this impeachment testimony. In the absence of an objection, the remaining two alleged errors in the prosecutor's final argument "did not amount to such gross impropriety as to require the trial judge to act *ex mero motu* . . . ." *State v. Oliver*, 309 N.C. 326, 359, 307 S.E. 2d 304, 324 (1983). The assignment of error is overruled.

3. "Acting in Concert" Instruction

The criminal charges against defendants arose out of an incident involving both defendants and James Ferguson that occurred outside an apartment complex in North Wilkesboro on 3 June 1983. Ferguson, who was sixty (60) years old, was beaten and kicked about the head. Ferguson died on 16 December 1983 of complications resulting from injury to the brain he received in this incident. Warrants were issued charging defendants with murder on account of Ferguson's death.

[3] The trial court instructed the jury on acting in concert which was taken verbatim from the North Carolina Pattern Jury Instructions—Criminal 202.10. Defendants contend this instruction was error as it effectively undermined (i) Harvey Lee Moxley's claim of self-defense and (ii) Bobby Joe Moxley's claim of defense of a family member. The thrust of this argument is that because a claim of self-defense depends upon the individual defendant's own perceptions and beliefs as to the necessity of the force used, and the reasonableness of those perceptions and beliefs, *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979), an instruction on "acting in concert" given in conjunction with a claim of self-defense or defense of others impermissibly shifts the burden of proof away from the State and onto the defendant in violation of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975). A similar argument was rejected by our Supreme Court in *State v. Boykin*, 310 N.C. 118, 310 S.E. 2d 315 (1984). In addition, the trial court herein clearly instructed the jury that: "The State has the burden of proving from the evidence beyond a reasonable doubt

that the defendant did not act in self-defense." Thus, when viewed contextually as we are required to do, *State v. Griffin*, 308 N.C. 303, 302 S.E. 2d 447 (1983), the instruction on acting in concert did not shift or reduce the State's burden of proof on self-defense.

[4] Defendants further contend that there was no factual basis for giving this instruction. To support an instruction on acting in concert, the State must present sufficient evidence that two or more persons acted together with a common plan or purpose to commit a crime. *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984). The State presented evidence which tended to show that Harvey Lee Moxley and Ferguson were involved in an incident wherein Harvey got cut with an object across his arm. After Harvey was cut and tending to his wound, Bobby Joe Moxley approached Ferguson, reached in his back pocket and made stabbing or slashing motions at Ferguson. Ferguson went to the ground, and Bobby kicked Ferguson a few times while he was down. There was testimony that both defendants continued to kick Ferguson while he was down. We hold this was sufficient evidence to support an instruction on "acting in concert." The assignment of error is overruled.

II

Defendant Harvey Lee Moxley

[5] In his final assignment of error, defendant Harvey Lee Moxley contends the court abused its discretion in sentencing him to a term of fifteen (15) years imprisonment. The trial judge found one aggravating factor and five mitigating factors and sentenced him to nine (9) years beyond the presumptive term. "[A] trial judge need not justify the weight he attaches to any factor. He may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa," *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E. 2d 689, 697 (1983), and "[t]he balance struck by the trial judge will not be disturbed if there is support in the record for his determination." *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). In *State v. White*, 68 N.C. App. 671, 316 S.E. 2d 112 (1984), a contention similar to defendant's that because he did not receive a sentence substantially less than Bobby Moxley constituted an abuse of discretion was rejected by this Court. The assignment of error is overruled.

III

Defendant Bobby Joe Moxley

1. Motion to Dismiss

[6] Defendant contends the court erred in denying his motion to dismiss all charges on the ground that there was no evidence that he was the aggressor or used excessive force. At least two witnesses, Steve Brown and Diane Barnett, testified that Ferguson was backing away from defendant, that defendant reached into his back pocket, that defendant made striking or slashing motions at or toward Ferguson, that Ferguson went down, and that defendant kicked him while he was down. We hold this evidence was sufficient to go to the jury on the question of whether or not defendant was the aggressor or whether he used excessive force. *See State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1 (1980).

2. Evidence of Decedent's Appearance

[7] Next, defendant contends that evidence regarding Ferguson's physical appearance at the scene and in the hospital was irrelevant, inflammatory and constituted prejudicial error. Similar evidence was admitted without objection; when a defendant objects to the admission of evidence but similar evidence is later admitted without objection, defendant waives his objection. *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983). This evidence was relevant under G.S. 8C-1, Rule 401 on the issue of excessive force, was not prejudicial under G.S. 8C-1, Rule 403, and was not inflammatory under our old rules. *See State v. Lewis*, 58 N.C. App. 348, 293 S.E. 2d 638, *cert. denied*, 311 N.C. 766, 321 S.E. 2d 152 (1984). (The admission of two human skulls into evidence was not inflammatory.)

3. Instruction on Flight

[8] Defendant argues there was no factual basis for giving an instruction on flight as contained in the North Carolina Pattern Instructions—Criminal 104.35. The State's evidence tended to show that both defendants went to Winston-Salem soon after this incident occurred, and remained there continually for two and one-half weeks until the police located them there. As stated by our Supreme Court in *State v. Irick*, 291 N.C. 480, 494, 231 S.E. 2d 833, 842 (1977):

> So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper.

The assignment of error is overruled.

4. Sentencing

[9] Finally, defendant contends the court incorrectly considered his prior criminal record as an aggravating factor and abused its discretion by imposing the maximum sentence allowed by statute. Defendant contends the court should not have considered a prior murder conviction on 6 June 1972 because it was so old. This argument is without merit because G.S. 15A-1340.4(a)(1)(O) imposes no time limitations on the use of prior convictions as aggravating factors. Although defendant attempts to argue the constitutionality of this statute in his brief, it is well-established that appellate courts will decline to rule upon constitutional questions when they were not argued or passed upon at the trial level. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). Defendant has wholly failed to show that the court abused its discretion by imposing the maximum sentence allowed by statute under the facts of this particular case.

The defendants herein received a fair trial, free from prejudicial error.

No error.

Chief Judge HEDRICK concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Although my intuitive convictions—that a death-qualified jury is more prone to convict than a non-death-qualified jury and fails to represent a fair cross-section of the community—have been verified based on methodologically sound sociological studies and surveys as well as expert testimony, *see Grigsby v. Mabry*,

758 F. 2d 226 (8th Cir. 1985) (en banc), *petition for cert. granted sub nom. Lockhart v. McCree*, --- U.S. ---, 88 L.Ed. 2d 48, 106 S.Ct. 59 (7 October 1985), I am compelled to concur in the result. I do so, however, solely because our Supreme Court has consistently upheld the death qualification process utilized in this case. *See, e.g., State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984).

LANDIN LTD., AND CARL W. JOHNSON v. SHARON LUGGAGE, LTD., OF GREENSBORO, INC., D/B/A CAROLINA LUGGAGE OUTLET; SHARON LUGGAGE, INC.; AND ROBERT F. STEIGER

No. 8518SC318

(Filed 31 December 1985)

Appeal and Error § 4; Rules of Civil Procedure §§ 58, 59— motion to amend judgment—time for filing appeal—amendment motion withdrawn—appeal not timely

The trial court did not err in ruling that defendants' notice of appeal and appeal entry from a 26 July 1984 judgment was untimely and should be dismissed where defendants filed a motion to amend judgment on 6 August 1984; at the 24 September 1984 hearing on their motion, defendants stated that they were withdrawing the motion and would instead pursue the case further by way of appeal; the 10-day time limit to give notice of appeal therefore was not tolled because there was never a judicial determination on defendants' motion; and defendants' colloquy with the court during the 24 September 1984 calendar call could not be considered as an oral notice of appeal, made while their motion was still pending.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Ross, Thomas W., Judge*. Judgment entered 30 October 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 October 1985.

This is a civil action instituted by plaintiffs for breach of a lease agreement. Plaintiff lessors, Landin Ltd. and Carl W. Johnson filed their complaint, alleging *inter alia*, that they are owners of real property consisting of the Greensboro Shopping Mall in Greensboro, North Carolina; that defendants, Sharon Luggage Ltd. of Greensboro, Inc., d/b/a Carolina Luggage Outlet, and Sharon Luggage Inc. entered into a written lease agreement as

primary lessees of plaintiffs; that defendant Robert Steiger pursuant to a written guaranty is the guarantor under the lease of all of the lease obligations of the two corporate defendants; that defendants are indebted to plaintiffs in the amount of $23,545.76, plus utilities, operating expenses, advertising expenses, taxes and other items including a percentage of rent based on gross receipts.

Defendants' first defense and motion to dismiss was that the complaint failed to state a claim for which relief may be granted. Rule 12(b)(6), N.C. Rules Civ. P. Defendants denied that Carl Johnson was a lessor; that Sharon Luggage Inc. is a lessee or tenant under the lease; that Robert F. Steiger is a guarantor of the lease; and that he executed a written guaranty. Defendants averred that Robert F. Steiger only executed a Guaranty of Lease in favor of Pamona Associates, a general partnership.

Plaintiffs made a motion to amend their complaint to reflect the alleged current debt owed to them by defendants. The trial court granted this motion. On 9 July 1984 this action was tried before a jury. At the close of plaintiffs' evidence defendants moved the court for directed verdicts pursuant to Rule 50, N.C. Rules Civ. P. The court allowed defendant, Sharon Luggage Inc.'s motion for directed verdict. The court denied defendants' motions for directed verdict. At the close of all the evidence, cross-motions for directed verdict were made by plaintiffs and defendants Sharon Luggage Ltd. and Robert Steiger. The court denied the cross-motions for directed verdict.

The court submitted two issues to the jury which were answered as follows:

1. What amount is owed by Sharon Luggage, Ltd. of Greensboro, Inc., d/b/a Carolina Luggage Outlet to plaintiffs under the lease agreement:

(a) For base rent?

Answer: 0

(b) For utilities?

Answer: 0

(c) For operating expenses for the first year?

Answer: 0

(d) For operating expenses after the first lease year?

Answer: $1,792.36

(e) For advertising expenses?

Answer: $370.28

(f) For taxes?

Answer: $857.08

(g) For interest?

Answer: $573.75

(h) For re-leasing expenses?

Answer: $5,571.00

(i) For refurbishing expenses?

Answer: 0

(j) For attorneys' fees?

Answer: 0

2. Did Robert F. Steiger guarantee the obligations of Sharon Luggage under the lease?

Answer: Yes

Plaintiff made a motion pursuant to Rule 50, N.C. Rules Civ. P. to have the verdict set aside and to have judgment entered in accordance with their earlier motion for directed verdict on all issues except 1(h) and 2, or alternatively for a new trial on all issues except 1(h) and 2. On 26 July 1984 the court denied plaintiffs' motion as to issues 1(c), (e), (f), (g) and (j); entered judgment of $1,527.45 as to issue 1(a) notwithstanding the verdict; set aside the verdict of $1,792.36 returned on issue 1(d) and entered judgment notwithstanding the verdict in the amount of $4,146.75 as to 1(d); set aside the verdict as to issues 1(b) and (i) but entered a directed verdict as to liability and ordered a new trial as to damages on issues 1(b) and (i).

On 6 August 1984, plaintiffs filed a notice of appeal and defendants, pursuant to Rule 59, N.C. Rules Civ. P., filed a motion to amend judgment. Defendants did not file a cross-notice of appeal. Defendants' motion was calendared for hearing for 24 September 1984. When the motion came on to be heard 24 September 1984, defendants elected not to proceed, although plaintiffs were present and prepared to proceed. On or about 4 October 1984 defendants filed written notice of appeal from the court's judgment entered 26 July 1984. On 9 October 1984 defendants presented to Judge Ross a proposed order that purported to dismiss their motion to amend the judgment. Judge Ross refused to sign this proposed order. Contemporaneously with the proposed order of dismissal, defendants also presented to Judge Ross a proposed appeal entry which recites that "the appeal entry is signed after denial of defendants' motion to amend judgment." Pursuant to Rule 59, N.C. Rules Civ. P., Judge Ross also refused to sign the proposed appeal entry.

On 10 October 1984 plaintiffs filed a motion to dismiss their notice of appeal, and to dismiss defendants' attempted appeal. The court held a hearing on plaintiffs' motion and on 30 October 1984 Judge Ross entered an order dismissing defendants' appeal. From this order entered 30 October 1984 defendants appeal.

Smith, Moore, Smith, Schell & Hunter, by Alan W. Duncan, for plaintiff appellees.

John F. Comer, for defendant appellants.

JOHNSON, Judge.

Defendants' only Assignment of Error is that the trial court erred by ruling that their notice of appeal and appeal entry from the 26 July 1984 judgment was untimely and should be dismissed. With respect to this Assignment of Error defendants have six (6) exceptions to the trial court's order. Defendants' principal exception is with the following finding by the court:

> (4) This motion came on for hearing before the undersigned Judge presiding at the 24 September 1984 civil session of the Superior Court of Guilford County. At the time of the calendar call on this motion, counsel for *defendants stated in open court to the undersigned Judge presiding that he was with-*

> *drawing the Motion to Amend Judgment, and would instead pursue this case further by way of appeal.* Counsel for defendants requested of the Court that the case be removed from the calendar in light of his withdrawal of the pending motion. Counsel for plaintiffs was present and stated to the Court that he was prepared to proceed with the hearing on defendants' pending motion at the time this withdrawal of the motion to amend judgment was made by counsel for defendants.

(Emphasis ours.) Defendants, in their brief, present a different version of the 24 September 1984 calendar call of their motion to amend judgment.

> At the time of the calendar call on this motion in open court, counsel for defendants stated to the Court that he was unable to provide the Court new evidence and would allow the Court to rule that the motion be disallowed. Counsel for defendants specifically stated to the Court that he would prepare an Order to that effect and present it to the Court and would pursue this case further by way of appeal.

The discrepancy between the trial judge's finding and defendants' version of the procedural posture of the case differ with respect to: (1) whether the court ruled on defendants' motion or whether defendants withdrew it and (2) whether defendants gave an oral notice of appeal while his motion was still pending. The procedural requirements to appeal from a judgment or order of Superior Court is set forth in the North Carolina Rules of Appellate Procedure.

> [G]iving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for a judgment notwithstanding the verdict with or without a motion for a new trial. . . .

Rule 3(a)(1), N.C. Rules App. P. On 26 July 1984 when the jury returned its verdict defendants did not give an oral cross-notice of appeal. On 6 August 1984, ten days after judgment was filed, defendant filed a Rule 59 motion to amend judgment. This motion by defendants tolled the time for filing and serving a cross-notice

of appeal until entry of an order on their motion. Rule 3(c) N.C. Rules App. P.

> If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding *must be taken within 10 days after its entry.* The running of the time for filing and serving a notice of appeal in a civil action or special proceeding *is tolled as to all parties by a timely motion* filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and *is to be computed from the entry of an order upon* any of the following motions: . . . (iii) *a motion under Rule 59 to alter or amend judgment.* . . .

Rule 3(c), N.C. Rules App. P. (emphasis ours). If finding number four (4) by the court that *defendants withdrew* their Rule 59 motion is without error then the ten (10) day time limit to give notice of appeal under Rule 3(c) would not be tolled because there was never a judicial determination on defendants' motion. The key term of art used in Rule 3(c) is "entry." The drafting committee's commentary to Rule 3(c) provides useful guidance in construing the meaning of Rule 3(c).

> 'Entry' is a word of art with a precise meaning now dictated by Rule 58 of the Rules of Civil Procedure. However satisfactory the procedure under Civil Rule 58 generally, its clear specification of the act which accomplishes 'entry' of a judgment of any kind, *coupled with its requirement that this be made a matter of record,* provides counsel with sure means of determining for purposes of appeal that judgment has been entered and the time of its entry.

Commentary Subdivision (c), N.C. Rules App. P. (emphasis ours).

The technical aspects of Rule 58, N.C. Rules Civ. P. indicate the exact requirements which have to be fulfilled in order to have a judgment entered.

> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. . . .

The Record on Appeal in the case *sub judice* is devoid of any ruling whatsoever by the trial court with respect to defendants' 6 August 1984 motion to amend judgment. The purpose of the requirements for such notations required by Rule 58, N.C. Rules Civ. P., is to provide a basis for making the time of entry of judgment easily identifiable and to give fair notice to all the parties of the entry of judgment. *See Barringer & Gaither, Inc. v. Whittenton*, 22 N.C. App. 316, 206 S.E. 2d 301 (1974). Plaintiff was present at the scheduled time for a hearing on defendants' motion and was not apprised of any ruling by the court on defendants' motion. To the contrary, plaintiffs assert and the court's order clearly recites that defendants withdrew their motion. The withdrawal of defendants' motion required no action by the court. Withdrawal of their motion does not entitle defendants to ten (10) days from their withdrawal to file notice of appeal from the 26 July 1984 judgment. To hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent Rule 58, N.C. Rules Civ. P. to wit: to give all interested parties a definite fixed time of a *judicial determination* they can point to as the time of entry of judgment.

When defendants withdrew their motion defendants indicated that defendants would instead pursue the matter on appeal. At oral argument defendants for the first time urged this court to consider the colloquy with the court during the 24 September 1984 calendar call as an oral notice of appeal, while their motion was still pending. This we decline to do.

We note that in the conclusion to defendants' brief it is stated that "[t]he Notice of Appeal of defendant-appellants filed on October 4, 1984, was filed and served within ten (10) days of the hearing before the Honorable Thomas W. Ross, Judge Presiding which was held on September 24, 1984." If defendants as they allege gave oral notice of appeal at the 24 September 1984 calendar call on their motion then there would have been no need for defendants to subsequently file a cross-notice of appeal on 4 October 1984. *See* Rule 3(a)(1), N.C. Rules App. P. We find that the cross-notice of appeal filed by defendants on 4 October 1984 supports the trial court's finding that it was *not* defendants' intention to give notice of appeal at the 24 September 1984 calendar call on their Rule 59 motion. Moreover, we find that defendants admit in the conclusion to their brief that a cross-notice of

appeal was not filed until 4 October 1984, which was two months after the judgment was entered on 26 July 1984. This is beyond the 10 day limit of Rule 3(c), N.C. Rules App. P., because defendants' motion was not pending 4 October 1984 when they filed their purported cross-notice of appeal. Defendants' remaining exceptions, which are noted in the Record on Appeal, pertain to the court's refusal to sign the purported notice of appeal and proposed order dismissing their "pending" motion. The Honorable Judge Ross' refusal to place his signature on the documents submitted by defendants was consistent with his findings which clearly show defendants withdrew their motion and did not timely file a cross-notice of appeal. Failure to give timely notice of appeal in compliance with G.S. 1-279 and Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed. *See Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E. 2d 98 (1983). The trial court acted correctly in dismissing defendants' attempted appeal.

Affirmed.

Judge WEBB concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I believe that defendants' remarks at the 24 September 1984 calendar call constituted an oral notice of appeal.

STATE OF NORTH CAROLINA v. ST. LUKE GREGORY, JR.

No. 851SC760

(Filed 31 December 1985)

1. Criminal Law § 73.5; Rape § 19— physician's testimony—statements made for medical diagnosis or treatment—exception to hearsay rule

A physician's testimony, including statements identifying defendant as the perpetrator of the sexual offenses charged, fell within the statutory exception to the hearsay rule created for statements made for purposes of medical diagnosis or treatment, since the 3½ year old victim was incompetent to

testify herself, but her statements to the physician made for the purpose of diagnosis and treatment were inherently trustworthy and were supported by corroborating physiological evidence discovered by the physician during his examination. N.C.G.S. 8C-1, Rule 803(4).

2. **Criminal Law § 73.5; Rape § 19— victim of sexual abuse—statements to grandmother for purpose of medical diagnosis—admissibility of grandmother's statements**

The trial court did not err in allowing the grandmother of a sexually abused 3½ year old victim to testify concerning statements made by the victim, since the evidence was admissible as statements for the purposes of medical diagnosis and treatment under G.S. 8C-1, Rule 803(4); moreover, even if the court erred in allowing the victim's grandmother to testify to a statement made by the victim three months prior to the incident in question, such error was not prejudicial in light of the other similar evidence properly admitted against defendant.

3. **Rape and Allied Offenses § 19— taking indecent liberties with child—gonorrhea—test results admissible**

In a prosecution of defendant for sexual offenses committed against his 3½ year old daughter, any error in admitting two year old gonorrhea test results which indicated that defendant and the victim had gonorrhea at the same time was not prejudicial.

4. **Incest § 1— insufficiency of evidence**

The trial court erred in failing to grant defendant's motion to dismiss an incest charge against him where there was no evidence of carnal intercourse.

5. **Rape and Allied Offenses §§ 5, 19— attempted rape—taking indecent liberties with child—sufficiency of evidence**

Evidence was sufficient to support a conviction of defendant for taking indecent liberties and attempted first degree rape where it consisted of statements related by defendant's 3½ year old daughter to a doctor and her grandmother about defendant's treatment of her, and of evidence that the doctor's examination fully supported the child's story.

APPEAL by defendant from *Small, Judge*. Judgments entered 25 April 1985 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 20 November 1985.

Defendant was charged in a proper bill of indictment with rape, sex offense, incest, taking indecent liberties with a child, and commission of a lewd and lascivious act. Defendant was found guilty of attempted first degree rape, incest and taking indecent liberties with his 3½ year old daughter. From judgments sentencing defendant to two consecutive 10 year prison terms, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Cathy J. Rosenthal, for the State.

John W. Halstead, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

At trial the State introduced the following evidence:

1. The victim's grandmother testified that on the morning of 7 September 1984, she discovered a thick, yellowish-white liquid on the victim's panties. After the grandmother discovered the liquid, and left a telephone message for Mrs. Gregory, the victim's mother, the victim said "[m]y daddy put it in my butt." The victim pointed to her crotch as she made her statement. The grandmother also testified that she found the same liquid on the victim's panties two years prior to 7 September 1984, and that the victim said "Grandmama, my daddy pooted in my butt" on one prior occasion.

2. Dr. Phillip David Greene testified that he examined the victim on 7 September 1984. The victim told him that her daddy, Mr. Gregory, unzipped his pants, had her spread her legs, told her he wanted to get close to her and then hurt her between her legs. Dr. Greene also testified that he examined the victim's vaginal area and found an infection. He also found inflammation "caused by some degree of irritation or manipulation beyond what you would normally expect to see in a child from routine or normal causes, and that would include simply the infection itself." Dr. Greene stated that "the examination fully supported the story as it was related to me by the child."

3. The State also introduced Gonorrhea culture results from September 1982 indicating that the victim and the defendant, Mr. Gregory, had Gonorrhea but Mrs. Gregory did not.

[1] Defendant asserts that the hearsay evidence rule and the right of criminal defendants to confront the witnesses against them, guaranteed by the Sixth Amendment to the United States Constitution and Article I of the North Carolina Constitution, prohibit Dr. Greene from testifying to what the victim said during the medical examination. We cannot agree.

Unless hearsay testimony is made admissible by statute, it is inadmissible. G.S. 8C-1, Rule 802. Dr. Greene's testimony, including statements identifying Mr. Gregory as the perpetrator of the sexual offenses, falls within the statutory exception to the hearsay rule created for statements made for purposes of medical diagnosis or treatment. G.S. 8C-1, Rule 803(4); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). Dr. Greene not only needed to know who the perpetrator was in order to plan for the psychological treatment of the victim, but also to comply with the North Carolina child abuse reporting and treatment statutes. G.S. 7A-543; G.S. 7A-549.

A prosecutor is prohibited by the Sixth Amendment to the United States Constitution and Article I Section 23 of the North Carolina Constitution from introducing any hearsay evidence in a criminal trial unless two requirements are met. The prosecution must show both the necessity for using the hearsay testimony and the inherent trustworthiness of the original declaration. *State v. Smith*, 312 N.C. 361, 323 S.E. 2d 316 (1984); *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980).

This two part confrontation clause test is not all form and no substance. Merely classifying a statement as a hearsay exception does not automatically satisfy the requirements of Article I Section 23 or the Sixth Amendment. *State v. Porter*, 303 N.C. 680, 697, 281 S.E. 2d 377, 388 (1981). The commentary to G.S. 8C-1, Rule 803 emphasizes this fact by noting that "[t]he exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration." Thus, the confrontation clause test must be applied on a case by case basis.

In the present case, the trial court held the required competency hearing and found that the victim failed to meet the competency requirements set forth in G.S. 8C-1, Rule 601(b). *See State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985). The unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements adequately demonstrate the necessity prong of the two prong confrontation clause test.

The second prong of the confrontation clause test is also met. A person, even a young child, making statements to a physician for the purpose of medical diagnosis and treatment has a strong motivation to be truthful. *See State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). This inherent indicia of trustworthiness is further supported by corroborating physiological evidence discovered by Dr. Greene during his examination. It is also clear from voir dire that the victim, although incompetent to testify, could identify her father and distinguish him from other adult males. We therefore find no error in the trial court's ruling admitting Dr. Greene's testimony.

[2] Defendant next asserts that the hearsay evidence rule and the constitutional right of criminal defendants to confront the witnesses against them also prohibit the victim's grandmother from testifying to the victim's inculpating statements. We disagree.

In *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985), our Supreme Court held that a statement made by a four year old girl to her grandmother describing a sex offense, identifying the perpetrator and complaining of pain was admissible as a statement for the purposes of medical diagnosis and treatment under G.S. 8C-1, Rule 803(4). As a direct result of the statements made in *Smith*, the victim was taken to a hospital. In the present case, the 3½ year old victim was discovered with panties full of pus. The victim complained that "my daddy put it in my butt." As a direct result of these events, the victim was taken to a hospital. We find no significant distinction between the circumstances surrounding the hearsay statement in *Smith* and the hearsay statement in question. We therefore hold that the trial court did not err in ruling that the victim's statements to her grandmother fit into an exception to the hearsay rule. The fact that the trial court based its ruling on G.S. 8C-1, Rule 803(2) rather than G.S. 8C-1, Rule 803(4) is irrelevant. See *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971).

The trial court also allowed the victim's grandmother to testify to a statement made by the victim three months prior to the incident in question. The trial court ruled that the victim's statement "my daddy pooted in my butt" was an excited utterance admissible under G.S. 8C-1, Rule 803(2). We need not decide whether

this statement was an excited utterance or a statement for the purpose of medical diagnosis or treatment because, in the light of all the circumstances of this case, the admission of the statement is at worst non-prejudicial error. Unless the error infringes upon defendant's constitutional rights, the defendant has the burden of showing that there was a reasonable possibility that the jury would have reached a different result if the trial judge had not committed the error. G.S. 15A-1443(a). In light of the other similar evidence properly admitted against defendant, we cannot find that defendant has met his burden. *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984).

[3] Defendant also asserts that the trial court erred in admitting two year old Gonorrhea test results indicating that he and the victim had Gonorrhea at the same time. He bases his objection on the relevance of the test results. Rule 404(b) of the North Carolina evidence statute addresses this issue:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

G.S. 8C-1, Rule 404(b).

In *State v. Williams*, 308 N.C. 357, 302 S.E. 2d 438 (1983), our Supreme Court held that evidence showing that the defendant was peeping in windows near the scene of a crime three days after the crime was committed was relevant and admissible evidence of identity in a burglary case. In light of *Williams* and Rule 404(b), the test results may be relevant. However, assuming arguendo that the results are not relevant, we hold that introduction of this evidence is also non-prejudicial error.

Defendant also challenges the sufficiency of the evidence by assigning error to the trial court's ruling denying defendant's motions to dismiss all charges. We address the trial court's ruling seriatim.

[4] First, there is insufficient admissible evidence from which any reasonable jury could conclude, beyond a reasonable doubt, that defendant committed incest. Incest requires carnal inter-

course. G.S. 14-178. There is no evidence of carnal intercourse in the record before us. In fact, the physical evidence discovered by Dr. Greene while examining the victim is to the contrary. Therefore the trial court erred in failing to grant defendant's motion to dismiss the incest charge.

[5] Second, there is sufficient evidence in the record to support a conviction for taking indecent liberties. The properly admitted testimony of Dr. Greene is in itself sufficient to support a conviction for taking indecent liberties. *State v. Vehaun*, 34 N.C. App. 700, 239 S.E. 2d 705 (1977), *disc. rev. denied*, 294 N.C. 445, 241 S.E. 2d 846 (1978).

Third, there is sufficient admissible evidence from which a reasonable jury could conclude, beyond a reasonable doubt, that defendant committed attempted first degree rape. In order to prove attempted first degree rape under the circumstances of this case, the State must show that the victim was twelve years old or less, that the defendant was at least twelve years old and at least four years older than the victim, that the defendant had the intent to engage in vaginal intercourse with the victim, and that the defendant committed an act that goes beyond mere preparation but falls short of actual commission of intercourse. G.S. 14-27.6; *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982). All the elements except for intent are shown by direct evidence introduced at trial. We hold that the State's evidence raises sufficient circumstantial inferences to support the necessary finding of intent to commit rape. *State v. Robinson*, 310 N.C. 530, 313 S.E. 2d 571 (1984).

In short, the judgment on the incest charge is reversed. We find no prejudicial error in the taking indecent liberties with a child or attempted first degree rape convictions. Because the trial judge aggregated the incest and the taking indecent liberties charges at sentencing, the taking indecent liberties charge is remanded for resentencing.

Reversed in part, no prejudicial error in part and remanded for resentencing.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. LEE OTIS BOYKIN

No. 8514SC118

(Filed 31 December 1985)

1. **Criminal Law § 98.3— defendant in handcuffs—viewing by juror—no prejudice**

Evidence was sufficient to support the trial judge's finding of fact on a motion for mistrial that only one juror saw defendant being moved from the courtroom to the jail in handcuffs where the trial judge polled the jurors as to what they had seen; after questioning each juror, the trial judge afforded counsel for both parties the opportunity to advise the judge if there was any other question they wanted the judge to ask; defense counsel made no request which was not satisfied; and the juror who reported seeing defendant in handcuffs was excused.

2. **Larceny § 7— sufficiency of evidence**

Evidence in a larceny prosecution was sufficient to be submitted to the jury where it tended to show that defendant was unknown to the victims and was never given permission to be about their house; a radio which bore defendant's latent fingerprint had been removed from the victim's residence and was discovered beside a recently disturbed path leading from the house to the place where defendant's car had been observed parked on the side of the highway; the stolen items were found about 30 feet into the woods from the point where the car had been located; a neighbor saw defendant pull into the victims' driveway, back out and park beside the road, and go into the woods and down a path toward the victims' residence on the day of the break-in; and another witness testified that defendant and a companion ran out of the woods, that they were perspiring heavily, that the driver of the car stated he was in the woods to go to the bathroom, and that the car left and did not slow down at a nearby stoplight.

3. **Larceny § 4— felony larceny—larceny of firearms—one taking**

The trial court erred in failing to dismiss three charges of larceny of a firearm where defendant was properly charged with one count of felonious larceny, and all of the property stolen, including the firearms, was allegedly taken at the same time in one criminal incident. N.C.G.S. 14-72(b)(4).

APPEAL by defendant from *Brannon, Judge*. Judgment entered 20 April 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 19 September 1985.

Defendant was convicted and judgment was entered on each of the following charges contained in separate bills of indictment: (i) larceny of a Sears 12 gauge semiautomatic shotgun, serial number 26042, a firearm, (ii) larceny of an H&R 20 gauge single-shot shotgun, serial number AY516813, a firearm, (iii) larceny of an H&R 12 gauge single-shot shotgun, serial number AV420023, a

firearm, and (iv) larceny of goods including radios, stereo, speakers and other items having a value of $1,650.00. Defendant was sentenced to consecutive terms of imprisonment totaling twenty-five (25) years. Defendant appealed.

Attorney General Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

Loflin and Loflin, by Thomas F. Loflin, III, and Dean A. Shangler, for defendant appellant.

PARKER, Judge.

Appellant's first and second assignments of error relate to the trial judge's refusal to excuse for cause a juror who saw appellant being brought to or from the courtroom in handcuffs and the trial judge's refusal to grant a mistrial when on another occasion during the trial, a similar incident occurred and at least two members of the jury allegedly saw appellant being moved in handcuffs. As to these two assignments, appellant concedes that *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976) controls. These assignments of error are, therefore, overruled.

[1] Appellant's third assignment of error challenges the trial judge's finding of fact on the motion for mistrial that only one juror saw the defendant being moved from the courtroom to the jail in handcuffs. Appellant contends that the evidence supported a finding that at least two jurors saw the defendant manacled and that the trial judge's finding was contrary to the evidence presented. The incident occurred when a bomb threat required evacuating the entire building. The trial judge instructed the jurors to leave the courtroom first; however, conditions in the hall were crowded as jurors from the other courtroom on that floor of the courthouse also filled the hall trying to get to the exits. At the same time, the sheriff had to remove three defendants in custody, including appellant, from the building. After hearing appellant's evidence on *voir dire*, which consisted of testimony by two employees of defense counsel's law firm, the trial judge made separate inquiry of each juror whether during the recess he or she had seen or heard anything or anyone involving the trial or the defendant. After questioning each juror, before that juror returned to the jury room, counsel for both parties were afforded the opportunity to advise the judge if there was any other ques-

tion they wanted the judge to ask. Nothing in the record indicates that defense counsel made a request which was not satisfied. One juror replied that she had observed appellant in the hall in handcuffs. The trial judge excused this juror. In making his findings of fact on the motion for mistrial, the judge found that only one juror had seen appellant in handcuffs in the hall outside the courtroom. The credibility and weight to be given witnesses' testimony on *voir dire* are for the trial judge and his findings based thereon will not be set aside if supported by competent evidence. In our view, the trial judge did not abuse his discretion in polling the jurors, and he was entitled to consider their answers in weighing the evidence and ruling on the motion for mistrial. This assignment of error is overruled.

[2] In his fourth assignment of error, defendant contends the court erred in overruling his motions to dismiss the charges because the evidence was insufficient as a matter of law to be submitted to the jury. We disagree.

On 3 January 1983, the home of Carl Roberts was broken into between 8:00 a.m. and noon. Many items removed from the Roberts' home were found in the woods near the house. A latent fingerprint was lifted by Officer David Frey of the Durham Police Department. Officer Frey, along with Richard Cirvello of the State Bureau of Investigation, expressed their opinions at trial that the fingerprint lifted from the radio was made by the right index finger of defendant. Although defendant did not testify, he offered the testimony of Claude Patterson, a police officer with about twenty (20) years experience as a latent fingerprint examiner who opined that there were many inconsistencies and discrepancies between the latent fingerprint lifted from the radio and the inked fingerprint card impression of defendant's right index finger.

Our Supreme Court, in *State v. Miller*, 289 N.C. 1, 4, 220 S.E. 2d 572, 574 (1975), addressed a similar argument as follows:

> These cases establish the rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is suffi-

cient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.

What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury. (Citation omitted.)

The evidence produced at trial showed that defendant was unknown to the Roberts and was never given permission to be about their house. The radio which bore defendant's latent fingerprint had been removed from the residence and was discovered beside a recently disturbed path leading from the house to the place where defendant's car had been observed parked on the side of the highway. The stolen items were found about thirty (30) feet into the woods from the point where the car had been located. A neighbor saw defendant pull into the Roberts' driveway, back out and park beside the road, go into the woods and down a path towards the Roberts' residence around 11:00 a.m. on 3 January 1983. Another witness testified that defendant and a companion ran out of the woods, that they were perspiring heavily, that the driver of the car stated he was in the woods to go to the bathroom, and that the car left and did not slow down at a nearby stoplight. We hold that this evidence was substantial evidence and was sufficient to overrule defendant's motion to dismiss and to support a jury finding that defendant was present when the crimes were committed and participated in their commission.

[3] In his fifth assignment of error, defendant contends the court erred in denying his motions to merge the larceny of a firearm charges into a single charge or to dismiss the larceny of a firearm charges altogether because all of the property stolen, including the firearms, was allegedly taken at the same time in one criminal incident. Defendant contends that to convict him separately of these additional counts of firearm larceny, in addition to the one count of felony larceny, subjected him to double jeopardy in violation of the State and Federal constitutions. Because we conclude that the Legislature by enacting G.S. 14-72(b)(4) did not intend, as the State asserts, to create a separate unit of prosecution for each firearm stolen nor to allow multiple punishment for the theft

of multiple firearms, we need not address the constitutional question presented by defendant.

While this particular issue is one of first impression in this jurisdiction, prior case law construing G.S. 14-72 supports our resolution of this question. In North Carolina, larceny remains a common law crime and is defined as " 'the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use.' " *State v. Revelle*, 301 N.C. 153, 163, 270 S.E. 2d 476, 482 (1980), quoting from *State v. McCrary*, 263 N.C. 490, 492, 139 S.E. 2d 739, 740 (1965). Our Supreme Court has held that "G.S. 14-72 relates solely to punishment for the separate crime of larceny," *State v. Brown*, 266 N.C. 55, 63, 145 S.E. 2d 297, 303 (1965), and this Court has concluded that "[t]he statutory provision upgrading misdemeanor larceny to felony larceny does not change the nature of the crime; the elements of proof remain the same." *State v. Smith*, 66 N.C. App. 570, 576, 312 S.E. 2d 222, 226, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 708 (1984).

General Statute 14-72 provides that "[l]arceny of goods of the value of more than four hundred dollars ($400.00) is a Class H felony." Certain other types of larcenies are felonies regardless of the value of the property stolen depending upon the type property or the manner in which it was stolen. In particular, G.S. 14-72(b)(4) states that the larceny "[o]f any firearm" is a felony. This Court has held that the "[l]arceny of a firearm is a felony regardless of the value of the weapon stolen and without regard to whether the larceny was accomplished by means of a felonious breaking or entering." *State v. Robinson*, 51 N.C. App. 567, 568, 277 S.E. 2d 79, 80 (1981).

Clearly, the plain language of the statute and the interpretation placed thereon by our appellate courts, manifests that the purpose of G.S. 14-72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. Nothing in the statutory language suggests that to charge a person with a separate offense for each firearm stolen in a single criminal incident was intended. In construing a criminal

statute, the presumption is against multiple punishments in the absence of a contrary legislative intent. *See Hunter v. Missouri*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983) and *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed. 2d 275 (1981). The principle of statutory construction referred to as the "rule of lenity" forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention. *See Albernaz, supra.*

As the Supreme Court noted in *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), a case in which defendant argued that the transportation of two women in one car was a single offense under the Mann Act, the Court held:

> Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?
>
> . . .
>
> When Congress leaves to the Judiciary the tasks of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . .

In our view, the Legislature has not clearly stated an intention to impose multiple punishments where three firearms, in addition to other property having a value greater than four hundred dollars ($400.00), were allegedly stolen in a single transaction. Therefore, we hold that the court erred in not dismissing the three larceny of firearms charges, where defendant was properly charged with one count of felonious larceny. Accordingly, the case is remanded for resentencing.

In his seventh assignment of error, appellant asserts that the trial court erred in not giving a requested jury instruction. Since appellant concedes that this issue was resolved by the Supreme Court in *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984) and this Court is bound by that decision, the assignment of error is overruled.

Remanded for resentencing.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. DWAYNE EDDIE HOLLINGSWORTH

No. 8512SC653

(Filed 31 December 1985)

Larceny § 7; Assault and Battery § 14.3; Robbery § 4.7— identity of perpetrator— insufficiency of evidence

In a prosecution of defendant for robbery, larceny, and assault with a deadly weapon with intent to kill inflicting serious injury, evidence was insufficient to be submitted to the jury where the only evidence tending to identify defendant as the perpetrator consisted of six out-of-court statements allegedly made by defendant's mother, the victim, none of which were admissible as exceptions to the hearsay rule, and defendant's mother testified at trial that she did not remember being hurt, that defendant had her permission to use the allegedly stolen items, and that defendant could have taken the items from her forever if he had wanted to. N.C.G.S. 8C-1, Rules 803(4), 803(5), 803(24), and 804(b)(5).

Judge PHILLIPS dissenting.

APPEAL by defendant from *Johnson (E. Lynn), Judge.* Judgment entered 30 January 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 December 1985.

Defendant was charged in a proper bill of indictment with the robbery with a dangerous weapon and the assault with a deadly weapon with intent to kill inflicting serious injury against his mother. He was also charged with felonious larceny of an automobile and felonious larceny of a firearm. Defendant was found guilty of assault with a deadly weapon inflicting serious injury and the robbery and larceny charges. The charges were consolidated for judgment. From a judgment imposing a prison sentence of twenty years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Assistant Appellate Defender Louis D. Bilionis, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant assigns as error the trial court's denial of his motion to dismiss for insufficiency of the evidence as to each of the charges. He contends that the only substantive evidence submitted at trial which tends to identify defendant as the perpetrator consists of six out-of-court statements allegedly made by his mother, none of which are admissible as exceptions to the hearsay rule. For the reasons set out below, we agree with defendant and reverse.

At trial, the State called as its first witness defendant's mother, Helen Lyde, who testified that she had taken Valium and was intoxicated on the evening of 26 April 1983. When asked about the head injuries she sustained that night, she testified, "I was drinking [that] evening. I don't remember going to bed. The only thing I remember was the next morning when I called my son, Dwayne Eddie Hollingsworth, to ask him what was wrong with me. And he got me to my chair and tried to take me to the hospital and I wouldn't let him." She explained that she wouldn't let him take her to the hospital because "I really didn't know I was hurt all that bad because I didn't remember getting hurt." She also testified that her son had her permission to use the allegedly stolen items "if he had wanted to" and further, that "if he had wanted to" that he could have taken them from her forever.

The remaining evidence submitted by the State which tended to identify defendant as the assailant consisted of the testimony of the investigating officer, the doctor who treated Ms. Lyde while she was in the hospital, the sheriff of Cumberland County, and two of Ms. Lyde's acquaintances. Each of these witnesses, over defendant's objection, testified about out-of-court statements made by Ms. Lyde concerning the alleged assault and larceny.

After a voir dire examination of Ms. Lyde, two written statements made by her to the investigating officer, Detective Burns, on 2 May and 11 May 1983 were admitted into evidence as exhibits and read to the jury. Although the findings made after the voir dire examination do not clearly establish the basis for overruling defendant's objections to the admission of these statements, it appears that the trial court allowed the 11 May statement under Rule 803(24), and, finding that Ms. Lyde had testified

to a lack of memory about the subject matter of the 2 May statement, allowed its admission under Rule 804(b)(5) or Rule 803(24).

These residual hearsay exceptions allow the admission of hearsay statements not specifically covered by any of the other enumerated exceptions, if the statements have "equivalent circumstantial guarantees of trustworthiness" and the court determines that

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence.

G.S. 8C-1, Rules 804(b)(5) and Rule 803(24). In determining whether the statements have the necessary "guarantees of trustworthiness," evidence that the declarant later recanted the statement is relevant. *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). Additionally, the availability of the witness to testify at trial is a crucial consideration under either hearsay exception, because usually the live testimony of the declarant will be the more probative evidence on the point for which it is offered. *Id.; State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985).

In the present case, Ms. Lyde recanted at trial both statements made to Detective Burns, maintaining that she was intoxicated on 26 April 1983 and had never had any knowledge about how she was injured. In reference to the 2 May statement, which was taken while she was in the hospital, she testified that she was sleepy and on medication when she talked to Detective Burns. She further testified that she was coached by her sister and her two nieces to incriminate the defendant in her 11 May statement. Thus, neither of these statements has the guarantees of trustworthiness required to allow their admission under the residual hearsay exceptions. Additionally, since Ms. Lyde was available to testify and did testify at trial, these hearsay statements are not the most probative evidence on whether a crime was committed or the identity of the perpetrator.

A letter dated 11 July 1983, written by Ms. Lyde to the sheriff of Cumberland County, was also admitted into evidence and read to the jury. The letter identified defendant as the perpetrator of the assault, stated that he had stolen an automobile, a pistol, and other items from Ms. Lyde, and implicated defendant in other crimes. After voir dire testimony, the trial court admitted the letter as a "past recollection recorded" pursuant to Rule 803(5).

Rule 803(5), in pertinent part, provides for the admission of certain evidence as follows:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

G.S. 8C-1, Rule 803(5). In this case, Ms. Lyde testified that the information contained in the letter was "what my sister told me to write," and "[a]ll this whole letter is a lie. I lied and my sister lied." She further testified that she did not remember and never had remembered anything that happened on the night of 26 April 1983. Since she testified that when she wrote the letter, it did not correctly reflect her knowledge of the events and she did not know facts that she had forgotten by the time of the trial, the trial court should not have admitted the letter into evidence as a recorded recollection.

The trial court also allowed Ms. Lyde's doctor, Dr. Menno Pennink, to read to the jury a notation from the victim's medical record. Dr. Pennink testified that under her medical history, which was typed by his assistant the day after her admission to the hospital, he added the following handwritten note: "[she] [w]as beaten, hit in head with hammer by her son, who was on dope." He further testified that the statement was "probably" made by Ms. Lyde, "probably" when he saw her on a follow-up visit on 8 June 1983.

The only conceivable basis for the admission of this statement is Rule 803(4), which allows the admission of hearsay statements made "for purposes of medical diagnosis or treatment and

describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." G.S. 8C-1, Rule 803(4). The commentary to this rule recognizes that such statements are usually trustworthy because of the patient's motivation to be truthful, but the statements as to fault would not ordinarily qualify under this exception.

In the present case, the evidence establishes that any statement by Ms. Lyde to her doctor identifying her assailant was made six weeks after her initial admission to the hospital for treatment. Thus, any statement made by the victim to the doctor which identified the perpetrator could not have been pertinent to the treatment of her injuries. The statement was not, therefore, admissible pursuant to Rule 803(4).

The trial court also allowed Ms. Lyde's neighbor, Belton Wayne Jones, to testify that she had told him that her son had hurt her and she was afraid of him. This statement was hearsay and was not covered by any of the hearsay exceptions provided by Rule 803 or Rule 804. Thus, the trial court erred in admitting this statement. G.S. 8C-1, Rule 802.

Finally, the trial court permitted Ms. Lyde's friend, Lester Caulder, to testify that she had called him at one o'clock on the afternoon of 27 April 1983. He testified, over defendant's objection, as follows: "Well, I couldn't—I wasn't sure it was her. And I said, 'Is that you, Helen?' And she said, 'Yeah.' Says, 'Would you come over here and carry me to the emergency room?' Because Eddie had hit her on the head with the hammer." When again asked to relate the conversation, he testified, "[s]he just asked me would I come and carry her to the emergency room. That was as much as she said." Thus, Mr. Caulder's testimony establishes that Ms. Lyde requested that he take her to the emergency room, but did not identify her assailant in their telephone conversation. Since the record is devoid of any evidence that he had personal knowledge of the identity of her assailant, he was incompetent to testify on this matter and defendant's objection should have been sustained. G.S. 8C-1, Rule 602.

Each of these out-of-court declarations was inadmissible hearsay evidence. G.S. 8C-1, Rule 802. Although some of these declara-

tions may have been prior inconsistent statements, such statements are not admissible as substantive evidence, but may be introduced only for the jury's consideration in determining the witness's credibility. *State v. Erby*, 56 N.C. App. 358, 289 S.E. 2d 86 (1982). Therefore, the record before us is devoid of any competent substantive evidence tending to show that defendant committed the crimes charged.

Reversed.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Under the rules of evidence now in effect I believe all of Ms. Lyde's out-of-court statements were admissible. For one thing, I interpret Lester Caulder's testimony as being that Ms. Lyde, in getting him to take her to the hospital, told him that defendant had hit her on the head with a hammer. For another, the statement to Dr. Pennink was related to medical treatment, I think, since it corrected the statement in the history which indicated that her head injury was such that she had no memory of the events that preceded it. Pre-injury memory or its lack can be a factor in treating a brain injury, so I understand. And her letter and written statements were properly received, I think, as past recorded recollections.

FIRST CAROLINA INVESTORS v. MARK G. LYNCH, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 8526SC771

(Filed 31 December 1985)

1. Taxation § 26.1— business trust—treatment as corporation—assessment of franchise tax proper

There was no merit to plaintiff's contention that it did not meet the statutory requirements for assessment of the N. C. franchise tax because it was a business trust and not a corporation within the definition of that term in

G.S. 105-114, since plaintiff met the three criteria of that statute by being an "other form of organization for pecuniary gain"; plaintiff's "shares of beneficial interest" were the functional equivalent of capital stock; and plaintiff's Declaration of Trust established for its trustees and shareholders limited liability for trust obligations, a privilege not possessed by individuals or partnerships.

2. Taxation §§ 2.3, 26.1— franchise tax—business trust not treated as limited partnership—no violation of uniformity requirement

There was no merit to plaintiff's argument that, because it was so similar to a limited partnership, which was not subject to the franchise tax, assessment of the tax against plaintiff violated the uniformity requirement of Article V, § 2 of the N. C. Constitution, since plaintiff's Declaration of Trust specifically declared that plaintiff should not be deemed a partnership; plaintiff's trustees and shareholders enjoyed a significant privilege not enjoyed by limited or general partnerships; and the difference in classification therefore was not arbitrary or unreasonable.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 22 April 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 December 1985.

The plaintiff appeals from a judgment dismissing its complaint. The plaintiff is a business trust created by a Declaration of Trust on 18 January 1972 and organized under the laws of South Carolina. The plaintiff is doing business in North Carolina and maintains its principal place of business in Charlotte.

The plaintiff protested an assessment of the North Carolina franchise tax for the years 1976 through 1981 on grounds that it is not taxable as a corporation within the meaning of G.S. 105-114. After a hearing in which the Secretary of Revenue sustained the assessment, the plaintiff paid the tax and instituted this action to recover the amount paid. The trial court granted the defendant's motion to dismiss and the plaintiff appealed.

Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb & McDonnell, by James D. Monteith, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for defendant appellee.

WEBB, Judge.

[1] In its first assignment of error the plaintiff argues that it does not meet the statutory requirements for assessment of the

North Carolina franchise tax because it is not a corporation within the definition of that term in G.S. 105-114, which provides in pertinent part:

> Nature of taxes; definitions.
>
> . . . .
>
> The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:
>
> . . . .
>
> (2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State.
>
> . . . .
>
> The term "corporation" as used in this Article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint-stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by individuals or partnerships; and whether organized under, or without, statutory authority.
> . . .
>
> When the term "doing business" is used in this Article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations whether the form of existence be corporate, associate, joint-stock company or common-law trust.
>
> . . . .

G.S. 105-114 levies a franchise tax only upon organizations which are (1) corporations as defined within that section and (b) doing business within North Carolina. As the plaintiff does not dispute that it is doing business in North Carolina, the only issue to be decided is whether the trial court correctly determined that the plaintiff is a corporation within the meaning of G.S. 105-114.

Under the terms of G.S. 105-114, an organization is properly classified as a corporation for franchise tax purposes when it satisfies three criteria: (1) it is a corporation, association, joint-stock company or any other form of organization for pecuniary gain; (2) it has capital stock represented by shares; and (3) it has privileges not possessed by individuals or partnerships.

The first statutory criterion for classification as a corporation for franchise tax purposes is clearly met. Assuming without deciding that the plaintiff is not an "association" within the meaning of the statute, it is nonetheless an "other form of organization for pecuniary gain."

The second criterion, issuance of capital stock represented by shares, is also easily established. Although the term "capital stock" is most commonly used in connection with ordinary business corporations, this statute was expressly intended to apply to forms of business organizations other than ordinary corporations. Therefore, "capital stock" must be read to encompass ownership interests in all the different types of business organizations potentially subject to the franchise tax.

Article V of the plaintiff's Declaration of Trust states in part:

> Every Shareholder shall be entitled to receive a certificate, . . . specifying the number of Shares held by such Shareholder. . . . . [S]uch certificates shall be treated as negotiable and title thereto and to the Shares represented thereby shall be transferred by delivery thereof to the same extent in all respects as a stock certificate, and the shares represented thereby, of a South Carolina business corporation.

In connection with the issuance of its shares, the plaintiff filed with the Securities and Exchange Commission a Form 10, General Form for Registration of Securities, and reported its shares of beneficial interest as capital stock to be registered. Because the plaintiff is organized as a business trust rather than as an ordinary business corporation, its shares of capital stock are designated as "shares of beneficial interest." Despite that designation, the plaintiff's shares are the functional equivalent of capital stock.

The third criterion for classification as a corporation, possession of privileges not possessed by individuals or partnerships, is also established in the plaintiff's Declaration of Trust.

Article IV of the Declaration states in part:

> No Shareholder shall be subject to any personal liability whatsoever in tort, contract or otherwise to any other Person or Persons in connection with the Trust Property or the affairs of the Trust, and no Trustee, officer, employee or agent of the Trust shall be subject to any personal liability whatsoever in tort, contract or otherwise, to any Person or Persons in connection with the Trust Property or affairs of the Trust save only for his failure to act in good faith in the reasonable belief that his action was in the best interest of the Trust or for his willful misconduct. The Trust shall be solely liable for any and all debts, claims, demands, judgments, decrees, liabilities or obligations of any and every kind, against or with respect to the Trust or in connection with the Trust Property, or the affairs of the Trust, and resort shall be had solely to the Trust Property for payment or performance thereof.

Individuals may not limit their liability for personal obligations. Every partnership must contain at least one general partner who remains personally liable for the obligations of the partnership. Therefore, by establishing for its trustees and shareholders limited liability for trust obligations, the plaintiff obtained a privilege not possessed by individuals or partnerships.

Because the plaintiff meets all three criteria necessary for classification as a corporation under G.S. 105-114 it is properly taxable under that statute.

The plaintiff argues the statutes imposing income and intangible taxes use the word trust. It contends that the failure to use the word trust in the statute imposing a franchise tax shows the General Assembly did not intend to impose a franchise tax on business trusts. We believe the plain words of G.S. 105-114 impose this tax on the plaintiff.

[2] In its second assignment of error the plaintiff argues that G.S. 105-114 as applied to the plaintiff violates Article V, § 2 of the North Carolina Constitution. The plaintiff argues that because

it is so similar to a limited partnership, which is not subject to the franchise tax, assessment of the tax against the plaintiff violates the uniformity requirement of that section. We disagree.

Article V, § 2 provides in part:

> Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable . . . .

Although the uniformity requirement is literally confined to taxes on property, our Supreme Court has held that it extends to license, franchise and other taxes. *Lenoir Finance Co. v. Currie*, 254 N.C. 129, 118 S.E. 2d 543, *app. dismissed*, 368 U.S. 289, 7 L.Ed. 2d 336, 82 S.Ct. 375 (1961).

The uniformity rule of Article V, § 2 requires the courts, "when the validity of a tax statute is challenged on the ground of discrimination, to ascertain if in fact there is a difference in the classes taxed." *Lenoir Finance Co., supra*, at 133, 118 S.E. 2d at 546. "[T]he power to classify subjects of taxation carries with it the discretion to select them, and . . . a wide latitude is accorded taxing authorities . . . ." *Id.* A classification will be upheld if it is "reasonable and not arbitrary" and rests upon "some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced should be treated alike." *Southern Grain & Provision Co. v. Maxwell*, 199 N.C. 661, 663, 155 S.E. 557, 558 (1930).

The plaintiff's Declaration of Trust specifically declares that the plaintiff shall not be deemed a partnership. Furthermore, as demonstrated under plaintiff's first assignment of error, the plaintiff's trustees and shareholders enjoy a significant privilege not enjoyed by limited or general partnerships. Therefore, the difference in classification is not arbitrary or unreasonable. It has a fair and substantial relation to the purpose of the legislation, to exact a tax "for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State."

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

OLIN D. HAWKINS v. RICHARD S. WEBSTER AND BENNY M. CHURCH

No. 8521SC331

(Filed 31 December 1985)

1. **Perjury § 1— no civil action based on perjury**

The rule in N. C. is that a civil action in tort will not lie for perjury or subornation of perjury.

2. **Conspiracy § 1— conspiracy to give false testimony—no civil action**

A civil action may not be maintained for a conspiracy to give false testimony.

3. **Malicious Prosecution § 13— no prior action by defendants against plaintiff—insufficiency of evidence**

The trial court properly dismissed plaintiff's claim for malicious prosecution where there was no allegation that defendants ever initiated a prior action against plaintiff but plaintiff instead alleged that defendants procured or caused to be instituted against him third party indemnity actions filed by a bank, his former employer; plaintiff did not sufficiently allege special damages; and plaintiff, by his own admission, indicated that his prior convictions, rather than the bank's third party indemnity claims, were responsible for any loss of livelihood he may have suffered.

4. **Process § 19— filing of answer—no abuse of process**

Plaintiff's complaint was insufficient to state a claim for abuse of process where plaintiff alleged that the improper act of defendants was the filing of their answers which contained falsehoods and resulted in his former employer bringing a third party action against him, since the filing of an answer is not the type of improper act upon which a proper claim of abuse of process may be founded; furthermore, statements in pleadings filed in a judicial proceeding which are relevant to the subject matter are absolutely privileged.

APPEAL by plaintiff from *DeRamus, Judge*. Judgment entered 6 December 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 21 October 1985.

Wilson, DeGraw, Johnson & Miller, by Gordon A. Miller, for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Howard L. Williams and Jill R. Wilson for defendant appellee.

BECTON, Judge.

The question before us is whether the trial court properly dismissed plaintiff's claims under Rule 12(b)(6).

I

The background to the present lawsuit follows. In July 1981, plaintiff Olin Hawkins, past president of United Citizens Bank (hereafter "the Bank") was convicted in federal court of five counts of banking violations, three of which related to Hawkins' allowing defendants Richard Webster and Benny Church to sign notes made payable to a J. R. Richards when Hawkins knew that defendants were signing the notes. In January 1983, the Bank filed two civil lawsuits, in one of which both Webster and Church were named among the defendants, and in the other, Webster was named as defendant. These actions were for amounts allegedly due on notes executed by defendants. Defendants filed answers containing counterclaims stating that defendants had signed the notes at the request and instruction of Hawkins, the Bank's agent. The Bank asserted third-party complaints against Hawkins for indemnity on the counterclaims. In the first lawsuit, the claims of all parties were voluntarily dismissed with prejudice. In the second, Hawkins was dropped from the lawsuit by stipulation of the parties, and the trial resulted in a directed verdict against Webster.

In the present action, Hawkins sets forth sixteen causes of action based on malicious prosecution, abuse of process, emotional distress, fraud, outrageous and negligent conduct, unfair and deceptive acts, conspiracy, perjury and invasion of privacy resulting from the earlier criminal and civil proceedings. More particularly, each of the claims is essentially derived from allegations that the defendants knowingly gave false information to the FBI and IRS agents who conducted the investigation that resulted in criminal charges being filed against Hawkins; that defendants gave perjured testimony at Hawkins' criminal trial; and that defendants' answers to the Bank's civil complaints contained information that defendants knew to be false. For the reasons stated below, we hold the trial court properly granted the motion to dismiss, and we affirm.

II

The essential question on a Rule 12(b)(6) motion is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory. *Benton v. Construction Co.*, 28 N.C. App. 91, 220 S.E. 2d 417 (1975). In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). Rule 12(b)(6) generally precludes dismissal except in those instances in which the face of the complaint discloses some insurmountable bar to recovery. *Brown v. Brown*, 21 N.C. App. 435, 204 S.E. 2d 534 (1974). We apply these principles to each of the claims advanced by Hawkins in his complaint.

Perjury

[1] Hawkins alleges that he suffered damages as a result of his criminal conviction for various illegal banking activities "based on and obtained through the perjured testimony of Defendants Webster and Church." The rule in North Carolina is that "a civil action in tort will not lie for perjury or subornation of perjury." *Henry v. Deen*, 61 N.C. App. 189, 196, 300 S.E. 2d 707, 711 (1983), *rev'd on other grounds*, 310 N.C. 75, 310 S.E. 2d 326 (1984);[1] *Accord Gillikin v. Springle*, 254 N.C. 240, 118 S.E. 2d 611 (1961) (perjured testimony and subornation thereof are criminal offenses, but neither supports civil action for damages). As the law of this State does not recognize a civil cause of action based on perjury, this claim was properly dismissed.

Conspiracy

[2] In his claim based on civil conspiracy, Hawkins alleges that defendants conspired to engage in a series of unlawful bank transactions, conspired to give false information to the FBI and IRS, conspired to commit perjury at Hawkins' criminal trial, and conspired to place false information in their answers to the Bank's

1. The Supreme Court in *Henry v. Deen* stated that it did not need to consider the "continuing vitality of the rule forbidding civil actions for perjury," 310 N.C. at 89, 310 S.E. 2d at 335, as the facts in that case only created an issue of whether a cause of action was stated for civil conspiracy. In distinguishing cases enunciating the rule, the *Henry* Court reviewed the reasons underlying it, namely, (1) availability of criminal sanctions, (2) lack of precedent for such an action, (3) policy favoring final judgments, (4) possibility of multiplicity of suits, and (5) danger that witnesses might be intimidated from testifying. *Id.* at 88, 310 S.E. 2d at 335.

civil actions. A civil action may not be maintained for a conspiracy to give false testimony. *Henry v. Deen.* Furthermore, statements in pleadings filed in a judicial proceeding which are relevant to the subject matter are absolutely privileged. *Jones v. City of Greensboro*, 51 N.C. App. 571, 584, 277 S.E. 2d 562, 571 (1981); *Perry v. Perry*, 153 N.C. 265, 69 S.E. 130 (1910) (statements in affidavit from prior action absolutely privileged). Thus, there is no legal theory upon which Hawkins might prevail on his claim of civil conspiracy.

Invasion of Privacy, Intentional Infliction of Emotional Distress, Fraud, Negligent and Outrageous Conduct, Unfair and Deceptive Trade Practices

In the above claims, Hawkins has simply taken allegations of perjury and relabeled them as recognized causes of action. For example, Hawkins charges that lies and misrepresentations made by the defendants to federal agents and the federal courts caused him "severe emotional distress, disorientation and despair." Since the basis of the foregoing claims is civil perjury, a cause of action North Carolina has expressly declined to recognize, the entry of dismissal as to these claims was proper. Furthermore, in his brief, Hawkins has failed to present and discuss any questions pertaining to fraud, outrageous and negligent conduct, and unfair and deceptive trade practices, as required by Rule 28(a), N.C. Rules of Appellate Procedure. Thus, Hawkins' appeal on those claims is deemed abandoned.

Malicious Prosecution

[3] The elements of malicious prosecution, when the claim is based on a civil action, are:

(1) That the defendant initiated an earlier proceeding;

(2) That the defendant did so maliciously and without probable cause;

(3) That the earlier proceeding terminated in the plaintiff's favor;

(4) That there was some element of special damage resulting from the action, the gist thereof being substantial interference either with the plaintiff's person or property.

Stanback v. Stanback, 297 N.C. 181, 203, 254 S.E. 2d 611, 625 (1979).

In the instant case, there is no allegation that defendants Webster and Church ever initiated a prior action against Hawkins; rather, Hawkins alleges that defendants "procured or caused to be instituted against [him]" the third party indemnity actions filed by the Bank. This does not, in our estimation, satisfy the requirement that the defendant initiate a prior proceeding.

Furthermore, the insufficient allegations of special damages make this claim susceptible to dismissal. The only arguably colorable allegation of special damages is that as a result of the third-party indemnity action, Hawkins suffered "loss of livelihood and business." In support of his position that he has adequately alleged special damages, Hawkins relies on *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964), in which the Supreme Court stated that when a person initiates proceedings against another before an administrative board "which has the power to suspend or revoke that other's license to do business or practice his [or her] profession," *id.* at 352, 137 S.E. 2d at 145, that person may be held liable for the resulting damages in an action for malicious prosecution. This rule seems to be limited to situations in which the allegations disclose that the prior action caused a direct interference with the right to earn a livelihood. *Cf. Hurow v. Miller*, 45 N.C. App. 58, 262 S.E. 2d 287 (1980) (refusing to apply rule concerning loss of livelihood when prior action was challenge to plaintiff's right to vote). We find the rule of *Carver v. Lykes* has no application to the instant facts.

Finally, we note that in the introductory allegations in his complaint, Hawkins alleges that after he resigned from United Citizens Bank in 1979, he became employed by the Northwestern Bank, and that "[a]s a result of his conviction in 1981, he was dismissed from employment at Northwestern Bank." By his own admission, then, Hawkins indicates that his prior convictions, rather than the Bank's third party indemnity claims, were responsible for any loss of livelihood he may have suffered.

Abuse of Process

[4] "[A]buse of process is the misuse of legal process for an ulterior purpose," *Stanback* at 200, 254 S.E. 2d at 624, *quoting*

Fowle v. Fowle, 263 N.C. 724, 728, 140 S.E. 2d 398, 401 (1965). Abuse of process requires both an ulterior motive and a wilful act not proper in the regular prosecution of the proceedings. *Id.* at 201, 254 S.E. 2d at 624. An example of such an act is an offer made to discontinue a lawsuit in return for the payment of money. *Id.* Hawkins alleges that the improper act here was the filing of defendants' answers, which contained falsehoods and resulted in the Bank bringing a third-party action against him. The filing of an answer is not the type of improper act upon which a proper claim of abuse of process may be founded. Moreover, insofar as the answers are alleged to contain false statements, we reiterate that such statements enjoy absolute privilege.

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

THE ASHEVILLE SCHOOL v. D. V. WARD CONSTRUCTION, INC., AND BANKERS MORTGAGE CORPORATION D/B/A BAMOCOR, INC.

No. 8528SC557

(Filed 31 December 1985)

1. Limitation of Actions § 4.3— defective roof—plaintiff's knowledge—breach of contract action barred by statute of limitations

The trial court did not err in granting defendants' motions for judgment n.o.v. on the issue of breach of contract since plaintiff knew as early as sometime in 1977 that its roof was defective, even if it was not aware of the extent of the damage, but plaintiff did not file its complaint until 11 June 1981, and the action was therefore barred by the statute of limitations; moreover, defendants were not estopped from pleading the statute of limitations because one defendant repeatedly promised to repair the roof and assured plaintiff that everything was fine, since the assurances faded in the face of repeated leaks in the roof and plaintiff slept on its rights until the opportunity to bring suit had expired.

2. Contracts § 21.2— negligence in repairing roof—insufficiency of evidence

The trial court did not err in granting defendant's motion for directed verdict on the issue of negligent roof repairs where plaintiff presented evidence of damages resulting from the failure to complete its gym in accordance with the original plans and specifications but did not offer any evidence of damages

resulting from improper repairs to the roof after completion, nor was there evidence of the difference in the market value of the gym before and after the repairs or evidence of the cost of repairs to the roof.

3. Damages § 1— nominal damages—failure to submit issue—no prejudice

Failure to submit the issue of negligent repairs to the jury when only nominal damages are available is not prejudicial and reversible error, since nominal damages are a trivial sum awarded in recognition of a technical rather than a substantial injury.

APPEAL by plaintiff from *Lewis, Robert D., Judge.* Judgment entered 8 November 1984. Heard in the Court of Appeals 20 November 1985.

On 12 December 1973 plaintiff and Heritage, Inc. entered a contract under which Heritage was to construct a gymnasium for plaintiff. Plaintiff inspected the building and took possession on 9 January 1975. It then discovered that the roof leaked.

Plaintiff's director of athletics wrote a memo to Heritage regarding the leaks on 18 November 1975. On 8 January 1976 he placed the leaks on a "Gymnasium Warranty Items" list which he submitted to Heritage. Don Ward, who had been employed originally by Heritage to build the gym, performed repair work on the roof subsequent to completion as well. Plaintiff's athletic director testified that in 1976 and 1977 Ward and his company

> would come out and fix the leaks occasionally. We would call them; they would come out; they would repair leaks. We would feel that perhaps the problem had been solved, and then we would see a new leak develop and we'd go through the same process, call them again and try to get them out. We'd get it perhaps solved temporarily again, hoping it to be permanently solved, but it seemed it just went on and on that way and we never did get complete resolution of the problem. . . . [W]e would get some water in the basketball area . . . they would do some work on the roof, things would seem to be okay, and then at a later time, we'd get a leak at another spot develop, or sometimes at that same spot.

Plaintiff ultimately had the entire roof replaced at a cost of $107,000.

Defendants D.V. Ward Construction Inc. (D.V. Ward) and Bankers Mortgage Corporation d/b/a Bamocor, Inc. (BMC) are suc-

cessor corporations to Heritage. Plaintiff filed an action on 11 June 1981 against various defendants alleging breach of contract and the construction of a defective roof. On 19 November 1981 the court ordered BMC joined as a party. The original complaint asserted only a claim for negligent repairs against D.V. Ward. On 25 July 1983, however, plaintiff amended its complaint against D.V. Ward to allege a claim for the original breach of contract and defective construction.

The court granted D.V. Ward's motion for directed verdict on the issue of negligent repairs. It found as a matter of law that Heritage breached its contract with plaintiff, and it submitted only the issue of damages to the jury. The jury awarded damages of $107,000. The court then granted D.V. Ward's and BMC's motions for judgment notwithstanding the verdict.

From the judgment entered, plaintiff appeals.

Morris, Golding, Phillips & Cloninger, by James N. Golding and John C. Cloninger, for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Marla Tugwell, and Roberts, Cogburn, McClure and Williams by Frank Graham, for defendant appellee D.V. Ward Construction, Inc.

Russell, Greene & King, P.A., by William E. Greene, for defendant appellee Bankers Mortgage Corporation d/b/a Bamocor, Inc.

WHICHARD, Judge.

[1] Plaintiff contends the court erred by granting defendants' motions for judgment notwithstanding the verdict on the issue of breach of contract. We disagree. Without addressing whether plaintiff may bring an action against these particular defendants, we find that plaintiff's action for breach of contract is barred by N.C. Gen. Stat. 1-52(1), the three year statute of limitations, and N.C. Gen. Stat. 1-52(16), which provides that in an action for physical damage to claimant's property "the cause of action . . . shall not accrue until . . . physical damage to [claimant's] property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs."

Our Supreme Court recently addressed the precise issue raised. In *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C.

488, 329 S.E. 2d 350 (1985), plaintiff had contracted with defendants to construct an industrial plant. Plaintiff filed an action in 1981 alleging that faulty construction had caused the roof to leak. The court held that N.C. Gen. Stat. 1-52(1), (16) barred the action as a matter of law. It reasoned:

> The plaintiff . . . first complained of leaks in the roof within two months after occupying its newly built facility. The undisputed facts show that further complaints about leaks in many spots in the roof were made over five consecutive months in 1976 and 1977. These complaints clearly show that plaintiff, although perhaps not aware of the extent of damage, knew that its roof was defective at least as early as April 1977. The statute of limitations does not require plaintiff to be a construction expert. *See Earls v. Link, Inc.*, 38 N.C. App. 204, 208, 247 S.E. 2d 617, 619 (1978). However, it does require that plaintiff not sit on its rights. Plaintiff, knowing of the existence of leaks in the roof, was put on inquiry as to the nature and extent of the problem. Plaintiff failed to inform itself of the nature and extent of the roof's defects when leaks were discovered and recurred repeatedly. Viewing the evidence in a light most favorable to plaintiff, there is nothing in the record which would indicate that plaintiff was unaware that its roof was defective until a point in time within three years prior to filing suit.

313 N.C. at 493, 329 S.E. 2d at 354.

Plaintiff here concedes that it was aware in early 1975 that the gym roof had begun to leak. Plaintiff made repeated complaints about leaks in many places over the next three years and thereafter. These complaints clearly show that plaintiff knew its roof was defective at least as early as sometime in 1977, even if it was not aware of the extent of the damage. Knowing of the leaks, plaintiff was obligated to inform itself of the nature and extent of the roof's defects. As in *Pembee*, "there is nothing in the record which would indicate that plaintiff was unaware that its roof was defective until a point in time within three years prior to filing suit." *Pembee* at 493, 329 S.E. 2d at 354.

Plaintiff contends defendants are estopped from raising the statute of limitations because defendant D.V. Ward repeatedly promised to repair the roof and assured plaintiff that everything

was fine. However, these "[a]ssurances . . . fade[d] in the face of repeated . . ." leaks in the roof. *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 358, 301 S.E. 2d 459, 463-64, *disc. rev. denied*, 309 N.C. 319, 306 S.E. 2d 791 (1983). "Subsequent [leaks in the roof were] ample evidence that the problem was a recurring one." *Id.* As in *Blue Cross*, plaintiff "slept on its rights until the opportunity to bring suit had expired[,]" and its estoppel argument is therefore without merit. *Id.*

Assuming, *arguendo*, that plaintiff's amended complaint against D.V. Ward of 25 July 1983 relates back to the original complaint filed 11 June 1981, the action is still barred as to both defendants by N.C. Gen. Stat. 1-52(1), (16), the three year statute of limitations. Accordingly, the court did not err by granting defendants' motions for judgment notwithstanding the verdict on the issue of breach of contract.

[2] Plaintiff next contends the court erred by granting D.V. Ward's motion for directed verdict on the issue of negligent roof repairs. We disagree.

"To overcome the motion for directed verdict plaintiff was 'required to offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence.' " *Sasser v. Beck*, 65 N.C. App. 170, 171, 308 S.E. 2d 722, 722-23 (1983), *disc. rev. denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984). "The basic elements of negligence are a duty owed by [defendant] to plaintiff and nonperformance of that duty, proximately causing injury and damage." *Id.*

" '[W]here actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed.' " *Norwood v. Carter*, 242 N.C. 152, 156, 87 S.E. 2d 2, 5 (1955), *quoting* 25 C.J.S. 496. "Damages are never presumed." *Lieb v. Mayer*, 244 N.C. 613, 616, 94 S.E. 2d 658, 660 (1956). "The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule." *Id. See also SNML Corp. v. Bank*, 41 N.C. App. 28, 38, 254 S.E. 2d 274, 280, *disc. rev. denied*, 298 N.C. 204 (1979).

Here plaintiff presented evidence of damages resulting from the failure to complete the gym in accordance with the original

plans and specifications. It did not, however, offer any evidence of damages resulting from improper repairs to the roof after completion. There was neither evidence of the difference in the market value of the gym before and after the repairs nor evidence of the cost of repairs to the roof. *See Plow v. Bug Man Exterminators*, 57 N.C. App. 159, 162-63, 290 S.E. 2d 787, 789, *disc. rev. denied*, 306 N.C. 558, 294 S.E. 2d 224 (1982). Since there was no basis for assessing actual damages, plaintiff did not satisfy its evidentiary burden and could not obtain them.

[3] Plaintiff could seek nominal damages, however. Such damages are recoverable in negligence actions. *Jewell v. Price*, 264 N.C. 459, 461, 142 S.E. 2d 1, 3 (1965). Failure to submit the issue of negligent repairs to the jury when only nominal damages are available, however, is not prejudicial and reversible error, since nominal damages are a trivial sum awarded in recognition of a technical rather than a substantial injury. *Marisco v. Adams*, 47 N.C. App. 196, 198, 266 S.E. 2d 696, 698 (1980).

For the reasons stated, we find no error. The result reached renders consideration of plaintiff's evidentiary arguments unnecessary.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. TONYA HARRIS STROUD

No. 858SC578

(Filed 31 December 1985)

1. Criminal Law § 76.4— statement by defendant—voir dire—reopening for limited purpose—voluntariness of statement

Where defendant, who was charged with vehicular manslaughter, moved to suppress any statements she made to any investigating officer, the trial court did not abuse its discretion in reopening the evidence on voir dire for the limited purpose of hearing testimony with respect to the nature of the rights stated by the investigating officer to defendant; furthermore, the court did not err in finding as a fact that defendant was advised of her rights and that there were no rewards, promises of reward, threats or inducements of-

fered to her, though the evidence was conflicting, nor did the court err in concluding that defendant was given the *Miranda* warnings and that the officer's interrogation was investigatory and not in-custody.

2. **Automobiles § 113.1— death by vehicle—violation of safety statute—speed within posted limit—sufficiency of evidence**

There was no merit to defendant's contention that the court erred in denying her motions to dismiss on the ground that violation of a safety statute is an element of the death by vehicle offense and there was no evidence that she violated a safety statute, since there was substantial evidence that defendant, though she drove within the posted speed limit, was driving faster than was reasonable and prudent under existing conditions in violation of G.S. 20-141(a) and (m).

3. **Criminal Law § 101— outburst by defendant's husband—denial of new trial—no error**

The trial court did not abuse its discretion in denying defendant's motion for mistrial based on her husband's conduct during the State's closing argument to the jury where, in reaction to a statement by the prosecuting attorney regarding distortion of the truth, defendant's husband slammed his hand on the table and stated, "My wife ain't a liar"; an outburst occurred in the courtroom and one of the State's witnesses showed emotional trauma; the court excused the jurors, took defendant's motion for mistrial, and then polled the jurors individually; and all jurors indicated that they could disregard the disturbance in going about their deliberations. N.C.G.S. 15A-1061.

APPEAL by defendant from *Phillips, Herbert O., III, Judge.* Judgment entered 4 January 1985 in Superior Court, WAYNE County. Heard in the Court of Appeals 24 October 1985.

Defendant was charged with vehicular manslaughter and convicted of the lesser included offense of misdemeanor death by vehicle, N.C. Gen. Stat. 20-141.4(a2). She appeals from a judgment entered upon the conviction.

Attorney General Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Barnes, Braswell & Haithcock, P.A., by Tom Barwick, for defendant appellant.

WHICHARD, Judge.

[1] Defendant moved to suppress any statements she made to any investigating officer. After presentation of evidence and arguments of counsel on voir dire, but before the court ruled on the motion, the State moved to reopen the evidence for the limited

purpose of offering testimony with respect to the nature of the rights furnished by the investigating officer to the defendant under the Miranda decision. The court, over defendant's objection, allowed the motion. Defendant contends this was error.

N.C. Gen. Stat. 15A-1226(b) provides: "The judge in his discretion may permit any party to introduce additional evidence at any time." Our Supreme Court has stated: "The trial court has discretionary power to permit the introduction of additional evidence after a party has rested." *State v. Jackson*, 306 N.C. 642, 653, 295 S.E. 2d 383, 389 (1982). This Court has stated: "It is within the discretion of the trial judge to permit, in the interest of justice, the examination of witnesses at any stage of the trial." *State v. Johnson*, 23 N.C. App. 52, 57, 208 S.E. 2d 206, 210, *cert. denied*, 286 N.C. 339, 210 S.E. 2d 59 (1974).

The purpose of the voir dire hearing was to enable the court to determine the question presented by defendant's motion to suppress. The court thus was "at liberty to make such inquiries [and allow such testimony] as [it] deem[ed] necessary to enable [it] to make a fair and independent determination of the question." *State v. Segarra*, 26 N.C. App. 399, 401, 216 S.E. 2d 399, 402 (1975). We find no abuse of the court's discretion in the re-opening of the voir dire examination.

Defendant contends the court erred in finding as a fact that she was advised of her rights and that there were no rewards, promises of reward, threats or inducements offered to her. She argues that she and her husband testified that the officer advised her that she could talk to him because there would not be any charges, and that there is no evidence to support the finding that no reward, promise of reward, threat or inducement was offered.

On direct examination the officer testified that he did not at any time before defendant made the statement "make any promise or any threats or any pressure or coercion." On cross-examination he denied that he advised defendant he "did not intend to prefer any charges and it did not appear that [he] would be preferring any charges." This testimony provided ample competent evidence to support the finding. "When the trial judge's findings are supported by competent evidence, they will not be disturbed on appeal even though the evidence is conflicting." *State v. Small*, 293 N.C. 646, 653, 239 S.E. 2d 429, 435 (1977). *See also State v.*

Tolley, 30 N.C. App. 213, 216, 226 S.E. 2d 672, 674, *disc. rev. denied*, 291 N.C. 178, 229 S.E. 2d 691 (1976) ("Since the . . . finding of fact that 'the officer made no offer of hope of reward or inducement for the defendant to make a statement' is supported by competent evidence, it is conclusive on appeal."). We find this argument without merit.

Defendant contends the court erred in concluding that she had been given the Miranda warnings and that the interrogation was not in-custody. She again argues that the officer's conduct amounted to a substantial inducement which rendered her statement inadmissible. We have found this argument without merit. We further find in the officer's voir dire testimony ample competent evidence to support the findings that the interrogation was investigatory rather than in-custody, that none of defendant's constitutional rights were violated, and that the statement was voluntarily, freely and understandingly made. Since the findings are supported by competent evidence, they are conclusive and binding on appeal. *State v. Burney*, 302 N.C. 529, 539, 276 S.E. 2d 693, 699 (1981).

[2] Defendant contends the court erred in denying her motions to dismiss in that violation of a safety statute is an element of the death by vehicle offense, *see* N.C. Gen. Stat. 20-141.4(a2), and there was no evidence that she violated a safety statute. We find substantial evidence that defendant violated N.C. Gen. Stat. 20-141(a) and N.C. Gen. Stat. 20-141(m). N.C. Gen. Stat. 20-141(a) provides: "No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." N.C. Gen. Stat. 20-141(m) provides:

> The fact that the speed of a vehicle is lower than the . . . limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

Defendant maintains that N.C. Gen. Stat. 20-141(m) "is violated only by one who drives less than the speed limit whose speed presents a hazard to others or others[']] property." N.C. Gen. Stat. 20-141(m) establishes that driving below the speed limit

is not a defense to a charge of driving at a speed greater than is reasonable and prudent under existing conditions, and that regardless of the posted speed limit motorists have a duty to decrease speed if necessary to avoid a collision. It does not, as defendant asserts, protect a driver proceeding at precisely the posted speed from responsibility for a rear-end collision with another vehicle.

As stated in *Primm v. King*, 249 N.C. 228, 233, 106 S.E. 2d 223, 227 (1958):

> [T]he . . . statutes [N.C. Gen. Stat. 20-140, -141] [make] clear that whether . . . a speed of 55 miles an hour is lawful depends upon the circumstances at the time. These statutes provide that a motorist must at all times drive with due caution and circumspection and at a speed and in a manner so as not to endanger or be likely to endanger any person or property. At no time may a motorist lawfully drive at a speed greater than is reasonable and prudent under the conditions then existing.

Thus, N.C. Gen. Stat. 20-141(a) and N.C. Gen. Stat. 20-141(m), construed together, establish a duty to drive with caution and circumspection and to reduce speed if necessary to avoid a collision, irrespective of the lawful speed limit or the speed actually driven. We therefore find this contention without merit and hold that the court properly denied the motion to dismiss.

Defendant contends the court erred in instructing the jury that it must find, as an element of death by vehicle, that defendant failed to reduce her speed as necessary to avoid the collision. She again argues that N.C. Gen. Stat. 20-141(m) insulates her from responsibility unless the speed of her vehicle was lower than the posted speed limit, and that the instruction was prejudicial in that it "indicates that regardless of the fact that the defendant may be proceeding at the posted speed limit . . . she was required to reduce her speed in order to avoid an accident." For reasons stated in response to the preceding argument, we find this contention without merit.

[3] Defendant contends the court erred in denying her motion for mistrial based on her husband's conduct during the State's closing argument to the jury. In reaction to a statement by the

prosecuting attorney regarding distortion of the truth, defendant's husband slammed his hand on the table and stated: "My wife ain't a liar." An outburst occurred in the courtroom and one of the State's witnesses showed emotional trauma. The court excused the jurors, took defendant's motion for mistrial, and then polled the jurors individually. All jurors indicated that they could disregard the disturbance in going about their deliberations.

The court must declare a mistrial if there occurs during the trial conduct inside the courtroom resulting in substantial and irreparable prejudice to the defendant's case. N.C. Gen. Stat. 15A-1061. A mistrial is appropriate, however, only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law, and whether a mistrial should be granted is in the sound discretion of the trial judge. *State v. Calloway*, 305 N.C. 747, 754, 291 S.E. 2d 622, 627 (1982). The ruling will be disturbed on appeal only if so clearly erroneous as to amount to a manifest abuse of discretion. *State v. McGuire*, 297 N.C. 69, 75, 254 S.E. 2d 165, 169, *cert. denied*, 444 U.S. 943, 100 S.Ct. 300, 62 L.Ed. 2d 310 (1979), quoting *State v. Sorrells*, 33 N.C. App. 374, 376-77, 235 S.E. 2d 70, 72 (1977), *cert. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977).

The court, having polled each juror individually, concluded that the jurors could disregard the disturbance in their deliberations. The record provides no basis for this Court to reach a different conclusion. Defendant has not shown that the disturbance made it impossible for her to attain a fair and impartial verdict under the law. *Calloway, supra.* We thus find no manifest abuse of discretion in the denial of the motion for mistrial.

No error.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. GARY DEAN EDWARDS

No. 8524SC610

(Filed 31 December 1985)

1. **Criminal Law § 76.5; Judgments § 2— ruling announced in open court—time for filing written order**

There was no merit to the State's contention that the trial judge erred in filing a written order suppressing defendant's in-custody statement after court had adjourned and after having previously entered findings and conclusions in open court, since the announcement of a ruling by the trial judge in open court constitutes an "entry of judgment," and only when the judge's ruling is not announced in open court is it necessary that the order be in writing, signed and filed with the clerk in the county, in the district and during the session when and where the question is presented.

2. **Criminal Law § 75.2— involuntary confession—coercion by sheriff**

Evidence was sufficient to support the trial court's conclusion that defendant's in-custody statement was involuntary where the evidence tended to show that defendant was 18 years old at the time of his arrest; he had only a tenth grade education; he had never before been arrested or interrogated by a law enforcement officer; he was employed as a manual laborer; he was in custody for 4 days because of his inability to make bond, while the two individuals arrested with defendant had been released; defendant was subjected to a polygraph examination and to frequent interrogation by the sheriff's department; defendant steadfastly maintained his innocence, while the sheriff insisted that defendant was not telling the truth; on the fourth day of defendant's custody, the sheriff interrogated him again; defendant's employer was present and was willing to do what was necessary to get defendant out of jail; defendant maintained his innocence but was told by the sheriff that he was lying and that he could not get out of jail unless he told the truth and made a signed statement; the sheriff made this statement even though he knew defendant's employer was prepared to make defendant's bond; only after this statement did defendant make the statement implicating himself; the statement was not in defendant's handwriting and not totally in defendant's own words; defendant changed the statement at the direction of the sheriff; and immediately upon signing the confession as prepared by the sheriff, defendant was allowed to sign an unsecured personal recognizance bond and was released.

APPEAL by the State of North Carolina from *Pachnowski, Judge*. Order entered 18 February 1985 in Superior Court, YANCEY County. Heard in the Court of Appeals 29 October 1985.

On 1 August 1984, defendant and two other individuals were arrested pursuant to warrants charging them with felonious breaking and entering and felonious larceny. While in custody

defendant made a statement to the sheriff confessing his involvement in the criminal activity. At trial on 18 February 1985, defendant moved to suppress the statement on the ground that it was not voluntarily given. A *voir dire* was conducted to determine the admissibility of the statement. At the conclusion of the hearing, the trial judge made oral findings of fact and entered an order granting defendant's motion. On 22 February 1985 the trial court reduced the findings and the order to writing as follows:

> That Gary Dean Edwards was arrested on or about August 1, 1984 and was in custody until August 4, 1984; and during the time that the Defendant was in custody of the Yancey County Sheriff's Department, he was not appointed an attorney, although his "miranda rights" had been read to him at the time of his arrest; that during the time the Defendant was incarcerated in the Yancey County jail, he was taken to Asheville, North Carolina for a polygraph test and was frequently interrogated by the Sheriff's Department; that the Defendant was 18 years of age at the time of his arrest, had dropped out of high school only completing the 10th grade, and was working as a logger immediately prior to his arrest; that the handwritten confession signed by the Defendant was not in the Defendant's handwriting; that the written confession was not totally in the Defendant's own words; and that during the preparation of the written confession, the Defendant was encouraged to change his original statement to conform with that being sought by the Sheriff's Department; that the Defendant was informed that he could not be released unless he signed the confession; that immediately after signing the confession as prepared by the Sheriff's Department, the Defendant did sign an unsecured personal recognizance bond;
>
> BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW That the Defendant did not freely and voluntarily sign the written confession;
>
> THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED That the written confession shall not be permitted to be introduced into evidence or used during the trial of the Defendant, Gary Dean Edwards.

The written order was filed on 17 April 1985.

From the order granting defendant's motion, the State appeals to this Court.

Attorney General Lacy H. Thornburg, by Associate Attorney Randy Meares, for the State.

Staunton Norris for defendant appellee.

ARNOLD, Judge.

[1] The State contends that the trial judge erred in filing the written order after court had adjourned and after having previously entered findings and conclusions in open court. The State argues that as a result of that error, the order is void. This contention has no merit.

The general rule concerning orders is that an order substantially affecting the rights of parties to a cause pending in the superior court at a term must be made in the county and at the term when and where the question is presented, and except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise. *State v. Boone*, 310 N.C. 284, 311 S.E. 2d 552 (1984). In the instant case, the trial judge announced his ruling on the motion to suppress in open court and later reduced the order to writing. Our Supreme Court, in *State v. Boone*, held the announcement of a ruling by the trial judge in open court constitutes an "entry of judgment," and thus only when the judge's ruling is not announced in open court is it necessary that the order be in writing, signed, and filed with the clerk in the county, in the district and during the session when and where the question is presented. Therefore, absent the necessary showing of prejudice to the State, the trial judge's failure to put the order in writing and to file it before the end of term was not error. *Id.*

[2] The State next argues that the trial judge erred in his findings and conclusion that defendant's statement was involuntary. We disagree.

The trial judge determines whether or not a statement is voluntary and thus admissible. In making this determination, the trial judge must make findings of fact. When the facts are supported by competent evidence, they are conclusive on the appellate courts. However the conclusions of law drawn from the

findings of fact are not binding on the reviewing courts. *State v. Hines*, 266 N.C. 1, 145 S.E. 2d 363 (1965). The evidence presented at *voir dire* supports the trial judge's findings of fact.

In *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964), the United States Supreme Court ruled that the admissibility of a confession in state criminal trials is tested by the same standard as applied to federal prosecutions.

> [A] confession, in order to be admissible, must be free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises, however slight*, nor by the exertion of any improper influence . . . (Emphasis added.)

Bram v. United States, 168 U.S. 532, 542-543, 18 S.Ct. 183, 187, 42 L.Ed. 568, 573 (1897). *See also Hutto v. Ross*, 429 U.S. 28, 50 L.Ed. 2d 194, 97 S.Ct. 202 (1976). The Court in *Malloy* specifically emphasized that it had held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed.

In applying this test to determine whether statements are voluntary, the Court has assessed the totality of all the circumstances, including both the characteristics of the accused and the details of the interrogation. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973). *See also State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983).

The circumstances of the case at bar reveal that defendant was 18 years old at the time of his arrest; he only had a 10th grade education; he had never before been arrested or interrogated by a law enforcement officer; and he was employed as a manual laborer. Defendant was in custody for four days because of his inability to make bond, while the two individuals arrested with defendant had been released. Defendant was subjected to a polygraph examination and to frequent interrogation by the Sheriff's Department. Defendant steadfastly maintained his innocence. The Sheriff continually insisted that defendant was not telling the truth. On the fourth day of defendant's custody, the sheriff interrogated defendant once again. Defendant's employer was present. The employer was short of help and had come to ask what he could do to get defendant out of jail. When first questioned,

defendant again maintained his innocence. The sheriff told defendant that he was lying and that unless he told the truth and made a signed statement he could not get out of jail. The sheriff made this statement even though he knew defendant's employer was prepared to make defendant's bond. Only after this statement by the sheriff did defendant make the statement implicating himself. The statement was not in defendant's handwriting and not totally in defendant's own words. In fact, defendant changed the statement at the direction of the sheriff. Finally, immediately upon signing the confession as prepared by the sheriff, defendant was allowed to sign an unsecured personal recognizance bond and was released.

Upon reviewing the trial court's findings and in light of the totality of the circumstances, we find the trial court properly suppressed defendant's statement.

Affirmed.

Judges WELLS and PARKER concur.

CAROLYN JOYCE WATSON v. WILLIAM S. HIATT, COMMISSIONER OF N.C. DIVISION OF MOTOR VEHICLES

No. 8510SC628

(Filed 31 December 1985)

Automobiles § 2.4— refusal to give third breath sample—refusal willful—revocation of license proper

Petitioner, by providing only two breath samples which differed by more than .02 percent in blood alcohol content, did not give the sequential breath samples necessary to constitute a valid chemical analysis, and petitioner's refusal to provide a third necessary breath sample could properly be deemed a willful refusal under G.S. 20-16.2(c) so as to support respondent's revocation of her driver's license. N.C.G.S. 20-139.1(b3).

APPEAL by respondent from *Smith, Judge*. Judgment entered 23 May 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 21 November 1985.

The Division of Motor Vehicles revoked the petitioner's driver's license for a willful refusal to submit to a breathalyzer test

and a hearing officer upheld this revocation. The petitioner appealed to the Superior Court of Wake County.

The evidence at the hearing in superior court showed that on 13 January 1985 the petitioner was charged with driving while impaired. She was taken to the courthouse of Wake County and after being advised of her rights a request was made that she take a breathalyzer test. The petitioner provided a breath sample which showed a blood alcohol content of .28 percent. She gave a second breath sample two minutes later which showed a blood alcohol content of .31 percent. The petitioner was requested to submit to a third breathalyzer test and she refused to do so.

The superior court made findings of fact in accordance with the evidence and concluded that the petitioner provided sequential breath samples necessary to constitute a valid chemical analysis within the meaning of the law and that the conduct of petitioner did not constitute a willful refusal to submit to a chemical analysis test. The superior court permanently enjoined the respondent from revoking the petitioner's driver's license.

The respondent appealed.

Hatch, Little, Bunn, Jones, Few & Berry, by E. Richard Jones, Jr., for petitioner appellee.

Attorney General Lacy H. Thornburg, by Associate Attorney Mabel Y. Bullock, for respondent appellant.

WEBB, Judge.

The appellant by his assignments of error contends that it was error for the court to conclude that the petitioner provided breath samples necessary to constitute a valid chemical analysis as required by law and that petitioner's conduct did not constitute a willful refusal to submit to a breathalyzer test. We agree with the appellant.

G.S. 20-139.1(b) provides in part that "[a] chemical analysis, to be valid, must be performed in accordance with the provisions of this section." The requirements for obtaining a chemical analysis of the breath are controlled by G.S. 20-139.1(b3), which provides:

> (b3) Sequential Breath Tests Required.—By January 1, 1985, the regulations of the Commission for Health Services

governing the administration of chemical analyses of the breath must require the testing of *at least duplicate sequential* breath samples. Those regulations must provide:

(1) A specification as to the minimum observation period before collection of the first breath sample and the time requirements as to collection of *second and subsequent samples.*

(2) That the test results may only be used to prove a person's particular alcohol concentration if:

a. The pair of readings employed are from consecutively administered tests; and

b. The readings do not differ from each other by an alcohol concentration greater than 0.02.

(3) That when a pair of analyses meets the requirements of subdivision (2), only the lower of the two readings may be used by the State as proof of a person's alcohol concentration in any court or administrative proceeding.

A person's willful refusal to give the sequential breath samples necessary to constitute a valid chemical analysis is a willful refusal under G.S. 20-16.2(c). (Emphasis supplied.)

This section lists the conditions which must be met for conducting chemical analyses of the breath. That within the same section is included a statement concerning willful refusal to provide the samples necessary for a valid chemical analysis demonstrates that the purpose of the section is to set out the requirements for a valid chemical analysis. It is clear from the language "at least duplicate sequential breath samples" and "second and subsequent samples" that the section contemplates situations in which more than two samples may be required to constitute a valid chemical analysis. One situation in which more than two samples would be necessary is the situation in this case where the readings for the first two breath samples differed by more than 0.02 percent blood alcohol concentration as stated in G.S. 20-139.1(b3)(2). Because in this situation neither of the first two readings can be used to prove alcohol concentration, the subject is required to provide the "subsequent samples" referred to in G.S. 20-139.1(b3)(1).

There is further support for this position in G.S. 20-139.1(b) which states in part that "[t]he chemical analysis must be performed according to methods approved by the Commission for Health Services. . . ." The regulations for the Division of Health Services provide that "[i]f the alcohol concentration differs by more than 0.02, *a third or subsequent test shall be administered as soon as feasible.* . . ." 10 N.C.A.C. 7B. 0344 (1985). (Emphasis added.) This was the situation in this case. The trial court improperly concluded that the petitioner, by providing only two breath samples, had given the sequential breath samples necessary to constitute a valid chemical analysis.

The question remains whether the petitioner's failure to provide the necessary breath samples could properly be deemed a willful refusal under G.S. 20-16.2(c) within the meaning of G.S. 20-139.1(b3).

Before petitioner's first breath sample was taken she was advised of her rights pursuant to G.S. 20-16.2(a). This section requires that the breathalyzer operator inform the petitioner, among other things, that:

(1) He has the right to refuse to be tested.

(2) Refusal to take any required test or tests will result in an immediate revocation of his driving privilege for at least 10 days and an additional 12-month revocation by the Division of Motor Vehicles.

(3) The test results, or the fact of his refusal, will be admissible in evidence at trial on the offense charged.

. . . .

G.S. 20-16.2(a). After the operator determined that the petitioner's first two breath samples had produced inconclusive results she informed the petitioner that a third sample was required by law. The petitioner refused to provide a third sample. As this Court stated in *Bell v. Powell,* 41 N.C. App. 131, 135, 254 S.E. 2d 191, 194 (1979):

> [T]he full import of G.S. 20-16.2(c) requires an operator of a motor vehicle, who has been charged with the offense of driving under the influence of intoxicating liquor, to take a breathalyzer test, which means the person to be tested must

follow the instructions of the breathalyzer operator. A failure to follow such instruction, as the petitioner did in this event, provided an adequate basis for the trial court to conclude that petitioner willfully refused to take a chemical test of breath in violation of law.

In the instant case the trial court made findings of fact that the petitioner provided two breath samples resulting in readings of .28 and .31 and that she then refused to provide any more samples. These findings do not support the court's conclusion that the petitioner's refusal to provide a third sample was not a willful refusal within the meaning of the statutes. The petitioner refused to comply with a known legal obligation to provide the sequential breath samples necessary to constitute a valid chemical analysis of the breath. Her conduct therefore amounted to a willful refusal under G.S. 20-16.2(c) within the meaning of G.S. 20-139.1(b3).

For the foregoing reasons the judgment of the trial court is reversed and the case is remanded with instructions to reinstate the order of the Division of Motor Vehicles.

Reversed.

Judges BECTON and COZORT concur.

PAMELA ANN BOWLIN HINSON v. ARNOLD DEAN HINSON

No. 8519DC875

(Filed 31 December 1985)

Divorce and Alimony § 19; Judgments § 6.1— correction of judgment—granting of substantive relief improper

The trial court's order adding the language "for so long as plaintiff continues to reside in the marital residence" following the name of the mortgage lender in the section of a consent judgment where plaintiff's debts were listed and inserting the word "net" before the word "proceeds" in the section stating that, "beyond a sale of said residence, the proceeds shall be divided equally by the parties" improperly granted plaintiff substantive relief and did not amount to a correction of mere clerical errors.

APPEAL by defendant from *Horton, Judge*. Order entered 7 May 1985 in District Court, CABARRUS County. Heard in the Court of Appeals 7 November 1985.

Defendant husband appeals from an order entered upon plaintiff wife's motion to correct alleged clerical errors in consent judgment.

Griggs, Scarbrough & Rogers, by William F. Rogers, Jr., for plaintiff-appellee.

Brooke and Brooke, by Carole Carlton Brooke, for defendant-appellant.

EAGLES, Judge.

The thrust of defendant's appeal is that the omissions in the consent judgment were not clerical in nature, but were substantive, and that the trial court therefore lacked authority to enter an order granting plaintiff the relief requested. We agree, and accordingly vacate the order.

I

Plaintiff sued in February 1983 for divorce from bed and board, custody, alimony and child support. In June 1983 the parties entered into a consent judgment whereby plaintiff received for herself and the children exclusive possession of the marital residence. Plaintiff assumed liability under the judgment for the mortgage, tax, insurance and other payments arising on the property. The listing of family debts included the mortgage lender as one of plaintiff's creditors. The judgment further provided:

> Upon a sale of said residence, the proceeds shall be divided equally by the parties. A sale of the residence may be required by either party upon Plaintiff removing herself therefrom, or, when the youngest child residing with plaintiff reaches 18 years of age, dies, becomes emancipated, or marries.

In March 1985 plaintiff filed a motion pursuant to G.S. 1A-1, R. Civ. P. 60(a) and 60(b)(1). She alleged that the judgment should have provided that she be responsible for payments on the mortgage only while she resided in the house and that the sale proceeds should be divided equally after payment of the existing

mortgage indebtedness. Otherwise, she could wind up paying the entire mortgage indebtedness out of her share of the sale price. The omission resulted from "clerical error and mistake on the part of the drafting attorneys." The court, after a hearing, agreed and entered an order under Rule 60(a) adding the language "for so long as plaintiff continues to reside in the marital residence" following the name of the mortgage lender in the section where plaintiff's debts were listed, and inserting the word "net" before the word "proceeds" in the quoted paragraph. From this order, defendant appeals.

II

A motion to amend a judgment must be made within ten days after entry thereof. G.S. 1A-1, R. Civ. P. 59(e). A motion for relief from a judgment on grounds of mistake, inadvertence, surprise, or excusable neglect must be made within one year. R. Civ. P. 60(b). A motion to correct clerical mistakes may be made at any time, however. R. Civ. P. 60(a). Since this motion was made more than a year after entry of the consent judgment, plaintiff is limited to the relief available, if any, under Rule 60(a).

III

The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E. 2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E. 2d 157 (1984); *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E. 2d 715 (1975). We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error. In *Vandooren*, we held that the court could not credit certain rents against alimony where the rents had not been considered in the original order. In *Snell v. Washington County Bd. of Educ.*, 29 N.C. App. 31, 222 S.E. 2d 756 (1976), we held that the court could not restore a forfeited bond to petitioners and require respondents to assume half the court costs as a clerical correction to an order dismissing a suit for injunction. In *H & B Co. v. Hammond*, 17 N.C. App. 534, 195 S.E. 2d 58 (1973), on the ground that it would prejudice subsequent innocent purchasers, we reversed an order changing a money judgment so that it was a lien against certain property, despite

evidence that that was the intent of the parties at the time the original judgment was entered. *Compare In re Peirce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981) (wording of oral order directing judgment omitted from written order, properly corrected).

The relief granted on plaintiff's motion here clearly was substantive in nature and therefore not available under Rule 60(a). By its order making the mortgage debt an obligation of plaintiff for only so long as she lived in the house, the trial court allowed plaintiff to move out of the house and rent it to third parties while transferring all or a portion of the debt to defendant. Further, the order's addition of the word "net" before "proceeds" may effect a material change in the distribution of eventual sale proceeds to defendant. The omission appears to have been more a matter of drafting, possibly resulting from negotiation, than a clerical error. Plaintiff was represented by counsel and could have easily made the change at the time of the consent judgment. On this record, the trial court lacked authority to make these changes under Rule 60(a).

IV

Decisions under the similar language found in Federal R. Civ. P. 60(a) support this result. In *Jones v. Anderson-Tully Co.*, 722 F. 2d 211 (5th Cir. 1984), the court affirmed a ruling that an oral judgment containing a boundary description that did not match what the court intended to establish as the boundary could not be corrected under Rule 60(a), even though plaintiff lost 18 acres of land as a result. In *Elias v. Ford Motor Co.*, 734 F. 2d 463 (1st Cir. 1984), the court held that an interpretation of law deliberately incorporated in a judgment, even if clearly erroneous, could not be corrected under Rule 60(a). *See also Willie v. Continental Oil Co.*, 746 F. 2d 1041 (5th Cir. 1984) (failure to enter judgment pursuant to stipulation between parties not clerical error) (clerical error must be in the nature of copying error), *reh'g granted*, 760 F. 2d 87 (1985).

V

We conclude that the trial court was without authority under Rule 60(a) to enter this order. Since the order was beyond the authority of the court, it is hereby

Vacated.

Chief Judge HEDRICK and Judge WELLS concur.

CYNTHIA GRIFFIN, EMPLOYEE-PLAINTIFF v. RED & WHITE SUPERMARKET, EMPLOYER, AND AETNA LIFE & CAS. INS. CO., CARRIER-DEFENDANTS

No. 8510IC619

(Filed 31 December 1985)

Master and Servant § 73.1— workers' compensation—loss of eye—no additional compensation for disfigurement

An employee who has received compensation for disability resulting from loss of vision to an eye may not also recover compensation for serious facial disfigurement when there has been no enucleation and the eye has been fitted with an artificial shield. N.C.G.S. 97-31.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and award entered 22 February 1985. Heard in the Court of Appeals 21 November 1985.

The defendant appeals an award by the North Carolina Industrial Commission. The plaintiff employee sustained an injury by accident arising out of and in the course of her employment with the defendant employer. The injury resulted in total loss of vision in her right eye. The damaged eye was not removed but was fitted with an artificial shield similar to a contact lens. The defendant insurance company paid the plaintiff $17,520.00 disability compensation for 100% loss of vision in the eye as required by G.S. 97-31(16) but denied the plaintiff's claim for compensation for serious facial disfigurement under G.S. 97-31(21).

After a hearing before a Deputy Commissioner who denied the plaintiff's claim, she appealed to the Full Commission. In its opinion the Full Commission made the following findings of fact:

. . . .

3. A veiwing [sic] of the damaged eye and facial area around the eye reveals no scars outside the eye itself. However, the plaintiff's damaged eye is obviously different in appearance from her other eye at close and relatively long

ranges. Her damaged eye remains stationary while the healthy eye tracks objects in its field of vision, giving plaintiff's entire face a grotesque appearance. Plaintiff's injury destroyed the symmetry of what otherwise would be acknowledged as an attractive face. Thus the damage to plaintiff's eye has badly marred and disfigured the appearance of her face, making her "repulsive," for lack of a better word, instead of attractive to the public at large. Her facial disfigurement also has had an adverse impact on her personality.

4. Plaintiff has not worked since her injury and her employment prospects now and in the future have been substantially diminished by her serious facial disfigurement.

Based on these findings the Full Commission concluded that the "[p]laintiff has sustained serious facial disfigurement which can be reasonably presumed to diminish her wage-earning capacity at the present and in the future. Fair and reasonable compensation for plaintiff's disfigurement is $10,000.00." The Commission then ordered the defendants to pay the plaintiff $10,000.00 in addition to payments already made for disability. The defendants appealed.

Shope, McNeil & Maddox, by E. Thomas Maddox, Jr., for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and Jeri L. Whitfield, for defendant appellants.

WEBB, Judge.

This appeal brings to the Court the question whether an employee may recover under the Workers' Compensation Act for disability and for serious facial disfigurement, both resulting from loss of vision to an eye, when there has been no enucleation and the eye has been fitted with an artificial shield. The plaintiff concedes that there has been no damage to the facial tissue surrounding the eye and that the only injury is to the eye itself. Therefore we must determine whether she may recover for disability and for disfigurement from a single accident affecting only one member.

This question is controlled by G.S. 97-31, which provides in pertinent part:

Schedule of injuries; rate and period of compensation.

In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

. . . .

(16) For the loss of an eye, sixty-six and two-thirds percent (66⅔%) of the average weekly wage during 120 weeks.

. . . .

(19) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. . . . .

. . . .

(21) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed ten thousand dollars ($10,000). In case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.

. . . .

We have found no North Carolina cases dealing with the subject of this appeal. We believe that under the plain words of the statute we must hold that the plaintiff is not entitled to any recovery in addition to the $17,520.00 she received for loss of her eye. G.S. 97-31 provides that compensation for the loss of a member of the body, including loss of vision, shall be paid at certain rates and this shall be in lieu of any loss of disfigurement. G.S. 97-31(21) creates an exception to this for serious facial or head disfigurement. Within this exception the statute says, "[i]n case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement."

The second sentence in G.S. 97-31(21) deals specifically with compensation for eye injuries. The plaintiff's eye has not been enucleated and she does not come within the language of this

sentence. We believe this bars her from recovery. If the first sentence of the section covered an eye injury there would be no reason for the second sentence. We believe that G.S. 97-31(21) when properly read means that a person may recover for serious facial and head disfigurement in addition to recovery under other parts of the section. It also means an enucleation where an artificial eye cannot be fitted and used is a type of facial disfigurement. No other type of eye injury is a compensable disfigurement. This is the only way we can read the statute to give effect to each sentence in G.S. 97-31(21).

The plaintiff argues that she is not seeking disfigurement compensation for her eye. She contends that her eye's appearance results in a loss of facial symmetry which mars and disfigures her entire face. The Industrial Commission found this as a fact. Whatever effect the injury may have on the plaintiff's facial appearance it is the eye that is causing this effect and we have held the plaintiff's eye injury is not compensable under G.S. 97-31 as a disfigurement.

For the reasons stated in this opinion we reverse and remand with an order that the plaintiff's claim be denied.

Reversed and remanded.

Judges BECTON and COZORT concur.

BARBARA ABSHER v. VANNOY-LANKFORD PLUMBING CO., INC.

No. 8523SC253

(Filed 31 December 1985)

1. Appeal and Error § 7.1— favorable judgment—plaintiff not aggrieved party

Plaintiff was not an aggrieved party and had no standing to appeal the trial court's decision to allow the jury to decide whether plaintiff's employer's negligence concurred with that of defendant in causing plaintiff's injuries, since all issues submitted to the jury were answered in plaintiff's favor, and whether plaintiff's employer was brought into the action or not, plaintiff's ultimate recovery would still be limited to the difference between the amount of the jury award and the amount of the workers' compensation award.

2. Interest § 2— computation on part of jury award

The trial court properly allowed interest on the amount of the jury award less the amount of the workers' compensation award rather than on the entire amount of the jury award, since interest should be calculated only on the amount plaintiff was actually entitled to receive. G.S. 24-5.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 26 October 1984 in Superior Court, WILKES County. Heard in the Court of Appeals 5 November 1985.

Plaintiff instituted this action on 10 November 1982 seeking damages for injuries received in an accident at her place of employment on 11 November 1981 and allegedly caused by defendant's negligence. Defendant's answer alleged that plaintiff's injuries were caused by the joint and concurring negligence of her employer, North Wilkesboro Coca-Cola Bottling Company (Coca-Cola). Defendant's answer was served on Richard T. "Dick" McNeil, president of Coca-Cola, on 12 January 1983 by certified mail, return receipt requested. From her employer's workers' compensation insurance carrier, The Maryland Casualty Company, plaintiff received $20,108.16.

The jury found that plaintiff was injured by defendant's negligence, that plaintiff was not contributorily negligent, that plaintiff was damaged in the amount of $26,400 and that the negligence of plaintiff's employer concurred with defendant's negligence in causing plaintiff's injuries. Pursuant to G.S. 97-10.2(e) the trial judge reduced plaintiff's award by $20,108.16, the amount which plaintiff's employer would otherwise have been entitled to receive by way of subrogation, and entered judgment awarding plaintiff the principal sum of $6291.84 plus 8% interest from the date the action was instituted.

Upon entry of judgment, plaintiff filed notice of appeal.

Franklin Smith for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice by Richard T. Rice and William A. Blancato for defendant-appellee.

EAGLES, Judge.

a.

[1] By her first assignment of error, plaintiff asserts that the trial court erred in denying her motion in limine and her motion to strike and in submitting the issue of employer's joint and concurring negligence to the jury. In essence, plaintiff appeals the trial court's decision to allow the jury to decide whether plaintiff's employer's negligence concurred with that of defendant. The basis of plaintiff's argument is that Coca-Cola, plaintiff's employer, was not properly served with defendant's answer alleging joint and concurrent negligence. Because plaintiff is not a party aggrieved, plaintiff has no standing. As to this first assignment of error, plaintiff's appeal is dismissed.

G.S. 1-271 provides for the right of appeal to any "party aggrieved." The "party aggrieved" is the one whose rights have been directly and injuriously affected by the judgment entered in the superior court. *Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434 (1939). Plaintiff here is not a "party aggrieved." All issues submitted to the jury were answered in her favor. Further, plaintiff's attorney did not represent plaintiff's employer, Coca-Cola. Whether or not Coca-Cola was properly served with defendant's answer has no bearing on plaintiff's recovery. G.S. 97-10.2(e) (1979) provides that where the jury finds that the employer's negligence joined and concurred with the third party's negligence to cause plaintiff's injuries, the plaintiff's award must be reduced by "the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation . . . and the entire amount recovered, after such reduction, shall belong to the employee. . . ."

Whether Coca-Cola was properly served is of significance only to Coca-Cola if it had chosen to defend against allegations that its negligence concurred with the defendant's negligence in causing injury to plaintiff. Even if the jury found the negligence issue in favor of Coca-Cola, plaintiff's award would still be reduced as required by G.S. 97-10.2(f)(1) (1979) which provides in pertinent part:

> [I]f an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount

obtained by . . . judgment against . . . the third party by reason of such injury . . . shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment.

b. Second to the payment of the fee of the attorney representing the person . . . obtaining judgment. . . .

c. Third to the *reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid* or to be paid by the employer under award of the Industrial Commission. [Emphasis added.]

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

Either way, plaintiff's ultimate recovery would be limited to $6291.84 which represents the difference between the $26,400 jury award and the $20,108.16 workers' compensation award.

Accordingly, we hold that as plaintiff was not a "party aggrieved" by the judgment entered in the Superior Court, plaintiff's appeal as to this first assignment of error is dismissed.

b.

[2] Plaintiff assigns as error that the court erred in limiting interest allowed to interest on $6291.84 and not permitting interest on the unreduced amount of the jury award. Plaintiff's argument is wholly without merit.

The jury found that plaintiff was damaged in the amount of $26,400. G.S. 97-10.2 contemplates that the employee's action against a "third party is to be tried on its merits as an action in tort," and any verdict "adverse to the third party is to declare the full amount of damages suffered by the employee," notwithstanding any award for compensation under the Workers' Compensation Act. *Lovette v. Lloyd*, 236 N.C. 663, 668, 73 S.E. 2d 886, 891 (1953).

Under G.S. 24-5, plaintiff is entitled to receive interest on the portion of her "money judgment" that represents "compensatory damages." Because plaintiff had already received a workers' com-

pensation award of $20,108.16, the judgment awarded plaintiff $6291.84 in damages. The trial court arrived at that figure by following the requirements of G.S. 97-10.2(e). After the reductions required by statute are made, it can be determined what amount plaintiff is actually entitled to receive. Interest should be calculated based on the amount plaintiff is actually entitled to receive. Accordingly, plaintiff's second assignment of error is overruled.

The result here is that as to plaintiff's first assignment of error the appeal is dismissed. In all other respects, we find no error in the trial.

Dismissed in part; no error.

Chief Judge HEDRICK and Judge WELLS concur.

BIAS M. EDGE, JR. AND WIFE SANDRA EDGE v. METROPOLITAN LIFE INSURANCE COMPANY, JOAN W. MERCER, HAL STOCKTON, AND FRANK TOWNSEND

No. 8512SC369

(Filed 31 December 1985)

Rules of Civil Procedure § 59— new trial ordered—specific findings not required

A discretionary new trial order is not reviewable on appeal in the absence of manifest abuse of discretion, and a trial judge is not required to make specific findings as to the factors causing him to order a new trial.

APPEAL by defendant Metropolitan Life Insurance Company from *Johnson (E. Lynn), Judge*. Order entered 15 November 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 28 October 1985.

Defendant appeals an order granting a new trial.

Emanuel and Emanuel, by Robert L. Emanuel; Rudolph G. Singleton; and William J. Toppeta, by Mary Currie, for defendant-appellant.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., for plaintiff-appellees.

EAGLES, Judge.

The dispositive question before this court on this appeal is whether the trial judge abused his discretion in ordering a new trial. We hold that he did not, that the various other issues argued by the parties are not before us, and dismiss the appeal.

The facts giving rise to the present appeal are, briefly summarized, as follows: plaintiff Sandra Edge had a miscarriage in 1977 and thereafter consulted a physician in an effort to determine why, despite their continuing efforts, she and her husband, plaintiff Bias Edge, did not conceive a third child. In May 1980, the Edges contacted defendant Metropolitan Life through its agents, the individual defendants, to obtain health insurance. The Edges filled out an application, which included a question whether any family members suffered from diseases or abnormal physical conditions; they mentioned only their daughter's ear problems. In July and August 1980 Sandra Edge underwent further fertility tests. A completed policy, excluding coverage for undisclosed preexisting conditions, was issued by Metropolitan in September 1980. In October 1980, Sandra Edge underwent further tests which revealed scarring and inflammation around her ovaries. Metropolitan denied coverage for this test, which cost $1,055, on the grounds that Sandra Edge's infertility was an excluded preexisting disease or abnormal condition undisclosed by plaintiffs. After some inconclusive correspondence between the parties, plaintiffs filed this action in June 1981. As amended, the complaint asked for damages exceeding $2,000,000. The claims involved breach of contract, bad faith denial of coverage, punitive damages and deceptive trade practices. The jury returned a verdict for the amount originally billed, plus $10,000 damages arising from Metropolitan's bad faith in denying the claim. Plaintiffs immediately moved for a new trial under G.S. 1A-1, R. Civ. P. 59(a). The trial judge granted the motion "in the Court's discretion," and defendant Metropolitan appealed.

The parties do not directly address the issue, but we first must determine whether the appeal is properly before us. *In re Watson*, 70 N.C. App. 120, 318 S.E. 2d 544 (1984), *disc. rev. denied*, 313 N.C. 330, 327 S.E. 2d 900 (1985). G.S. 1-277(a) provides for appeals from grants of new trial: "An appeal may be taken from every judicial order . . . upon or involving a matter of law or

legal inference, . . . which . . . grants or refuses a new trial." The language cited has long been part of the law governing appeals in this state. *See* Public Statutes, Code of Civil Procedure Section 299 (Battle Rev. 1873). It has been consistently held under this language that a discretionary new trial order, as opposed to an order granting a new trial as a matter of law, is not reviewable on appeal in the absence of manifest abuse, and that those appeals should be dismissed. *Goldston v. Chambers*, 272 N.C. 53, 157 S.E. 2d 676 (1967); *Scott v. Trogdon*, 268 N.C. 574, 151 S.E. 2d 18 (1966); *Bird v. Bradburn*, 131 N.C. 488, 42 S.E. 936 (1902). The Supreme Court recently considered at length the application of the established law regarding the scope of review of discretionary new trial orders, and the possible effect of the new Rules of Civil Procedure. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). The *Worthington* court did not address the appealability issue and did not change the scope of review. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E. 2d at 605.

Applying this standard, we are not convinced that a substantial miscarriage of justice or manifest abuse of discretion occurred. It does not appear that defendant has suffered any undue oppression. The trial was long, complex and full of opportunities for error. In light of this complexity, it is unclear precisely what reasons might have motivated the trial judge to order a new trial. The reasons that might motivate a judge to order a new trial are discussed at length in *Worthington v. Bynum, supra*, and *Bird v. Bradburn, supra.*

Defendant argues that the court erred in failing to make specific findings as to the factors causing him to order a new trial. Defendant failed to request any findings, however, and none were required under the Rules of Civil Procedure. G.S. 1A-1, R. Civ. P. 59(a); R. Civ. P. 52(a)(2). R. Civ. P. 59(d), requiring a statement of reasons, applies only to cases in which the trial court orders a new trial on its own motion. While it has been suggested that discretionary new trial orders should include reasons as a matter of course, *see Worthington v. Bynum, supra* (Carlton, J., concurring), the law does not require them in the absence of a

specific request. Accordingly, we conclude that there was no abuse of discretion and the appeal should be dismissed.

Appeal dismissed.

Chief Judge HEDRICK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. ROGER BYRD

No. 8525SC461

(Filed 31 December 1985)

1. **Constitutional Law § 43— lineup during investigation—no right to counsel**

In a prosecution for robbery there was no merit to defendant's contention that his constitutional right to counsel at a lineup was violated since, at the time of the lineup, defendant was charged with forgery of one of the checks taken in the robbery but was only a suspect in the robbery case, and the Constitution does not require that mere suspects be furnished counsel at lineups.

2. **Criminal Law § 46.1— flight of defendant—instructions proper**

There was no merit to defendant's contention that the trial court erred in instructing the jury that his attempted flight when officers came to arrest him on forgery charges could be considered as evidence of his guilt in this robbery case, since what defendant's flight meant, if anything, was a question of fact properly left to the jury.

APPEAL by defendant from *Owens, Judge*. Judgment entered 11 January 1985 in Superior Court, CATAWBA County. Heard in the Court of Appeals 22 October 1985.

Defendant was convicted of armed robbery. The evidence for the State tends to show the following: When Vickie Poole, who owns a restaurant in Hickory, was leaving the restaurant parking lot during the night of 26 July 1984 two men, one of them armed with a pistol, took two bags from her containing approximately $1,100 and fled down a nearby alley. The parking lot itself was not illuminated, but it received some illumination from some nearby streetlights. The police came and Ms. Poole described one of the robbers as a black man, having a squared-off face and close-cropped hair and beard. At a photo line-up conducted by the police on 30 July she tentatively identified defendant's picture as

a "strong possibility" of being one of the robbers. Later that day, but independent of the robbery investigation, defendant was arrested at a Hickory super market immediately after cashing one of the checks stolen in the robbery. He was charged with forgery and uttering and the next morning his bail was set and counsel appointed for him. Shortly thereafter, while still in jail and before he was contacted by his appointed counsel, he was taken to the Newton police station, a few blocks away, for a line-up in the Vickie Poole robbery investigation. His request that the lawyer appointed in the other case be present was denied. At the line-up Ms. Poole identified defendant as the robber and he was then charged with that offense. In a *voir dire* conducted on the State's identification evidence she testified on cross-examination that defendant looked different from the other men in the line-up. Following the *voir dire* the court found that, even though the identification procedure might have been suggestive, there was no substantial likelihood that he was mistakenly identified as the armed robber and denied defendant's motion to suppress.

Attorney General Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

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

PHILLIPS, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to suppress the State's evidence relating to his identification by Ms. Poole. The essence of defendant's contention is that his constitutional right to counsel at the line-up was violated. This contention is without merit. Defendant's right to counsel in this case did not attach until he was formally charged with the armed robbery. *State v. Sanders*, 33 N.C. App. 284, 235 S.E. 2d 94, *disc. rev. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977). And contrary to defendant's contention, in the setting that then existed, the forgery and armed robbery charges were not so closely related that his right to counsel for the armed robbery offense attached when he was arrested for forgery. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). Though upon his arrest for passing the forged check he became a suspect in the armed robbery case, he was only a suspect until Ms. Poole identified him, and the

Constitution does not require that mere suspects be furnished counsel at line-ups. Nor has defendant shown any other error in the denial of his motion. The court's extensive findings of fact, supported by competent evidence, support the trial court's conclusion that there was no substantial likelihood that defendant was misidentified. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976).

[2] Defendant's only other contention is that the trial court erred in instructing the jury that his attempted flight when the officers came to arrest him on the forgery charges could be considered as evidence of his guilt in this case. He argues that his flight was clearly a reaction to the bad check transaction, which had just occurred, and not to the armed robbery four days earlier. This argument is rejected. What defendant's flight meant, if anything, was a question of fact, not law, that was properly left to the jury; and one thing it could have meant was that it was prompted as much by defendant's commission of the armed robbery as it was by the passing of the check. Under the circumstances the instruction was not error. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977).

No error.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. THOMAS FLANNIGAN

No. 8512SC289

(Filed 31 December 1985)

Criminal Law § 88.3— 5-year-old incompetent to testify—cross-examination based on 5-year-old's statements improper

In a prosecution for taking indecent liberties with a child, defendant's 15-year-old stepdaughter, and incest, the trial court erred in permitting the prosecutor to ask defendant questions concerning his sexual abuse of his 5-year-old daughter and erred in refusing to instruct the jury to disregard the questions, since the court had ruled that the 5-year-old was incompetent to testify, and it was improper for the prosecutor to advise the jury of purported events based on his secondhand understanding of what the child knew and had said.

State v. Flannigan

APPEAL by defendant from *Johnson, E. Lynn, Judge.* Judgment entered 27 September 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 October 1985.

Defendant was convicted of taking indecent liberties with a child in violation of G.S. 14-202.1 and incest in violation of G.S. 14-178. The alleged victim in both instances was his 15-year-old stepdaughter, Virginia Annette, and the offenses allegedly occurred in November 1983. During the trial, the State offered to introduce the testimony of defendant's 5-year-old daughter, Tonya, to the effect that he had sexually abused her on various occasions; but after hearing her proffered testimony outside the presence of the jury, the judge ruled that she was not a competent witness and did not permit her to testify. When defendant later took the stand the prosecutor nevertheless put the following questions to him: "You have had your daughter, Tonya, on past occasions, rub your penis, have you not, Mr. Flannigan? You did insert your penis into [Tonya's] vagina, didn't you? You have in the past rubbed your penis between her legs, between Tonya's legs, have you not? Do you know any reason why she would say you have?" Defendant's objection to the last question was sustained, but he was required to answer the other questions, which he did in the negative. After that the State again attempted to have Tonya Flannigan testify, but following another *voir dire* outside the presence of the jury the request was denied. As in the first *voir dire* pertinent parts of her proffered testimony were contradictory and obviously did not support the State's claims concerning her knowledge and competence. Among other things, she showed no clear understanding of the supposed incidents she was questioned about; she could not say why she was in court; and when asked by the court "did anything happen between you and your daddy," and whether he ever put his hands between her legs she responded "no" to both questions. Also, after correctly stating that a lie was something made up, when the court questioned her about telling the social worker that something had happened, she said twice that the earlier statement was a lie. Defendant's motions for a mistrial and that the jury be instructed to disregard the prosecutor's questions about Tonya were denied.

Attorney General Thornburg, by Assistant Attorney General Edmond W. Caldwell, Jr., for the State.

Appellate Defender Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

PHILLIPS, Judge.

The prejudicial effect of the prosecutor's questions to defendant about sexually abusing his 5-year-old daughter is too obvious for discussion, and the only question presented in regard thereto is whether the court erred in permitting the questions to be asked and in refusing to instruct the jury to disregard them. That the questions concerned specific acts by defendant collateral to this case was no drawback. A defendant who takes the stand may be asked about collateral misdeeds that tend to show his criminal conduct, intent or motive in the case being tried. Rule 608 and Rule 404(b), N.C. Rules of Evidence. But such questions must have a good faith basis, *State v. Pilkington*, 302 N.C. 505, 276 S.E. 2d 389, *cert. denied*, 454 U.S. 850, 70 L.Ed. 2d 140, 102 S.Ct. 290 (1981), and the only basis for the questions asked defendant was the confused, contradictory and unreliable statement of a 5-year-old child who the court ruled was incompetent to testify. Since the child herself was incapable of informing the jury firsthand of the events that the State claimed she participated in, we do not believe it was proper for the prosecutor to advise the jury of these purported events based on his secondhand understanding of what the child knew and had said. Though done by questions put to a defendant during cross-examination the State may not inform the jury of purported misdeeds by the defendant that firsthand knowledge of its source does not support. The ruling by the court that the child was an incompetent witness to the purported events left no support whatever for the prosecutor's disparaging questions, and the court erred both in permitting the questions and in failing to instruct the jury to disregard them.

The defendant's only other contention, that the court misstated the evidence in charging the jury, is not ruled on since the statement complained of is not likely to be repeated when the case is retried.

New trial.

Judges WEBB and JOHNSON concur.

CATHERINE M. LEE v. LEON HENRY LEE

No. 8518DC353

(Filed 31 December 1985)

Divorce and Alimony § 24.4— child support—present ability to pay—finding of contempt improper

There was no determination by the trial court that defendant had the present ability to comply with a civil contempt order requiring him to pay $1,000 of a child support arrearage, since the trial court's finding that "defendant represents to the court that he is presently employed . . . and earns $5.10 per hour" was not a determination by the court of a fact established by the evidence, nor was the finding that "defendant has had the ability to comply" sufficient to support the conclusion of law that defendant had the present ability to comply.

APPEAL by defendant from *Bencini, Judge*. Judgment entered 24 January 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 22 October 1985.

On 8 September 1978 defendant, Leon Henry Lee, pursuant to the provisions of G.S. Chap. 110, executed a voluntary support agreement for the support of his three minor children. Defendant agreed to pay the sum of $30.00 per week. The agreement was approved by a District Court judge in accordance with G.S. 110-133. At a hearing 1 November 1984 upon motion of the Guilford County Child Support Enforcement Office defendant was found to be in arrears in the amount of $3,461.75. The court found that defendant was employed, had an increase in wages, and was able to pay increased child support. Defendant was ordered to pay $112.00 every two weeks of which $102.00 was to be applied to regular support and $10.00 to the arrearage until the arrearage was paid in full.

On 24 January 1985, upon motion of the Guilford County Child Support Enforcement Office, a civil contempt hearing was held for defendant to show cause why he should not be held in

contempt for failing to comply with his support obligations as ordered. At the hearing the court found that since the 1 November 1984 order defendant had paid only $224.00; that defendant has a total arrearage of $5,685.75; that "defendant represents to the court he is presently employed by Alma Desk Company and earns $5.10 per hour," and that "defendant has had the ability to comply with the previous order." The court held defendant in civil contempt and ordered him jailed until he purged himself of contempt by paying $1,000.00 of the arrearage. Defendant was given work release.

Defendant gave notice of appeal and this Court issued a writ of supersedeas on 25 February 1985 staying the execution of the sentence for contempt pending the outcome of this appeal.

Gregory L. Gorham, for plaintiff appellee.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for defendant appellant.

JOHNSON, Judge.

Defendant does not dispute the court's ability to enforce its previous orders. Defendant contends that there is no determination that he has the *present* ability to comply with the civil contempt order requiring him to pay $1,000.00 of the arrearage. We agree.

In *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E. 2d 786, 787 (1980), this Court held that:

> For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the *present* ability to comply, or the *present* ability to take reasonable measures that would enable him to comply, with the order. (Emphasis ours.)

Accord McMiller v. McMiller, 77 N.C. App. 808, 336 S.E. 2d 134, (1985); *Jones v. Jones*, 62 N.C. App. 748, 303 S.E. 2d 583 (1983).

G.S. 1A-1, Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially. . . ." The court must make its own determination as to

what pertinent facts are established by the evidence rather than merely reciting what the evidence may tend to show. *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 323 S.E. 2d 368 (1984). In the case *sub judice*, the trial court's finding that "defendant represents to the court he is presently employed . . . and earns $5.10 per hour" is not a determination by the court of a fact established by the evidence. At best it is a recapitulation of defendant's testimony. Therefore, we are left with the finding that "defendant has had the ability to comply. . . ." In *McMiller, supra*, this Court rejected this exact finding as a basis of showing that a defendant has the *present* ability to purge himself of the contempt order. This Court stated such a finding "justifies a conclusion of law that defendant's violation of the support order was willful (citation omitted) however, [it] . . . does not support the conclusion of law that defendant has the present ability to purge himself of the contempt by paying the arrearages." *Id.* at 809, 336 S.E. 2d at 135.

For the reason that there is no evidence in this record that defendant actually possessed the $1,000.00 or that he had the present ability to take reasonable measures that would enable him to comply with the contempt order, the order must be vacated and the cause remanded for further proceedings.

Vacated and remanded.

Judges WEBB and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 31 DECEMBER 1985

BARRINGER v. AMERICAN BANKERS LIFE ASSURANCE CO. OF FLORIDA No. 8526SC364	Mecklenburg (83CVS12602)	Affirmed
CARPENTER v. McLENDON No. 8526DC739	Mecklenburg (82CVS104)	No Error
DUNN v. PRENTIS No. 8514SC346	Durham (83CVS3291)	No Error
JOHN ROBBINS MOTOR COMPANY v. GENERAL MOTORS CORPORATION No. 8510SC507	Wake (84CVS4742)	Affirmed
STATE v. BARRIER No. 853SC400	Craven (84CRS3971) (84CRS3972)	No Error
STATE v. BLAKELY AND SADLER No. 8526SC560	Mecklenburg (84CRS49454) (84CRS49456) (84CRS49434) (84CRS49437)	No Error
STATE v. CHRISTOPHER No. 8526SC668	Mecklenburg (84CRS9089)	No Error
STATE v. HARVEY AND BROOKS No. 852SC71	Beaufort (83CRS5819) (83CRS5820) (83CRS7188) (83CRS7189)	New Trial
STATE v. HENRY No. 854SC648	Onslow (84CRS3799) (84CRS3802) (84CRS4089) (84CRS4090) (84CRS6027) (84CRS6029)	Judgments in case Nos. 3802, 3799, 6029 and 4090 are remanded for resentencing.
STATE v. HOLLY No. 8514SC184	Durham (81CRS285)	Affirmed

STATE v. THOMPSON No. 8518SC819	Guilford (84CRS37227) (84CRS41812)	Vacated & Remanded
WILKIE CONSTRUCTION COMPANY, INC. v. TRUSTEES OF CALDWELL COMMUNITY COLLEGE No. 8525SC300	Caldwell (83CVS23)	Reversed & Remanded

IN RE DENIAL OF REQUEST BY HUMANA HOSPITAL CORPORATION, INC. FOR RECONSIDERATION HEARING FOR PROJECT NO. J-1561-81 PROPOSED CONSTRUCTION OF PARKWAY MEDICAL CENTER

No. 8510SC443

(Filed 7 January 1986)

Hospitals § 2.1— denial of certificate of need—subsequent application—alleged errors involving first application rendered moot

Where petitioner filed its application in 1981 with the Certificate of Need Section, Division of Facility Services, Department of Human Resources proposing the construction of a 160 bed general acute care hospital in the Apex-Cary portion of Wake County and the application was denied because the 1979-80 State Medical Facilities Plan showed no need for additional acute care beds through the year 1986 in the area which included Wake County, any alleged errors in the denial of a reconsideration hearing of petitioner's 1981 application and the 1981 review process were moot, since petitioner filed a 1982 application proposing essentially the same structure and services as its 1981 application; the 1982 application was reviewed under the 1981-82 State Medical Facilities Plan which projected a need of 174 beds by the year 1987 and the issue of bed need was therefore no longer in controversy; there was no merit to petitioner's argument that mootness would only be applicable to its claims against the 1981 review process if it had subsequently been awarded a certificate of need; and petitioner was not entitled to priority status because it was the only applicant in the 1981 review process to request a reconsideration hearing and an administrative appeal.

APPEAL by petitioner from *Brewer, Judge* and *Battle, Judge*. Judgments entered 29 November 1982 and 16 January 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 30 October 1985.

On 12 June 1981, petitioner, Humana Hospital Corporation, Inc. (hereinafter "Humana") gave written notice to the Certificate of Need Section, Division of Facility Services, Department of Human Resources (the Section) of its intent to apply for a certificate of need. By memorandum, dated 7 August 1981, the Section advised petitioner and other interested parties that the 1979-80 State Medical Facilities Plan (1979-80 SMFP) would be applied to all applications deemed complete on or before 31 December 1981, or the effective date of the 1981-82 State Medical Facilities Plan (1981-82 SMFP), whichever occurred first.

On 17 August 1981, Humana filed its application with the Section, proposing the construction of a 160 bed general acute

care hospital in the Apex/Cary portion of Wake County. The application was deemed complete on 8 September 1981. Humana filed a second application on 3 December 1981, which proposed essentially the same physical plant and services as the first proposal. On 4 December 1981, the Section denied Humana's first application along with two other applications based on similar proposals. In denying these three applications, the Section applied the 1979-80 SMFP which showed no need for additional acute care beds through the year 1986 in the area which included Wake County.

The 1981-82 SMFP went into effect 1 January 1982 and projected a bed need for the year 1987 of 174 beds. On 4 January 1982, Humana requested a reconsideration hearing on its first application primarily on the ground that the 1981-82 SMFP, showing a need for beds, had been adopted. Humana's request for a reconsideration hearing was denied on the ground that changes in the SMFP were not relevant to Humana's first application. On 19 January 1982, Humana was granted a contested case hearing by the Section.

On 17 February 1982, Humana filed, in the Superior Court, a petition for judicial review of the Section's decision denying it a reconsideration hearing. Later, the petition was amended to include judicial review of the Section's denial of Humana's 1981 application. The Section answered, denying the material allegations, and raised several affirmative defenses including mootness and lack of prejudice in its refusal to grant a reconsideration hearing. Hospital Building Company d/b/a Raleigh Community Hospital, Wake County Hospital System, Inc., and certain named individuals on behalf of low income residents of Wake County were permitted to intervene in support of the Section's denial of Humana's 1981 application.

At the same time Humana was pursuing judicial review of its first application, its second application was being reviewed by the Section under the 1981-82 SMFP which projected a need of 174 beds for the year 1987. Humana's second application was denied on 28 May 1982 and this decision was affirmed in a reconsideration hearing. Although Humana's 1982 application was denied, Hospital Building Company and Wake County Hospital System, Inc., which were the other two applicants in the 1981 review process, were granted approval of their 1982 applications.

On 29 November 1982, Judge Brewer entered summary judgment in the Section's favor, dismissing Humana's petition "on the grounds that the availability to Petitioner of participation in the 1982 review process constituted an adequate remedy for any procedural deficiencies or other errors that may have been made in the 1981 review process." Humana appealed, raising constitutional questions which had not been addressed by the court below. This court dismissed the appeal as premature. *In Re Denial of Request of Humana Hospital Corp.*, 68 N.C. App. 162, *disc. rev. denied*, 311 N.C. 757, 321 S.E. 2d 135 (1984), Humana then submitted to a voluntary dismissal of its constitutional claims and a final judgment was rendered in this case on 16 January 1985. Humana gave notice of appeal from the entry of summary judgment on 29 November 1982 and from the entry of final judgment on 16 January 1985.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John R. Corne, and Johnson, Gamble, Hearn & Vinegar, by George G. Hearn and M. Blen Gee, Jr., for respondent appellee.

Sanford, Adams, McCullough & Beard, by Charles H. Montgomery and Renee J. Montgomery, for petitioner appellant.

Hollowell & Silverstein, P.A., by Edward E. Hollowell and Robert L. Wilson, Jr., for Wake County Hospital System, Inc., intervenor appellee.

Jordan, Brown, Price & Wall, by John R. Jordan, Jr., Joseph E. Wall, and Stephen R. Dolan, for Hospital Building Company, intervenor appellee.

East Central Community Legal Services, by Gregory C. Malhoit, and Legal Services of the Lower Cape Fear, by Richard Klein, for Hubert A. Evans, et al., intervenor appellee.

MARTIN, Judge.

Humana contends on appeal that the Section committed violations of its own administrative procedures in the 1981 review process and in denying Humana's application for a reconsideration hearing on its 1981 application. In addition, Humana assigns error to the Superior Court's decision that Humana has been afforded an adequate remedy and its claims are moot. We do not address

the issues concerning the procedural violations because we agree with the Superior Court that Humana's claims are moot.

The doctrine of mootness is applicable to an appellate proceeding where the original question in controversy is no longer at issue. In *State ex rel. Utilities Comm. v. Southern Bell Tel. & Tel. Co.*, our Supreme Court held that

> [w]hen, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightfully have won in the lower Court.

289 N.C. 286, 288, 221 S.E. 2d 322, 324 (1976). The doctrine of mootness was also applied in *In re Peoples* where the Court held that

> [w]henever, during the course of litigation it develops that the relief sought has been granted or that questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

296 N.C. 109, 147, 250 S.E. 2d 890, 912 (1978). Applying the doctrine of mootness, as defined above, to the present case, we find that the relief sought by Humana has been adequately provided for and that questions originally in controversy are no longer at issue.

The record reveals that in Humana's request for a reconsideration hearing concerning the denial of its 1981 application, Humana stated two grounds as "good cause" for a reconsideration hearing, pursuant to 10 NCAC 3R .0801. First, Humana asserted that there was a change in the State Medical Facilities Plan showing a need for 174 beds in the area, including Wake County. Second, Humana submitted additional information relating to special criteria. In addition, Humana made reference to information submitted in November, which was not considered part of Humana's 1981 application because it was submitted after the review of its first application had begun. 10 NCAC 3R .0510.

Humana basically sought a review of its 1981 application under the SMFP effective 1 January 1982, enhanced by additional information, in its request for a reconsideration hearing. Humana's 1982 application, which was virtually identical to its 1981 application, was reviewed under the 1981-82 SMFP and contained the additional information Humana wished to submit. The Superior Court found that the relief sought by Humana was provided for through the review of its 1982 application. We agree. Therefore, Humana's assignments of error relating to the denial of a reconsideration hearing concerning its 1981 application are moot.

Similarly, Humana's assignments of error as to the review process of its 1981 application are also moot. Humana basically alleges that the Section erred in reviewing its 1981 application under the 1979-80 SMFP which projected no bed need for the area including Wake County. Humana alleges that the Section should have applied the 1981-82 SMFP which projected a bed need by the year 1987. Regardless of which plan the Section applied, however, Humana claims that the Section should have considered information in its application which projected a bed need in the area.

The thrust of Humana's argument is that there was a bed need in 1981 and that its 1981 application should have been reviewed in light of this fact. The bed need controversy was no longer at issue however, when the 1981-82 SMFP, projecting a need of 174 beds by the year 1987, went into effect 1 January 1982. Humana's 1982 application, which proposed essentially the same structure and services as its 1981 application, was reviewed under the 1981-82 SMFP. We agree with the Superior Court that the 1982 review process afforded Humana an adequate remedy to have its application reviewed under a plan projecting a bed need, regardless of any alleged error in the 1981 review process. Therefore, the assignments of error as to the review process of Humana's 1981 application are moot because the issue of bed need is no longer in controversy.

In support of our decision, we consider it significant that Humana's 1981 and 1982 applications were almost identical and that no certificate of need was issued to any applicant in the 1981 review process. The only significant distinction between the two

applications is that the 1982 application contained information submitted by Humana in November which was not considered as a part of the 1981 application because it was submitted after the 1981 application was deemed complete. 10 NCAC 3R .0510. Furthermore, the 1982 application contained additional information relating to special criteria which was not available in the 1981 application.

Humana contends that the 1981 and 1982 application cycles were different because changes were made in the procedure used to evaluate applications (*see generally,* 1981 N.C. Sess. Laws, c. 651; 10 NCAC Subchapter 3R (effective 1 October 1981)); therefore, the review of its 1982 application did not adequately provide a remedy for the alleged error in its 1981 application. In addition, Humana points out that the 1982 application was revised to conform with the regulations in effect in 1982. Finally, Humana emphasizes the fact that there were three applicants in the 1981 review process and five applicants in the 1982 review process, and that the two other applicants in 1981 rewrote their respective applications for the 1982 review.

We do not believe that Humana has shown that any of its rights have been prejudiced by having to reapply for review in 1982. The differences in the two application cycles pointed out by Humana relate to procedure. It is a generally recognized principle in this state, and in most other jurisdictions, that there is no vested right in any particular mode of procedure or remedy. 16 Am. Jur. 2d § 675, Constitutional Law (1979); *see also Byrd v. Johnson,* 220 N.C. 184, 16 S.E. 2d 843 (1941). However, no procedural change can disturb vested rights. *Gardner v. Gardner,* 300 N.C. 715, 268 S.E. 2d 468 (1980). A vested right is that "which is otherwise secured, established, and immune from further legal metamorphosis." *Id.* at 719, 268 S.E. 2d at 471.

Humana had a right to apply for a certificate of need and to have its application reviewed fairly under the appropriate plans, standards, and criteria. G.S. 131-175(1)-(7). This right was not disturbed by the changes in procedure from 1981 and 1982 and Humana was still afforded this right under the 1982 review process. G.S. 131E-175(1)-(7) (1985 Supp.). Therefore, the review of Humana's 1982 application provided an adequate remedy for the alleged errors in the review of Humana's 1981 application.

Humana further argues that mootness would only be applicable to its claims against the 1981 review process if Humana had subsequently been awarded a certificate of need. We disagree. Humana had only a right to a fair review of its application and not the absolute right to a certificate of need.

In *State ex rel. Utilities Comm. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976) (*Southern Bell I*), Southern Bell appealed a denial of its first rate request and while the case was on appeal, filed a second application for a rate increase. Southern Bell was granted its second rate request and this decision was appealed. Even though the second proceeding might be subject to an appeal, the Supreme Court held that the first proceeding was moot on the ground that the second proceeding had granted a new rate to Southern Bell after a "full, adversary hearing and fresh desterminations of changed facts by the Commission." *Id.* at 290, 221 S.E. 2d at 324.

In the present case, Humana participated in a full adversary hearing and fresh determination of changed facts in the 1982 review process. The Section reviewed its 1982 application and held a reconsideration hearing based on the "changed facts" that 174 beds would be needed by 1987. Although Humana was denied a certificate of need in the 1982 review process, it received a review based on the projected bed need of 174 beds which it sought to be applied in the 1981 review process. The Certificate of Need Law secures to applicants the right to a fair review of an application and not the absolute right to a certificate of need. G.S. § 131-175 provides in pertinent part:

> (4) That this trend of proliferation of unnecessary health care facilities and equipment result in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of the expensive resources and overutilization of acute care hospital services by physicians.
>
> . . .
>
> (7) That the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to type, level, quality of care, feasibility, and other criteria as determined by provi-

> sions of this Article or by the North Carolina Department of Human Resources pursuant to provisions of this Article prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

G.S. § 131-175(4) and (7).

Humana contends that a more recent case, *State ex rel. Utilities Com'n v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E. 2d 763 (1983) (*Southern Bell II*), supports its argument that mootness would be applicable to its claims of error in the 1981 review process only if it had been awarded a certificate of need in the 1982 review. In that case, the Supreme Court held that a second application for a rate increase which was granted did not render the issues concerning the denial of the first rate request moot because the second rate increase, not being applied retroactively, would not give the full relief sought in the first application. The Court did not overrule *Southern Bell I* but the Supreme Court simply distinguished the two cases by pointing out that the two requests were the same in *Southern Bell I* but the two requests in *Southern Bell II* covered different time periods.

We believe that the present case is similar to *Southern Bell I* and distinguishable from *Southern Bell II*. In *Southern Bell II*, the two requests were for different time periods, while in the case *sub judice*, Humana's 1981 and 1982 applications requested approval of virtually identical proposals. Therefore, Humana was afforded an adequate remedy for the alleged errors in the 1981 review process by its participation in the 1982 review process. *See also Stewart v. Stewart*, 47 N.C. App. 678, 267 S.E. 2d 699 (1980); *In re Williamson*, 67 N.C. App. 184, 312 S.E. 2d 239 (1984).

Humana asserts that it is entitled to a priority status because it was the only applicant of the three applicants in the 1981 review process to request a reconsideration hearing and an administrative appeal. In essence, it is Humana's claim that its application should be reviewed under the 1981-82 SMFP in isolation from the competing applicants.

The United State Supreme Court has recognized that a priority status cannot be written into a statute by implication; instead, such priority would have to be conferred by legislative action.

F.C.C. v. Pottsville Broadcasting Company, 309 U.S. 134 (1940). In *Pottsville*, the Commission denied an application for a broadcasting license but on appeal the Court found the decision to be in error and remanded. As to the issue of whether the Commission should consider subsequent applications, the Court stated that

> [t]he Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

Id. at 145-146. The Court further noted that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Id.* at 145.

The North Carolina Certificate of Need Law does not provide a priority status. G.S. § 131-182 provides that a final decision be made within a certain time period from the date of the notification of review. 10 NCAC 3R .0512 (effective 1 February 1979) pro-

vides for a competitive review whenever possible. Subsequent applications would have to be filed and deemed complete within the time frame provided by G.S. § 131-182 in order to compete with the initial application, however this does not grant a priority status on the initial application but merely imposes a time period on the Section for decisions. *See also* 10 NCAC 3R .0507 and .0509 (effective 1 February 1979). In addition, the purposes behind the enactment of the Certificate of Need Law were to regulate health care so that only those services which are needed and less costly but more effective are made available to the public. G.S. § 131-175 (1)-(7). Under *Pottsville*, the Section should not be foreclosed from carrying out the purposes and intent of the Certificate of Need Law by an alleged priority status obtained by an applicant being the only one of several applicants to exercise its rights to judicial review. Therefore, Humana is not entitled to a priority status.

We believe that our decision is in accord with the legislative purpose and intent in the enactment of the Certificate of Need Law. In enacting the Certificate of Need Law, the legislature found as facts that the forces of free market competition are largely absent in health care and government regulation is therefore necessary to control the cost, utilization, and distribution of health services and to assure that the less costly and more effective alternatives are made available. G.S. § 131-175(1)-(7); § 131-181(a)(4). By holding that Humana received an adequate remedy by having its application considered in the 1982 competitive review process, we adhere to the purpose of the Certificate of Need Law and the public policy considerations for which it was enacted.

Finally, we point out that our decision in the case *sub judice* is based upon and limited to the unique facts and circumstances surrounding this case. This opinion should not be construed as holding that the opportunity to reapply for a certificate of need automatically moots all procedural claims in all cases. We believe that, under the facts of this case, Humana has been afforded an adequate remedy by its participation in the 1982 review process and that any alleged errors in the denial of its reconsideration hearing of its 1981 application and the 1981 review process are moot. Therefore, the decision of the Superior Court is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

THEODORE LEWIS SURRETTE v. DUKE POWER COMPANY

No. 8526SC468

(Filed 7 January 1986)

1. **Electricity § 6; Negligence § 30.2— injury while stringing electical wire—proximate cause of injury—insufficient evidence of negligence**

In an action to recover damages for personal injuries allegedly caused by defendant's negligence, the trial court properly entered summary judgment for defendant where the evidence tended to show that defendant provided a puller-tensioner to plaintiff's employer to facilitate plaintiff's job of installing wire onto power poles; although the bolt which initially broke was in the puller-tensioner when plaintiff began using the machine, there was no evidence that the bolt was other than the original bolt installed at the time the machine was manufactured, that it was improperly installed, or that defendant should have been aware, by reasonable maintenance and inspection, that it might break; there was no evidence suggesting that plaintiff was injured when the first bolt sheared; there was no evidence that defendant's employees instructed plaintiff or his co-worker to install an inadequate bolt or pressured plaintiff to continue the work under unsafe conditions; there was evidence that plaintiff's employer was authorized to procure, at defendant's expense, parts and equipment necessary to the performance of the work; and there was evidence that plaintiff installed an inadequate bolt and fell a third time when a rope separated from the wire which was being installed, but this occurrence did not involve defendant; and after this third fall, plaintiff's foreman reduced tension on the wire and the job was completed without further incident, even though plaintiff continued to use the puller-tensioner with a 3/8 inch carriage bolt installed in the place of the proper ½ inch bolt.

2. **Negligence § 35.1— continued operation of machinery—contributory negligence**

Defendant in a personal injury action was entitled to summary judgment on the basis of plaintiff's contributory negligence where the evidence tended to show that plaintiff operated a piece of machinery while fully aware that the mechanism connecting the motor to a reel required a case-hardened ½ inch bolt because of its strength; he knew that a ½ inch bolt had sheared, causing him to fall; he nevertheless proceeded to operate the machine using a weaker 3/8 inch carriage bolt; and, when the smaller bolt failed, plaintiff fell again and sustained an injury.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 24 January 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 November 1985.

In this civil action, plaintiff seeks damages for personal injuries which he alleges were proximately caused by negligence on the part of Duke Power Company (Duke). Specifically, plaintiff alleges that he was injured on 5 May 1981 while he was engaged in his employment as a lineman for Harrison-Wright Company, Inc. (Harrison-Wright), a contractor employed by Duke to install electrical wire onto power poles. In order to facilitate the installation of the wire, Duke provided for Harrison-Wright's use a piece of equipment known as a puller-tensioner, a trailer mounted device consisting of a large motor driven reel wound with heavy rope. Plaintiff alleges that as he was using the machine to pull electical wire, a bolt sheared, causing him to lose his balance and fall down an embankment. He contends that Duke was negligent in failing to properly inspect and maintain the machine and in furnishing an unsafe machine.

In its answer, Duke denied any negligence on its part and asserted, as affirmative defenses, contributory negligence on the part of plaintiff and his employer. Both plaintiff and Duke moved for summary judgment. When the motions were heard, the only materials submitted to the court, other than the pleadings, were depositions of Nelton A. Mullis, plaintiff's foreman, and Charles David Powell, a co-employee who was working at the puller-tensioner with plaintiff at the time of the events in question. These depositions tended to show that Duke had provided the puller-tensioner to Harrison-Wright on previous occasions and had furnished manuals and instruction as to its use. Both Mullis and Powell had used the puller-tensioner or similar equipment on several occasions before 5 May 1981.

In order to install wire, rope is unwound from the reel on the puller-tensioner and strung over the power poles to the place where the wire truck is located. The rope is attached to the wire, and is then rewound onto the reel of the puller-tensioner, causing the wire to be pulled into place along the power poles. Plaintiff's job was to guide the rope back onto the reel evenly and required that he exert pressure on the rope.

On 5 May 1981 plaintiff and Powell went to the site where the puller-tensioner was located about 3,500 feet from the wire truck where Mullis and another Harrison-Wright employee were working. Shortly after plaintiff and Powell began pulling wire, a bolt, which was a part of the mechanism connecting the motor to the reel broke, relieving tension on the reel and causing the rope to go slack. When the rope went slack, plaintiff lost his balance and fell. He apparently was not injured by this fall. The bolt which sheared was a ½ inch bolt; it was not preserved as evidence. At plaintiff's suggestion, Powell radioed Duke's service office and requested a ½ inch case-hardened bolt to replace the broken bolt. He was advised that Duke had no such bolt in stock and that he should use whatever was available. Powell had some 3/8 inch carriage bolts in his truck and he and plaintiff used one of these carriage bolts to replace the ½ inch bolt which had sheared. Shortly after they resumed operation of the machine, this bolt either broke or came out of the mechanism, causing plaintiff to fall again. On this occasion, he fell over some logs and debris and complained to Powell that he had injured his knee. He and Powell replaced the broken bolt with another 3/8 inch carriage bolt and resumed work. At some point later in the day, the grip connecting the rope to the wire came loose, causing the plaintiff to fall a third time. He complained about his knee on that occasion as well. After this incident, Powell requested Mullis to reduce the amount of tension placed on the wire as it was being drawn out of the wire truck. The pulling operation was then completed without further incident. On the following day, Mullis purchased several case-hardened ½ inch bolts in Hendersonville for use on the machine.

The trial court concluded that there were no issues of material fact and that Duke was entitled to judgment in its favor. From the order granting Duke's motion for summary judgment, plaintiff appeals.

Warren & Mallonee, by Bob Warren and L. Lane Mallonee; and D. Thomas Johnson, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by Rodney Dean, for defendant appellee.

MARTIN, Judge.

Plaintiff assigns as error the denial of his motion for summary judgment and the granting of summary judgment in favor of Duke Power Company. Although the trial court did not specify the basis upon which defendant's motion was granted, our review of the record discloses two grounds upon which the trial court's order can be supported, either of which would entitle defendant to summary judgment. Accordingly, the trial court's judgment must be affirmed.

The rules with respect to summary judgment are well established. Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c).

> An issue is genuine if it "may be maintained by substantial evidence." (Citations omitted.)
>
> . . . .
>
> [A] fact is material if it would constitute or would irrevocably establish any material element of a claim or defense. (Citation omitted.)

City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 654, 268 S.E. 2d 190, 193 (1980). The moving party must establish not only the lack of a genuine issue as to a material fact, but also that he is entitled to judgment as a matter of law. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The evidence presented must be viewed in the light most favorable to the non-movant. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516 (1972). Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury. *Moore v. Crumpton*, 306 N.C. 618, 295 S.E. 2d 436 (1982). However, summary judgment may be granted, in a negligence case where there is no question as to the credibility of witnesses and the evidence shows either (1) a lack of any negligence on the part of the defendant, *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979) or (2)

that plaintiff was contributorily negligent as a matter of law. *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982).

In this case, neither party submitted affidavits, answers to interrogatories or admissions in support of their respective motions for summary judgment. Both plaintiff and defendant relied solely upon the depositions of Mullis and Powell; there is nc dispute as to the credibility of either witness.

[1] The first issue which we must consider is whether the evidence, considered in the light most favorable to plaintiff, raises any genuine issue as to negligence on Duke's part, and if so, as to whether such negligence was a proximate cause of plaintiff's injury. We conclude that it does not. Although the bolt which initially broke was in the puller-tensioner when plaintiff began using the machine, there was no evidence that the bolt was other than the original bolt installed at the time the machine was manufactured, that it was improperly installed, or that Duke should have been aware, by reasonable maintenance and inspection, that it might break. In addition, there was no evidence suggesting that plaintiff was injured when the first bolt sheared. Thus, the evidence with respect to the initial incident is insufficient to raise a genuine issue as to any negligence on the part of Duke which proximately caused an injury to plaintiff.

Even so, plaintiff contends that after Duke had been informed of the initial incident, a Duke employee instructed plaintiff and Powell to use an improper bolt to get the puller-tensioner back in operation. Plaintiff argues that Duke should have known of the danger involved in the use of an improper bolt in the machine and was negligent in failing to prevent the continued use of the puller-tensioner until a proper replacement bolt could be located. The evidence, however, indicates that when Powell radioed Duke's service center, he was told only that Duke did not stock the kind of bolt that he requested and that he would have to use whatever was available to him to repair the machine. There was no evidence that any of Duke's employees instructed Powell or plaintiff to install an inadequate bolt in the machine or pressured plaintiff or his employer to continue the work under unsafe conditions. There was also evidence that Harrison-Wright was authorized to procure, at Duke's expense, parts and equipment necessary to the performance of the work, and that plaintiff's foreman purchased

several ½ inch case-hardened bolts the day after these incidents occurred. Finally, there was evidence that plaintiff fell a third time when the rope separated from the wire which was being installed, an occurrence not involving Duke. After this incident plaintiff's foreman reduced tension on the wire and the job was completed without further incident, even though plaintiff and Powell continued to use the puller-tensioner with a 3/8 inch carriage bolt installed in lieu of the proper ½ inch bolt. From our review of all the evidence, and giving plaintiff the benefit of every reasonable inference to be drawn therefrom, we find no substantial evidence of any fact which would tend to establish negligence on the part of Duke or that any act or omission on Duke's part proximately caused any injury to plaintiff.

[2] Even if the evidence had disclosed a genuine issue of material fact as to the negligence of Duke, Duke would nevertheless be entitled to summary judgment on the basis of plaintiff's contributory negligence as a matter of law. The evidence establishes that plaintiff was fully aware that the mechanism connecting the motor to the reel required a case-hardened ½ inch bolt because of its strength. He also knew that a ½ inch bolt had sheared, causing him to fall. Nevertheless, he proceeded to operate the machine using a weaker 3/8 inch carriage bolt. When the smaller bolt failed, plaintiff fell again and sustained an injury.

"[T]he law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided." *Mintz v. Town of Murphy*, 235 N.C. 304, 314, 69 S.E. 2d 849, 858 (1952). A person is considered to be contributorily negligent if "he acts or fails to act with knowledge and appreciation, either actual or constructive, of a danger of injury. . . ." *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E. 2d 593, 597 (1965).

The evidence discloses that plaintiff was aware of the danger involved in operating the puller-tensioner without the proper bolt, that he proceeded to use the machine notwithstanding such knowledge, and that he was injured by reason of such conduct. Thus, his use of the machine rendered him contributorily negligent as a matter of law.

Because we hold that defendant's motion for summary judgment was properly allowed, we deem it unnecessary to discuss the denial of plaintiff's motion for summary judgment. The judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

GREAT AMERICAN INSURANCE COMPANY v. ALLSTATE INSURANCE COMPANY, TERRY TILLEY EATON, PATSY CRABTREE CLAYTON, TOMMY FARR CLAYTON, THOMAS CHARLES WALE, SEAN THOMAS WALE, PEGGY HOLLOWAY AND ALENE HOLLOWAY

No. 8510SC729

(Filed 7 January 1986)

Insurance § 87.1 – automobile liability insurance – driver as resident of father's household – jury question

In a declaratory judgment action to determine the respective contractual obligations under two policies of insurance where the determinative question was whether, at the time of the automobile collision in question, the driver was a resident of his father's household, the trial court erred in entering summary judgment and there was a material issue of fact where the evidence tended to show that the driver was an emancipated person who was enlisted in the Navy and stationed in Virginia; he had no housing other than his military station; his habit of returning to his parents' home for furloughs and leaves and his returning there after discharge from the Navy tended to show an intent to make his parents' home his own; but the driver himself stated that he did not intend to return to his parents' home after enlistment and did not consider himself to be a resident of his parents' household at the time of the collision.

APPEAL by defendants Allstate Insurance Company and Thomas Charles Wale from *Bailey, Judge*. Judgment entered 2 April 1985 in WAKE County Superior Court. Heard in the Court of Appeals 5 December 1985.

Plaintiff Great American Insurance Company (Great American) brought this declaratory judgment action to determine the respective contractual obligations under two policies of insurance; one issued by Great American to Tommy F. Clayton, the other

issued by defendant Allstate Insurance Company (Allstate) to defendant Thomas Charles Wale.

In its complaint, Great American alleged the following pertinent facts and circumstances. On 29 April 1982, Patsy Clayton was driving her husband's Pontiac automobile on Interstate Highway 85 when it was struck by a Chevrolet automobile owned by Terry Eaton and driven by defendant Sean Wale, who was driving Eaton's car with her permission. Personal injuries and property damage resulted from the collision. Terry Eaton had no liability insurance on her car. At the time of the collision, Sean Wale, a resident of his father Thomas Wale's household, was negligent in the operation of the Eaton car but Allstate has denied coverage. Great American's uninsured motorist coverage under the Clayton policy should not apply.

Great American petitioned the trial court to determine the rights, liabilities and legal relations arising under the two policies.

Allstate answered admitting that Sean Wale was the son of Thomas Wale but denied that Sean was a resident of his father's household.

Both Great American and Allstate moved for summary judgment. From judgment entered for Great American, Allstate has appealed.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Dan M. Hartzog and Theodore B. Smyth, for plaintiff-appellee.

Boyce, Mitchell, Burns & Smith, P.A., by Robert E. Smith, for defendants-appellants.

WELLS, Judge.

The essential facts surrounding the collision are not at issue in this case. The determinative question is whether at the time of the collision Sean Wale was a resident of his father Thomas Wale's household. The trial court, in effect, answered that question in the affirmative, ruling that the Allstate liability coverage applied and that the Great American uninsured motorist coverage was not applicable. We reverse and remand.

The Allstate policy contained the following pertinent provisions:

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. . . . "Covered person" as used in this Part means:
>
> 1. You or any family member for the ownership, maintenance or use of any auto or trailer.
>
> . . .
>
> "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household.

The forecast of evidence before the trial court showed that at the time of the collision, Sean Wale was an emancipated person who was enlisted in the United States Navy and stationed at Norfolk, Virginia. He enlisted in November of 1979. At the time he enlisted he gave his parents' home address in Salisbury as his home address. During his enlistment, he had no housing other than his military station. Also, during his enlistment, he visited his parents from time to time and, just prior to the April collision, he had completed a 14-day convalescent leave spent at his parents' home and was returning to his base in Norfolk. At the time of the collision, Sean gave the investigating highway patrolman a home address the same as his parents' home address in Salisbury. In June 1982, when asked by an insurance adjuster where he was, Sean answered, "At home," giving his parents' address. After he got out of the service in August of 1982, Sean stayed with his parents for several weeks while he looked for a place to live.

When Sean left to join the Navy, he removed all of his personal belongings from his parents' home. When he visited his parents on leave, he slept on a living room couch and had no bed or dresser of his own. When he enlisted in the Navy, he never intended to return to his parents' home. He did not consider himself to be a resident of his parents' household at the time of the collision. Sean's parents did not consider Sean to be a resident of their household at the time of the collision.

The interpretation of the terms "resident of your household" or "resident of the same household" or similar terms in insurance

policies has been the subject of numerous appellate court decisions. *See generally* 96 A.L.R. 3d 804 (1979) (no-fault and uninsured motorist coverage) and 93 A.L.R. 3d 420 (1979) (liability insurance); *see, e.g., Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966); *Newcomb v. Insurance Co.*, 260 N.C. 402, 133 S.E. 2d 3 (1963); *Barker v. Insurance Co.*, 241 N.C. 397, 85 S.E. 2d 305 (1954); *Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 331 S.E. 2d 744 (1985); *Fonvielle v. Insurance Co.*, 36 N.C. App. 495, 244 S.E. 2d 736, *disc. rev. allowed*, 295 N.C. 495, 246 S.E. 2d 215 (1978), *motion to withdraw petition for disc. rev. allowed* 15 August 1978. As observed by our courts, the words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. *Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co., supra.* "Residence" has many shades of meaning, from mere temporary presence to the most permanent abode. *Id.* It is difficult to give an exact or even satisfactory definition of the term "resident," as the term is flexible, elastic, slippery and somewhat ambiguous. *Id.* Definitions of "residence" include "a place of abode for more than a temporary period of time" and "a permanent and established home" and the definitions range between these two extremes, *Barker v. Insurance Co., supra.* This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection. *Jamestown v. Nationwide, supra; Davis v. Maryland Casualty Co., supra.*

Our courts have also found, however, that in determining whether a person in a particular case is a resident of a particular household, the intent of that person is material to the question. *Jamestown v. Nationwide, supra; Fonvielle v. Insurance Co., supra.* The forecast of evidence before the trial court raises a question as to Sean Wale's intent to remain a resident of his parents' household or to assume that status from time to time. Sean's habit of returning to his parents' home for furloughs and leaves and his returning there after discharge from the Navy tends to show an intent to make his parents' home his own. On the other hand, the forecast is complicated by Sean's own statement that he did not intend to return to that residence after his enlistment;

this statement tends to show an opposite intent from that shown by his habits and activities. Thus, a material issue of fact has been raised which must be determined by the finder of fact.

In other pertinent North Carolina cases we have examined, the issue of residency went to trial, but in the case now before us, defendant Allstate having demanded a jury trial, summary judgment would be appropriate only where, on undisputed aspects of the opposing evidentiary forecast, there were no genuine issues of fact and plaintiff was entitled to judgment as a matter of law. *See Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E. 2d 518 (1981). Summary judgment should be denied if there is a question of credibility of witnesses or if there is a question which can be resolved only by the weight of the evidence. *Id.; Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). There being such a question in this case, summary judgment was improvidently entered.

Reversed.

Judges ARNOLD and PARKER concur.

EVERETTE S. SCHOFIELD v. JOAN R. SCHOFIELD

No. 8526DC679

(Filed 7 January 1986)

Divorce and Alimony § 19.1; Process § 9.1— motion to reduce or terminate alimony —payments sent to nonresident defendant—insufficient minimum contacts with North Carolina—no personal jurisdiction

Pursuant to N.C.G.S. 1-75.4(5)(d), North Carolina had statutory jurisdiction over plaintiff's motion to reduce or terminate his alimony obligations where plaintiff lived in North Carolina; defendant lived in New Jersey; N.C.G.S. 1-75.4(5)(d) states that statutory jurisdiction is found in any action which "[r]elates 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"; and money payments are "things of value" within the meaning of the statute; however, defendant did not have sufficient minimum contacts with North Carolina so that exercise of personal jurisdiction over her was consistent with due process of law where defendant lived and worked in this State from 1 September 1978 to 1 September 1983; there was no evidence to indicate where the parties were married, but they were divorced in South Carolina; there was

no indication that the parties shared a matrimonial domicile in this State; the complaint was filed almost a year after defendant had moved to New Jersey; and there was nothing in the record to indicate that defendant had conducted business or other activities in the State since she left, that she owned property here, or that she in any way invoked the protection of the laws of North Carolina.

APPEAL by defendant from *Sherrill, Judge.* Judgment entered 26 March 1985 in MECKLENBURG County District Court. Heard in the Court of Appeals 3 December 1985.

Plaintiff husband and defendant wife were married on 23 November 1957. Plaintiff moved to North Carolina from South Carolina in March of 1977. While still living in South Carolina, defendant initiated proceedings in the Family Court of York County, South Carolina for divorce and alimony. On or about 1 September 1978, subsequent to the initiation of the divorce proceedings, defendant also moved to this State. On 13 October 1978 the South Carolina court granted a divorce and permanent alimony to the defendant.

On 17 February 1981, when both parties were residing in Charlotte, the South Carolina court heard a motion by plaintiff in the original divorce action to reduce or eliminate his alimony obligations based upon a change in circumstances. This motion was denied and the denial was subsequently affirmed by the South Carolina Supreme Court. In August of 1983, defendant moved to New Jersey.

On 15 August 1984 plaintiff filed this motion in Mecklenburg County District Court to have his alimony obligations reduced or terminated based on a change of circumstances pursuant to N.C. Gen. Stat. § 50-16.9 (1984). Defendant, through her attorney, moved to dismiss the action based on lack of personal and subject matter jurisdiction, N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (2) of the Rules of Civil Procedure. The motion was allowed. Plaintiff then moved for relief from the order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 of the Rules of Civil Procedure. This relief was granted and defendant's motion to dismiss was rescheduled for hearing. At this hearing defendant's motion to dismiss was denied. Defendant appealed.

No brief for plaintiff-appellee.

Haynes, Baucom, Chandler, Claytor & Benton, P.A., by Rex C. Morgan, for defendant-appellant.

WELLS, Judge.

Defendant has appealed from the denial of her motion to dismiss for lack of personal jurisdiction. Though interlocutory, such a ruling is immediately appealable. N.C. Gen. Stat. § 1-277(b) (1983); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982).

To determine if foreign defendants may be subjected to personal jurisdiction in this State, we apply a two-pronged test. First, we determine whether North Carolina jurisdictional statutes allow our courts to entertain the action. Second, we determine whether our courts can constitutionally exercise such jurisdiction consistent with due process of law. *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, *appeal dismissed*, 313 N.C. 604, 330 S.E. 2d 612 (1985).

Plaintiff's motion to reduce or terminate his alimony obligations was made pursuant to G.S. 50-16.9. This statute provides only that an alimony order entered by a court of another jurisdiction may be modified by a court of this State "upon gaining jurisdiction over the person of both parties"; therefore, statutory jurisdiction arises, if at all, under N.C. Gen. Stat. § 1-75.4 (1983), the North Carolina "long-arm" statute. This statute should be construed liberally, in favor of finding jurisdiction. *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978). The burden is on the plaintiff to establish *prima facie* that one of the statutory grounds applies. *Marion v. Long, supra.*

G.S. 1-75.4(12), entitled "Marital Relationship," applies to an action under Chapter 50 only if the action for absolute divorce in the relationship was filed on or after 1 October 1981, 1981 N.C. Sess. Laws, ch. 815, s. 7, and so does not apply to the present case. None of the other provisions apply specifically to the marital relationship. However, the long-arm statute was intended to make available to the courts of this State the full jurisdictional powers permissible under due process. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

G.S. 1-75.4(5)(d) states that statutory jurisdiction is found in any action which "[r]elates 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. . . ." This Court has held that money payments are "things of value" within the meaning of G.S. 1-75.4(5)(c). *See, e.g., Pope v. Pope*, 38 N.C. App. 328, 248 S.E. 2d 260 (1978) (Court had jurisdiction in action for arrearages due under a separation agreement). The same logic applies to (5)(d). We hold that statutory jurisdiction exists under G.S. 1-75.4(5)(d).

The exercise of statutory jurisdiction must meet the test of constitutional due process, requiring the defendant to have sufficient minimum contacts with the forum state to ensure that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Miller v. Kite*, 313 N.C. 474, 329 S.E. 2d 663 (1985). The concept of minimum contacts furthers two goals. First, it safeguards the defendant from being required to defend an action in a distant or inconvenient forum. Second, it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system. *Id.*

In *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed. 2d 132 (1978), a couple had been married in California but spent their married life in New York. After a separation, the wife moved to California. Eventually, with the husband's acquiescence, one of the couple's children went to live in California. Another child also moved there without the husband's acquiescence. The husband was paying child support at this time. The wife later filed actions in California for divorce and custody, *i.e.*, to adopt and modify a divorce decree obtained in Haiti. The Court held that the husband's contacts with California, his acquiescence to and benefit gained by the children's living there and his support payments sent there were insufficient to establish minimum contacts, as the husband did not "purposefully derive benefit from any activities relating to the State of California." *See also Southern v. Southern*, 43 N.C. App. 159, 258 S.E. 2d 422 (1979); *Miller v. Kite, supra.*

The facts alleged by plaintiff in support of personal jurisdiction are as follows: Defendant lived and worked in this State from approximately 1 September 1978 to 1 September 1983. The South Carolina divorce was granted 13 October 1978, so that plaintiff

and defendant "were actually married to each other" for approximately six weeks in 1978 while they both resided in this State.

There is nothing in the record to indicate where the parties were married. They were divorced in South Carolina. There is no indication that the parties shared a matrimonial domicile in this State. The complaint was filed almost a year after defendant had moved to New Jersey. There is nothing in the record to indicate that defendant has conducted business or other activities in the State since she left, that she owns property here or that she has in any other way invoked the protection of the laws of North Carolina.

There is no clear formula to determine whether the exercise of personal jurisdiction is justified; all decisions evolve ultimately into a test of reasonableness, fairness and justice in light of all circumstances surrounding the action. *Holt v. Holt*, 41 N.C. App. 344, 255 S.E. 2d 407 (1979). The United States Supreme Court has admonished that the flexible standard of *International Shoe* does not herald the eventual demise of all restrictions on the personal jurisdiction of state courts. *Kulko, supra.*

We hold that defendant did not have sufficient minimum contacts with North Carolina to ensure that the maintenance of this action against her does not offend "traditional notions of fair play and substantial justice" and that the motion to dismiss for lack of personal jurisdiction was improperly denied.

Reversed.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. JOSEPH LEE MONROE

No. 8516SC738

(Filed 7 January 1986)

1. Robbery § 4.5— armed robbery—defendant's aid in robber's escape—sufficiency of evidence

Evidence in an armed robbery case was sufficient to be submitted to the jury where there was evidence from which the jury could find that defendant was driving an automobile in the vicinity of the place where the armed rob-

bery occurred with the intention of aiding the robber in his escape, and the jury could also find that the defendant picked the robber up in his automobile a few minutes after the robbery and did aid the robber in leaving the scene.

2. **Criminal Law § 34.1— other offenses by defendant—inadmissibility to show defendant's character**

The trial court erred in allowing the State to elicit testimony that defendant had shot a person where the shooting was unrelated to the crime for which defendant was being tried, and such evidence was improperly offered to prove defendant's character. N.C.G.S. 8C-1, Rule 404(b).

APPEAL by defendant from *McLelland, Judge.* Judgment entered 19 March 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 10 December 1985.

The defendant was tried for armed robbery. The State's evidence showed that on 30 June 1984 at approximately 10:00 p.m. the City Sunoco in Lumberton, North Carolina was robbed. A clerk in the City Sunoco followed the robber out of the store and called to Ronald Williams, an officer with the City of Lumberton Police Department who was passing the station in a police vehicle. Mr. Williams followed the robber for some distance until the robber disappeared. Mr. Williams then saw the robber as he entered the passenger side of a mustard-colored Gremlin. Mr. Williams pursued the Gremlin until it ran off the road and into a tree. Two men fled from the Gremlin. Mr. Williams testified that he recognized the man who left from the passenger side of the Gremlin as the man he had chased after the robbery. Mr. Williams testified that he recognized the defendant as the man who left from the driver's side of the Gremlin.

The Gremlin was searched by the police who found in it several photographs of the defendant and two checkbooks belonging to the defendant. The automobile was owned by Annie Stewart.

The defendant offered evidence tending to prove an alibi. The defendant was convicted as charged and sentenced to fourteen years in prison. He appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert R. Reilly, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

WEBB, Judge.

[1] The defendant assigns error to the court's refusal to dismiss the case on the ground of insufficiency of the evidence. There was evidence from which the jury could find that the defendant was driving an automobile in the vicinity of the place where the armed robbery occurred with the intention of aiding the robber in his escape. The jury could also find that the defendant picked the robber up in his automobile a few minutes after the robbery and did aid the robber in leaving the scene. This is sufficient evidence to overcome the defendant's motion to dismiss. *See State v. Robinette*, 33 N.C. App. 42, 234 S.E. 2d 28 (1977). This assignment of error is overruled.

[2] In his second assignment of error the defendant argues that it was prejudicial error for the State to be allowed to elicit testimony as to a shooting in which he was involved, which shooting was unrelated to the crime for which he was being tried. We believe this assignment of error has merit. Before the defendant testified he called as a witness his girlfriend Eva Mae Singleton who testified the defendant was with her at the time of the robbery. On cross examination the following colloquy occurred:

Q. Well, now, he's done you some favors in the past, hasn't he?

A. No, he have not.

Q. He never has?

A. What kind—he have by keeping my baby while I work.

Q. How about by shooting your ex-boyfriend right there in the house in which you live?

Mr. Rogers: Objection. Move to strike. Call for a mistrial.

Court: Denied.

Q. Didn't he shoot your boyfriend right there in the house?

A. Yes, he did.

The State by this testimony on cross examination introduced evidence of a crime or wrong by the defendant. G.S. 8C-1, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

It appears to us that this evidence of another wrong by defendant was offered to prove his character. It does not fit any of the exceptions of Rule 404(b). It was error to allow this testimony. We cannot say there is not a reasonable possibility another result would have been reached had this error not been made. We hold it was prejudicial error.

The State argues that this question was proper to show that the witness was biased for the defendant on account of the favor he had done for her by shooting her ex-boyfriend. The witness testified that she was the defendant's girlfriend and that they lived together. We believe this was a sufficient showing of bias so that the prejudice to the defendant from allowing evidence of the additional favor he did for Eva Mae Singleton outweighs any probative value this testimony may have.

For the reasons stated in this opinion there must be a new trial.

New trial.

Judges ARNOLD and WELLS concur.

W. H. DAIL PLUMBING, INC. v. ROGER BAKER AND ASSOCIATES, INC., AND J. GORDON FISHER, AND WIFE, SHIRLEY C. FISHER

No. 8515SC740

(Filed 7 January 1986)

1. Laborers' and Materialmen's Liens § 8.1— plumbing in office condominium—blanket lien filed—apportionment proper

Where plaintiff agreed to install the plumbing and drainage systems in an office condominium complex, corporate defendant defaulted on the payments due plaintiff under the contract, and plaintiff filed a blanket lien on the entire

project pursuant to N.C.G.S. 44A-8, the trial court properly apportioned the lien and did not enforce the blanket lien on the entire complex against the individual defendants' unit.

2. **Laborers' and Materialmen's Liens § 8.1— office condominium—apportionment of lien—determination of value to be apportioned**

In an action to determine the amount of a lien attributable to defendants' unit in an office condominium complex, there was no merit to plaintiff's contention that the value to be apportioned should be $49,518.90, the amount he allegedly expended on the project, since a lien under N.C.G.S. 44A-8 attaches only for "debts owing for labor done or professional design or surveying services or material furnished," with nothing being said about lost profit; the "debts owing" were claimed to be $13,718.61 in plaintiff's own complaint and later documents filed; the amount of the lien was limited by N.C.G.S. 44A-13(b) to the amount stated in the claim; and the evidence was clear that plaintiff had contracted with the corporate defendant for a total of $43,178.61 and that, prior to defaulting, the corporate defendant had paid $30,000 toward this total.

3. **Interest § 2— prejudgment interest—inapplicable to statutory lien**

Prejudgment interest is not authorized when only enforcing a statutory lien, absent a contract between the parties, since N.C.G.S. 24-5(a) limits the allowance of prejudgment interest to contract actions.

APPEAL by plaintiff from *Bowen, Judge*. Judgment entered 26 April 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 5 December 1985.

Plaintiff contracted with defendant Roger Baker and Associates (Baker) to install the plumbing and drainage systems in an office condominium complex located in Chapel Hill. The contract price was $39,500.00. Defendant Baker conveyed Unit 104 of the complex to defendant Fisher. Baker defaulted on the payments due plaintiff under the contract and plaintiff filed a blanket lien on the entire project pursuant to G.S. 44A-8. Plaintiff then filed suit against the Fishers to enforce the entire lien against their unit. After summary judgment was granted for plaintiff at trial, the Fishers appealed and this Court reversed, ruling that the lien, while applicable to the Fishers' unit, could only be in the amount of the value of labor and materials provided by plaintiff attributable to their unit. *Dail Plumbing v. Roger Baker and Assoc.*, 64 N.C. App. 682, 308 S.E. 2d 452 (1983), *disc. rev. denied*, 310 N.C. 152, 311 S.E. 2d 296 (1984).

Upon remand, a trial was held before Judge Bowen, sitting without a jury, to determine the amount of the lien attributable to Unit 104. Judge Bowen found that the fair market value of

Unit 104 represented 8.83% of the fair market value of the entire complex and concluded that the lien would be in the amount of $1,211.35, or 8.83% of $13,718.61, the amount sought by plaintiff. Plaintiff appealed.

Boxley, Bolton and Garber by Ronald H. Garber for plaintiff appellant.

Mount, White, Hutson and Carden, P.A., by James H. Hughes for defendants appellees.

PARKER, Judge.

We note at the outset that defendants did not appeal from the judgment and their challenges thereto are not properly raised by cross-assignments of error which under Rule 10(d) of the Rules of Appellate Procedure are reserved for errors which "deprived the appellee of an alternative basis in law for *supporting* the judgment." (Emphasis added.) In their final purported assignment of error, defendants challenge the method used by the trial judge to apportion the lien. The trial judge utilized a comparison of fair market value of the entire complex to fair market value of defendants' unit. As defendants contend, the preferable method, in our judgment, is the method for apportioning costs under the Declaration of Condominium. However, as this issue was not properly presented, we cannot overturn the trial judge's ruling on this basis.

[1] Plaintiff first contends that it was error for the trial judge to apportion the lien and not enforce the blanket lien on the entire complex against Unit 104. In support of this argument, plaintiff contends that we are not bound by the prior decision of this Court in *Dail, supra* and that that decision was in error. This argument is without merit. The prior decision of this Court has become the law of this case and the trial judge, and this panel, are bound by that decision. *North Carolina National Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983). The cases relied on in the first *Dail* decision adopted an apportionment theory in valuing the lien to be placed on a single unit in a condominium project. *See, e.g., Hostetter v. Inland Development Corp. of Montana*, 172 Mont. 167, 561 P. 2d 1323 (1977). This assignment of error is overruled.

[2] Plaintiff next contests the amount apportioned by Judge Bowen. Plaintiff contends that the total value to be apportioned should be $49,518.90, the total amount plaintiff alleges to have expended on the project. Plaintiff argues that this amount is necessary in order to protect the profit that it should recover for its work. However, a lien under G.S. 44A-8 attaches only for "debts owing for labor done or professional design or surveying services or material furnished." Nothing is said about lost profit. Second, the "debts owing" were claimed to be $13,718.61 in plaintiff's own complaint and later documents filed. The amount of the lien is limited by G.S. 44A-13(b) to the amount stated in the claim. The evidence was clear that plaintiff had contracted with Baker for a total, after change orders, of $43,178.61 and that prior to defaulting, Baker had paid $30,000 toward this total. Therefore, the "debts owing" to which a lien under G.S. 44A-8 could attach totalled $13,718.61. This assignment of error is overruled.

[3] Plaintiff's final assignment of error is the order of the trial judge allowing interest on the judgment only from the date of the judgment itself. Instead, plaintiff contends the interest should accrue from the date Baker breached their contract by defaulting on an installment, citing *Interstate Equipment Co. v. Smith*, 292 N.C. 592, 234 S.E. 2d 599 (1977). However, *Interstate Equipment*, as well as the other cases relied on by plaintiff, involved a breach of contract action between the parties to the contract. The Fishers were not a party to the contract breached. This is solely an action to enforce a statutory lien, governed by G.S. 44A-7, *et seq.* General Statute 44A-13(b) provides: "Judgment enforcing a lien under this Article may be entered for the principal amount shown to be due, *not exceeding the principal amount* stated in the claim of lien thereby enforced" (emphasis added). Prejudgment interest is not authorized when only enforcing a statutory lien, absent a contract between the parties. General Statute 24-5(a) limits the allowance of prejudgment interest to contract actions. Plaintiff's assignment of error is overruled.

The judgment appealed from is

Affirmed.

Judges ARNOLD and WELLS concur.

JENNIE B. MORRIS v. JAMES R. BRUNEY

No. 8520SC158

(Filed 21 January 1986)

1. **Parent and Child § 4.1— alienation of affections of child—no right of action by parent**

Summary judgment on plaintiff's claim for damages for the alienation of the affections of her son was proper because, absent seduction or abduction, no action for alienating the affections of a child will be supported by the parent-child relationship. Even if plaintiff's claim were to be construed as an action for abduction, plaintiff alleged only that her son left home with the aid of defendant after defendant cast aspersions on plaintiff's character and fitness as a mother. In a civil case for the abduction of a minor, there must be some allegation that the minor child was taken or carried away, actually or constructively, by the defendant.

2. **Libel and Slander § 5.3— slander—rumor that plaintiff pregnant when married—repeated as rumor—dismissal proper**

The trial court did not err in an action for slander and alienation of the affections of plaintiff's son by dismissing the slander action at the close of plaintiff's evidence. Although defendant told plaintiff's daughter, at the daughter's request, that his wife had heard a rumor at work that plaintiff had gotten married because she was pregnant, this did not amount to an accusation that plaintiff committed a crime involving moral turpitude because defendant's remark did not assert as fact the substance of the false rumor.

3. **Libel and Slander § 5.2— slander—statements that plaintiff not a good parent—plaintiff employed at nursery school—dismissal proper**

The trial court did not err in an action for slander and the alienation of the affections of plaintiff's son by dismissing the slander action at the close of plaintiff's evidence where the evidence, taken in the light most favorable to plaintiff, would support an inference that defendant told a third party that plaintiff was "unreasonable," "immature," and "unintelligent"; "could not raise a sixteen-year-old"; "did not act like a mother"; "attempted to bribe her son"; and "had a mental ability of a child of age 5." Even though plaintiff worked with children in a nursery school, those statements were not actionable per se, plaintiff offered no evidence of special damages, and plaintiff failed to prove that defendant published any statements constituting slander per se.

APPEAL by plaintiff from *Mills, Judge*. Judgment entered 7 September 1984 in Superior Court, ANSON County. Heard in the Court of Appeals 23 September 1985.

Henry T. Drake for plaintiff appellant.

Taylor and Bower, by George C. Bower, Jr., and E. A. Hightower, of counsel, for defendant appellee.

BECTON, Judge.

Plaintiff, Jennie B. Morris, brought an action for the alienation of the affection of her son and for slander against defendant, James R. Bruney. The trial court granted defendant's motion for summary judgment as to the claim for alienation of affection but denied summary judgment on the slander claim. The trial court dismissed the slander claim at the close of plaintiff's evidence. Plaintiff appeals.

I

Many, if not most, of the facts in this case are in dispute. The parties described the same activities in different tones and with contrasting emphasis on various details. But on appeal from summary judgment and nonsuit, we must take the facts in a light most favorable to the non-movant, the plaintiff. They are summarized below.

Jennie Morris is the mother of four children—three by her first husband, Roy Thomas Morris, and one by her second husband. One of her children, Derrick Morris, turned sixteen on 9 October 1983. Around this time, Jennie Morris and Derrick lived next door to James Bruney, who was married and had three teenage step-children. Jennie Morris and James Bruney were very friendly and sociable neighbors. They frequently visited in each other's homes, and their children spent time together.

Derrick was a cooperative, loving and caring son, who did well in school and often helped around the house, until about August 1983 when he began to spend a great deal of time (twenty to twenty-five hours per week) with James Bruney. In the past, Bruney had conducted hypnotic sessions with various people, including Jennie Morris, and, without Jennie's consent, attempted to exercise mind control over Derrick through closed hypnotic sessions. Because of this, Derrick became progressively less cooperative, more hostile toward Jennie and obstinate. Derrick refused to do his usual chores and called his mother unreasonable. Jennie expressed her concern to Derrick, Bruney, and Bruney's wife, and she told Derrick to stay away from Bruney's residence.

In essence, Bruney interfered with Jennie's relationship with her son by telling Derrick that his mother was unreasonable, immature, and unintelligent and that Bruney could be the father

Derrick needed. Derrick began to do poorly at home and at school. He refused to accept a car his mother gave him for his sixteenth birthday because Bruney had convinced Derrick that Jennie's rules for the use of the car were unreasonable. Derrick left home, and Bruney tried to convince Derrick's father to institute court proceedings to get custody of Derrick. Jennie found notes in Bruney's handwriting in Derrick's room in which Bruney admitted he had controlled Derrick's mind and had told Derrick that Jennie had gotten married because she was pregnant and left her husband for another man. Bruney encouraged Derrick to become sexually overactive and to refuse to communicate with Jennie.

In her Complaint, Jennie alleged several instances of slander by Bruney, generally disparaging Jennie's ability to raise her family and her fitness as a mother, but also asserting that she was pregnant before she was married. Jennie alleged that all of this was false. As a consequence, Jennie claimed, she suffered the loss of services and companionship of her son and was subjected to scorn, contempt and ridicule entitling her to $100,000 in actual damages and $150,000 in punitive damages.

Other facts necessary for an understanding of the case will be described in the body of the opinion.

II

[1] Jennie Morris' claim for alienation of the affection of her child is similar to *Edwards v. Edwards*, 43 N.C. App. 296, 259 S.E. 2d 11 (1979). In *Edwards*, this Court considered, as an issue of first impression in North Carolina, whether a parent could recover from another parent for alienating the affection of their child. After stating the general rule that, absent seduction or abduction, no action will be supported by the parent-child relationship, the Court noted that such an action was neither recognized at common law nor provided for by statute in this State. *Id.* at 300-01, 259 S.E. 2d at 14 (quoting 3 Lee, N.C. Family Law Sec. 244, at 132 (1963) and other authorities). The Court found the reasoning in *Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949) (child has no action against third party for alienating affections of mother) controlling, primarily because of the distinction drawn between the relationship of a husband and wife and that of a parent and child. The former is protected because of the unique nature of the injury involved—a loss of consortium and conjugal society—a

right peculiar to the marital relationship. *Edwards*, 43 N.C. App. at 302, 259 S.E. 2d at 15.

> This Court has also recognized that the gravamen of the action for alienation of affections is a spouse's loss of the protected marital right of the affection, society, companionship and assistance of the other spouse. *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E. 2d 104 (1969). The relation of parent and child supports no legal right similar to that of consortium.

Id.

Jennie Morris cites *Howell v. Howell*, 162 N.C. 283, 287, 78 S.E. 222, 224 (1913) which held that a father has an action against one who intentionally interrupts the relation of the father and child or who abducts the child from the father's home. In *Howell*, the parents of the child had agreed in writing that their child would remain with the mother until her sixth birthday, at which time she would be returned to her father. Just before the child reached age six, the mother "spirited the child away beyond the State to some place unknown to the plaintiff." 162 N.C. at 283-84, 78 S.E. at 223. Thus, *Howell* is distinguishable in that it involved the physical abduction—"the unlawful taking away or concealment"—of a minor child. *Id.* at 286, 78 S.E. at 224.

Similarly, *Little v. Holmes*, 181 N.C. 413, 107 S.E. 577 (1921) is distinguishable. In *Little*, the Supreme Court held that a father had an action against one who induced the father's minor sixteen-year-old daughter to leave home against her father's will, even though with the consent of the daughter. The action in *Little* was for the abduction of the child, not the alienation of the child's affection. The defendant had driven to the father's house "by the back way," in the father's absence, and "spirited away" the child. The mother was home, and she protested passionately; the defendant said they were going to Monroe, but he sped away in the car to South Carolina where the child was married to another man who lied about the child's age. 181 N.C. at 413-14, 107 S.E. at 577. The case for abduction was clear, and the Court held that, under *Howell*, abduction was a valid cause of action. The Court then discussed, among other things, whether the plaintiff could recover *damages* for the alienation of his daughter's affection, and the Court held that he could. *See id.* at 416-18, 107 S.E. at 578-80.

Thus, there are several cases decided by our Supreme Court in the late nineteenth century and in the early part of this century that recognize civil causes of action for the seduction or the abduction of minor children. *See, e.g., Little; Howell; Snider v. Newell*, 132 N.C. 614, 44 S.E. 354 (1903) (seduction); *Abbott v. Hancock*, 123 N.C. 99, 31 S.E. 268 (1898) (seduction); *Scarlett v. Norwood*, 115 N.C. 284, 20 S.E. 459 (1894) (seduction). In these cases, one element of damages to consider was the suffering caused by the alienation of the affection of the abducted or seduced minor child. Nevertheless, this does not form the basis for a cause of action based solely on alienation of affection.

The allegations in the case at bar are insufficient to support an action for abduction. Plaintiff correctly asserts that abduction need not be accomplished against the will of the child. Plaintiff quotes language from *Little*, however, for the proposition that abduction may be accomplished by mere persuasion.

> Even on an indictment for abduction it is not necessary that it should be against the will of the minor child. It is sufficient if it is against the will of the father and that it is committed by violence, fraud, or persuasion. *S. v. Burnett*, 142 N.C., 581; *S. v. Chisenhall*, 106 N.C., 676; *S. v. George*, 93 N.C., 567. The defendants could not be indicted, however, for our statute for abduction applies only when the child is under fourteen years of age. G.S. 4222, 4223, 4224.

Little, 181 N.C. at 418, 107 S.E. at 579. Thus, on a criminal indictment for abduction, it was sufficient to aver that the defendant took and carried away the victim by force, fraud or persuasion. *See State v. Burnett*, 142 N.C. 577, 581, 55 S.E. 72, 74 (1906); *State v. Chisenhall*, 106 N.C. 676, 679, 11 S.E. 518, 519 (1890).

In a civil case for the abduction of a minor, there must be some allegation that the minor child was taken or carried away, actually or constructively, by the defendant. In *Little*, the defendant deprived "the father, forcibly and violently and against his will, of the custody and society of his daughter . . . ." 181 N.C. at 415, 107 S.E. at 578. In the case at bar, plaintiff Morris alleges only that her son left home, with the aid of defendant, after defendant Bruney cast aspersions on plaintiff's character and fitness as a mother. This is insufficient to support an action for abduction in this State. Were we to rule otherwise, every parent whose

child was convinced to leave home before majority would have a cause of action for abduction through which to recover for the alienation of affection. There are many sociological and other pressures that prey on children's minds, and some educational, religious and political organizations are critical of the home lifestyles in which many parents raise their children. When such pressures and criticisms persuade a child to leave home, should the parents be allowed to sue in tort for abduction and recover for the loss of the child's affection? We think not. Summary judgment on the plaintiff's claim for damages for the alienation of the affection of her son was proper, even if it were to be construed as an action for abduction.

III

[2] Plaintiff's second argument is that the trial court erroneously dismissed the slander claim at the close of plaintiff's evidence by granting defendant's motion for a directed verdict under Rule 50, N.C. Rules Civ. Proc. In considering a motion for directed verdict, the non-movant's evidence must be taken as true and contradictions, inconsistencies and conflicts in the evidence must be resolved in favor of the non-movant. *Cook v. Export Leaf Tobacco Co.*, 50 N.C. App. 89, 272 S.E. 2d 883 (1980), *disc. rev. denied*, 302 N.C. 396, 279 S.E. 2d 350 (1981). If it is the defendant's motion, the plaintiff is entitled to the benefit of all reasonable inferences in his or her favor, and the motion will be granted only if, as a matter of law, the evidence is insufficient to justify a jury verdict for the plaintiff. *McKay v. Parham*, 63 N.C. App. 349, 304 S.E. 2d 784 (1983), *disc. rev. denied*, 310 N.C. 477, 312 S.E. 2d 885 (1984); Shuford, N.C. Civ. Prac. & Proc. Sec. 50-5, at 376 (2d ed. 1981). In the case at bar, only plaintiff's evidence can be considered, and it will be taken as true for the purposes of this appeal.

There has been considerable confusion of terms in the application of the law of slander. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. Rev. 120, 121 (1934); Prosser and Keeton, The Law of Torts Sec. 111, at 782 (5th ed. 1984); Note, 48 N.C. L. Rev. 405, 405 (1970); 50 Am. Jur. *Libel and Slander* Sec. 2 (1970). Because both parties in this action rely on cases in which terminology is misused, it may be helpful to define our terms. There is an important distinction between publications that are defamatory per se and defamatory publications that are ac-

tionable per se. A publication is defamatory per se (generally, libelous per se if written and slanderous per se if spoken) if its injurious or defamatory character is clear and obvious from the words alone.[1] This should be contrasted with publications that are defamatory only in context, requiring the plaintiff to plead and prove extrinsic facts and innuendo necessary to show that the publication was, in fact, defamatory.[2] *See* McCormick, *supra*, at 122.

A defamatory publication may be actionable per se or only actionable upon proof of special damages. This distinction is often confused with the distinction drawn in the previous paragraph. *Id.* at 121-22. And it is in this classification that libel and slander are treated differently.

Traditionally, all libels were treated as actionable per se (plaintiff did not need to prove special damages), perhaps because, being in relatively permanent written form, damage could be presumed.[3] Most American courts, however, began to treat only those publications that were libelous per se (obviously defamatory on their face) as actionable per se. Prosser, *supra*, Sec. 112, at 795-96; Note, *supra*, at 407. Intuitively, this makes sense. The burden of proof, to show special damages, is greater when it is not clear that the publication is libelous to the plaintiff. This appears

1. Such publications are defamatory "on their face." An example is the statement, "Mr. X is a thief." McCormick, *supra*, at 121-22. Whether a publication falls within this category is a question of law. 50 Am. Jur. 2d *Libel and Slander* Sec. 8.

2. For example, additional facts are necessary to demonstrate how the comment, "Mr. X did not pay for this car," would be injurious to Mr. X's reputation: *e.g.*, that the people who heard the comment knew that Mr. X had an unexcused obligation to pay for the car.

3. The development of different rules for slander actionable per se and slander actionable only on proof of special damages is probably a result of the different rules historically applied to actions brought in law and those brought in equity; and the later development of a distinct body of law for libel was influenced by the growth of education and printing. McCormick, *supra*, at 121. Another explanation for treating all libels as actionable per se is that there was a deliberate attempt to tip the scales "against those who deliberately put down on paper a lasting memorial of *any* lie against a neighbor's good name" and to handicap those who complain to the courts for "oral detractions of the more trivial sort." *Id.* The law of libel is extensively developed in this State. *See, e.g., Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 316-17, 312 S.E. 2d 405, 408-09 (setting forth the three classes of libel and four categories of libel per se), *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 121, 105 S.Ct. 187 (1984).

to be the rule in our State. *See, e.g., Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979); *Kindley v. Privette*, 241 N.C. 140, 144-45, 84 S.E. 2d 660, 662-63 (1954); *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). Apparently because any publication that was libelous per se was also actionable per se, the terms were used interchangeably. The Supreme Court long ago recognized that "[t]he phrase 'libelous *per se*,' used extensively, has been criticized as inexact. . . . While this phrase appears in our decisions, the words are used in the sense of actionable *per se*." *Kindley*, 241 N.C. at 144, 84 S.E. 2d at 663.

Originally, slander was not actionable without allegation and proof of special damages. Prosser, *supra*, Sec. 112, at 788. Specific exceptions were established so that oral publications falling within these categories were actionable per se. These publications were actionable without proof of special damages regardless of whether they were slanderous per se or slanderous only in context (often called slander per quod). *Id.*; Note, *supra*, at 406. The categories of slander currently actionable per se are: (1) accusations that the plaintiff committed a crime involving moral turpitude; (2) allegations that impeach the plaintiff in his or her trade, business, or profession, and (3) imputations that the plaintiff has a loathesome disease.[4] *Tallent v. Blake*, 57 N.C. App. 249, 291 S.E. 2d 336 (1982); *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E. 2d 319 (1971).

Unfortunately, through the years the confusion in terminology in the law of libel spilled over into the law of slander. The original rule in North Carolina apparently followed the traditional rule that slander per quod was still actionable per se if it fit within one of the specific categories. *See Scott v. Harrison*, 215 N.C. 427, 2 S.E. 2d 1 (1939). Later cases, however, treat slander as actionable per se only if it is slanderous per se. If extrinsic facts are needed to show the slander, special damages also must be alleged and proven, even though the remark fits within one of the

4. Apparently, a libelous publication may be actionable per se if it "otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick*, 310 N.C. at 317, 312 S.E. 2d at 409. This broad category is notably absent from decisions discussing slander, but there is some language in the cases implying the existence of other categories of oral publications that are considered slanderous per se and, therefore, actionable per se. *See, e.g., Penner v. Elliott*, 225 N.C. 33, 33 S.E. 2d 124 (1945); *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 277, 168 S.E. 2d 236, 237 (1969).

three exceptions. *See, e.g., Badame v. Lampke*, 242 N.C. 755, 89 S.E. 2d 466 (1955); *Penner*; *Gibby v. Murphy*, 73 N.C. App. 128, 325 S.E. 2d 673 (1985). Although this approach has been severely criticized, *see* Note, 48 N.C. L. Rev. 405 (1970), it appears to be the current rule in this State.

There is some evidence in this case, in the form of the testimony of plaintiff's daughter, Ellen, that Bruney told Ellen that Bruney's wife had heard a rumor at work that Ellen's mother was pregnant before she got married, and that she got married for this reason. Although Ellen testified that she knew Bruney expressed only his own opinion, at her request, plaintiff contends that this amounts to an accusation that plaintiff committed a crime involving moral turpitude, actionable per se under the first category.[5] Although there is some authority for the proposition that the expression of an opinion may, in some cases, carry with it the assertion of fact, *see* Prosser, *supra*, Sec. 111, at 776, we believe defendant's remark to plaintiff's daughter did not assert as fact the substance of the false rumor. Defendant merely repeated what his wife told him that someone had told her. This was at Ellen's request, and defendant explained that it was a rumor.

[3] The evidence presented at trial, taken in a light most favorable to the plaintiff, would support an inference by the jury that defendant told a third party that the plaintiff was "unreasonable," "immature" and "unintelligent"; "could not raise a sixteen-year-old"; "did not act like a mother"; "attempted to bribe her son"; and "had a mental ability of a child of age 5." Plaintiff argues that, because she works with children in a nursery school, these remarks will affect her in her trade or business and are actionable per se under the second category of actionable-per-se slander. We do not agree.

5. Plaintiff also contends that Bruney's statement is actionable per se because it is an imputation of unchastity. We note that in 1808, a fourth category of slander —charging incontinency to a woman—was added by statute to the list of false statements actionable per se. 1808 N.C. Sess. Laws Ch. 13; *see* N.C. Gen. Stat. Sec. 99-4 (1972). The accusation had to allege that a woman committed a criminal act of adultery or fornication. *McBrayer v. Hill*, 26 N.C. 136 (1843). The statute, G.S. Sec. 99-4, was repealed in an effort to rid this State's laws of sex-based distinctions causing discrimination. 1975 N.C. Sess. Laws Ch. 402. Thus, plaintiff's only valid argument relating to this statement is that defendant accused her of committing a crime involving moral turpitude, fornication.

> [T]he better reasoned decisions seem to hold that in order to be actionable without proof of special damage, the false words (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. That is to say, it is not enough that the words used tend to injure a person in his business. To be actionable *per se*, they must be uttered of him in his business relation. . . . Defamation of this class ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct in business.

Badame, 242 N.C. at 757, 89 S.E. 2d at 468 (citations omitted).

> North Carolina cases have held consistently that alleged false statements made by defendants, calling plaintiff "dishonest" or charging that plaintiff was untruthful and an unreliable employee, are not actionable per se. . . . In the law of defamation, special damage means pecuniary loss, as distinguished from humiliation.

Stutts v. Duke Power Co., 47 N.C. App. 76, 82, 266 S.E. 2d 861, 865 (1980) (citations omitted). These statements might have been actionable had plaintiff alleged special damages, but they are not actionable per se. *Id.*; *Tallent*.

Plaintiff Morris offered no evidence of special damages. She also failed to prove that defendant published any statements constituting slander per se. Therefore, the trial court properly dismissed plaintiff's action for slander.

For the reasons set forth above, the judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

MILTON T. LEWIS v. AIROLL BRUNSTON AND REGINALD D. YATES

No. 858SC215

(Filed 21 January 1986)

Automobiles and Other Vehicles §§ 79, 91.3— intersection accident—contributory negligence—speed competition—willful and wanton negligence

In an action to recover damages for personal injuries sustained by plaintiff in an automobile accident, the trial court erred in directing verdicts for defendants on the ground that plaintiff was contributorily negligent as a matter of law where the evidence tended to show that plaintiff approached a T intersection, stopped, looked both ways, waited for a car on his right to pass, looked both ways again and saw defendants' cars approximately 470 feet from his left, proceeded to turn left in front of defendants and was then struck in his own lane of travel by defendants' cars which were traveling 75 to 80 m.p.h. bumper to bumper just prior to the collision; while plaintiff's evidence would permit a finding that negligence on his part was a contributing proximate cause of the collision, evidence did not establish that he was contributorily negligent as a matter of law; and plaintiff's evidence of defendants' speed competition on the highway would permit a finding of willful or wanton negligence on defendants' part as the proximate cause of the accident.

APPEAL from *Barefoot, Judge.* Judgment entered 23 October 1984 in Superior Court, LENOIR County. Heard in the Court of Appeals 27 September 1985.

Allen, Hooten & Hodges by Imelda J. Pate for plaintiff appellant.

Wallace, Barwick, Landis, Rodgman & Bower by Paul A. Rodgman for defendant appellee.

Morris, Rochelle, Duke & Braswell by Thomas H. Morris for defendant appellee, Reginald D. Yates.

COZORT, Judge.

This is a civil action in which plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of defendants' negligence in an automobile accident. The accident occurred on 7 March 1981 when plaintiff, after stopping his car at a stop sign on Fitzgerald Drive, was struck by defendants' cars as he was turning left onto Tower Hill Road. Plaintiff alleged negligence and wilful or wanton negligence on defendants' part. Both defendants answered denying any negligence and alternatively

asserted contributory negligence on plaintiff's part. Defendant Yates also counterclaimed against plaintiff and cross-claimed against defendant Brunston. At the close of plaintiff's evidence both defendants moved for a directed verdict. The trial court granted defendants' motion for a directed verdict holding that plaintiff was contributorily negligent as a matter of law. The trial court, with the consent of defendant Yates, dismissed with prejudice Yates' claims against plaintiff and defendant Brunston. We reverse the trial court's granting of directed verdict for defendants.

The test for directing a verdict for a defendant on the ground of contributory negligence is succinctly stated in *Brown v. Hale*, 263 N.C. 176, 178, 139 S.E. 2d 210, 212 (1964): The motion for directed verdict should be granted only when "the evidence, when considered in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom."

Considered in the light most favorable to him, plaintiff's evidence shows the following:

On 7 March 1981 between 11:30 p.m. and 12:00 a.m., plaintiff was driving south in his car on Fitzgerald Drive in Kinston, N.C. Fitzgerald Drive runs in a north and south direction and connects with Tower Hill Road, which runs in an east and west direction, forming a "T" intersection. West is toward Kinston. Traffic on Fitzgerald Drive has to stop in obedience to a stop sign that is positioned at the corner of Fitzgerald Drive and Tower Hill Road. The speed limit on Tower Hill Road at the intersection is 45 m.p.h.

Plaintiff stopped at the stop sign on Fitzgerald Drive with his left turn signal on. Plaintiff looked both ways after he stopped. Plaintiff was familiar with a two-block span of Tower Hill Road from the intersection of Tower Hill Road and Fitzgerald Drive to the intersection of Tower Hill Road and Girl Scout Road, which is approximately 470 feet east of the Fitzgerald Drive intersection. Plaintiff had driven through the intersection of Tower Hill Road and Fitzgerald Drive earlier that evening.

At the stop sign plaintiff could see approximately 500 feet to his left, down to the intersection of Girl Scout Road and Tower

Hill Road. Upon looking both ways, plaintiff saw a car to his right traveling east on Tower Hill Road. Plaintiff waited for this car to pass. Plaintiff looked both ways again and saw the headlights of two cars to his left on Tower Hill Road. When plaintiff saw the headlights of the two cars, they were at the intersection of Girl Scout Road and Tower Hill Road. Plaintiff knew the speed limit on Tower Hill Road was 45 m.p.h., but he could not tell how fast the cars were going when he first saw them.

Seeing that the cars were 400 to 500 feet to his left, plaintiff proceeded to make a left turn onto Tower Hill Road. Plaintiff had entered into his lane of travel on Tower Hill Road and was straightening up when he heard tires squealing and saw lights. He was then hit by the defendants' cars, one after the other. Plaintiff's car was hit initially on the left rear. The impact with the first car spun his car around, then the other car hit his. Plaintiff's car ultimately came to rest against a telephone pole.

On direct examination plaintiff testified about the location of his car upon impact with the first car: "I was turning to the left when the car hit me. At the time I was first hit, I had not completely straightened my car up to head up Tower Hill Road, it was still in an angle but I was in the right lane." On cross-examination by defendant Brunston's attorney, plaintiff testified:

> All I remember after I pulled out was that I was straightening up in my lane, there were headlights and squealing tires. One car hit me, then another. The first car spun me around. Then there was another hit and from there I was headed into the telephone pole. I do not know where the second car hit me. I am sure that the first car hit me on the back left, then spun me around.

And on cross-examination by defendant Yates' attorney plaintiff testified about the collision as follows:

> After I looked both ways, the car coming to the right passed by and I looked both ways again. I saw headlights and when I proceeded with my turn, that's when the lights were right up on me and there was squealing tires and when my wife said, "Look out," that's when one hit me and spun me around and then the other and then we were thrown in the telephone pole. I was in my lane straightening up and that's when we heard squealing tires and my wife said, look out.

* * * *

I had already turned into Tower Hill Road and I was straightening up in my lane of travel when suddenly I saw the lights coming towards me and the tires squealing. I was completing my turn at an angle in the center of that intersection when I was struck. I didn't say it was completed. I was in the process of straightening up when I was hit.

The driver of the car, which plaintiff waited for on Tower Hill Road prior to entering the intersection, testified that as he approached the Fitzgerald Drive intersection, he observed a car sitting at the stop sign and that this car waited for him to pass. As he passed through this intersection, he saw in front of him on Tower Hill Road car lights and could not tell how fast the car was coming or how many cars there were. When the defendants' cars passed him, the witness testified that the speed of the defendants' two cars was "75 to 80. 75, no less than 80." At the time the defendants' cars passed him they were "bumper to bumper" and less than two seconds later he heard a crash. The witness turned his car around and went to the crash site. He did not observe any changes in the speed of the two cars that passed him. While he saw the plaintiff's car pull out in front of the defendants' cars, he did not see the collision happen.

Lynwood Bradshaw, who came upon the accident scene, testified that about three minutes prior to the collision defendants' cars passed him on Tower Hill Road about one-half mile from Fitzgerald Drive. At the time defendants' cars passed him they were "between two and three feet together. One was in front of the other . . . [and] the cars were speeding." Bradshaw testified that at that time he thought the speed limit on Tower Hill Road was "50 or 55 miles an hour."

Kinston Police Officer Robert G. Brown was called by the plaintiff as a witness. Officer Brown received a call about the accident at 11:43 p.m. on 7 March 1981. When he arrived at the accident scene he saw three cars near the intersection of Fitzgerald Drive and Tower Hill Road. Both defendants' cars were off the road in ditches on opposite sides of Tower Hill Road. Plaintiff's car was up against a utility pole off the northwest corner of the intersection. Brunston's car was 94 feet from the middle of the intersection and was on the same side of the road as plaintiff's car.

Yates' car was across the road in a ditch facing away from Kinston. At the intersection Officer Brown found a pile of debris and glass. The debris was located to the south of the Fitzgerald Drive intersection on the right-hand side of Tower Hill Road going east out of Kinston. Officer Brown also found two sets of fresh skid marks on Tower Hill Road. One set of marks measured 294 feet from the debris and glass. The other set of skid marks measured 109 feet from the debris and glass. Brown testified that both sets of skid marks "follow the same line side by side going down Tower Hill Road and veer over to the left into the center and even across the center line and as it gets on down the road." The 294 feet of skid marks follow the Brunston car. Additional skid marks of 68 feet were found from the debris to where the Brunston car was in the side ditch. Additional skid marks of 57 feet were found from the debris to the ditch where Yates' car came to rest.

The color of defendant Brunston's car was red and the color of defendant Yates' car was yellow, while plaintiff's car was beige. Officer Brown found red paint on the back of Yates' car and yellow paint on the front of Brunston's car. Both yellow and red paint were on plaintiff's car. Beige paint was also on Brunston's car.

Officer Brown interviewed both defendants on the evening of the accident and both admitted they were going 55 or 60 m.p.h. on Tower Hill Road. Defendant Brunston told Officer Brown he was headed west on Tower Hill Road and "there was another car right on his bumper."

At the close of plaintiff's evidence the trial court, upon motion of the defendants, granted a directed verdict for defendants.

G.S. 20-158(b)(1) provides that "[w]hen a stop sign has been erected . . . at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway." A violation of G.S. 20-158(b)(1) is not "negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether a party was guilty of negligence or contributory negligence." G.S. 20-158(d).

The duty of a driver on a servient highway is summarized in *Matheny v. Central Motor Lines, Inc.*, 233 N.C. 673, 679, 65 S.E. 2d 361, 366 (1951):

> One who is required to stop before entering a highway should not proceed, with oncoming vehicles in view, until in the exercise of due care he can determine that he can do so with reasonable assurance of safety. [Citation omitted.] Generally when the driver of an automobile is required to stop at an intersection he must yield the right of way to an automobile approaching on the intersecting highway [citation omitted] and unless the approaching automobile is far enough away to afford reasonable ground for the belief that he can cross in safety he must delay his progress until the other vehicle has passed. . . .

The automobile driver on a dominant highway approaching an intersecting servient highway is not under a duty to anticipate that the automobile driver on the servient highway "will fail to stop as required by . . . statute, and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment," that the automobile driver on the servient highway will obey the law and stop before entering the dominant highway. *Hawes v. Atlantic Refining Co.*, 236 N.C. 643, 650, 74 S.E. 2d 17, 21-22 (1953). The automobile driver on the servient intersecting highway, however, is not under a duty to anticipate that the automobile driver on the dominant highway, "approaching the intersection of the two highways, will fail to observe the speed regulations, and the rules of the road, and, in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption" that the automobile driver on the dominant highway will obey "such regulations and the rules of the road." *Id.*, 236 N.C. at 650, 74 S.E. 2d at 22.

In support of their motion for a directed verdict, defendants presented to the trial court a copy of *Warren v. Lewis*, 273 N.C. 457, 160 S.E. 2d 305 (1968). On appeal defendants rely on *Warren v. Lewis* in support of their position that a directed verdict was properly granted. The facts in *Warren v. Lewis*, however, are readily distinguishable from the facts here. In *Warren v. Lewis*,

> the plaintiff attempted to enter the main highway (Shattalon Drive) from the north over a private road, intending to turn east on Shattalon. A white line separated the lanes for eastbound and westbound traffic. The defendant, driving his Dodge eastward, crashed into the rear of the plaintiff's Chevrolet before the plaintiff completed his intended movement. Judgment of involuntary nonsuit was affirmed on the ground that the plaintiff's evidence disclosed contributory negligence as a matter of law. The opinion of Justice Higgins for this Court states: "His (plaintiff's) view from the intersection to his right was unobstructed to the top of a hill 400 to 600 feet west of the intersection. An automobile could be seen an additional 50 feet beyond the crest. In clear weather, and in broad daylight, he entered the main highway, without discovering the vehicle approaching from the west. The physical evidence indicated the plaintiff had moved only a distance of approximately 16 feet—6 to and 10 across the north lane before the collision. The plaintiff testified he never saw the defendant's Dodge before this '. . . his third wreck.' " 273 N.C. at 460, 160 S.E. 2d at 307.

Blackwell v. Butts, 278 N.C. 615, 622, 180 S.E. 2d 835, 839 (1971). Additionally, in *Warren v. Lewis*, the evidence showed defendant was traveling within the speed limit at the time of the accident. Here, unlike in *Warren v. Lewis*, the evidence shows that plaintiff saw defendants' cars before the collision. The evidence, considered in the light most favorable to plaintiff, shows that, after waiting for a car on his right to pass, plaintiff looked both ways again and saw defendants' cars approximately 470 feet from his left. Plaintiff proceeded to turn left onto Tower Hill Road and was then struck in plaintiff's lane of travel on Tower Hill Road by defendants' cars which were traveling 75 to 80 m.p.h. bumper to bumper just prior to the collision.

While the plaintiff's evidence would permit a finding that negligence on plaintiff's part was a contributing proximate cause of the collision and damages to plaintiff's car, the evidence does not establish that plaintiff was contributorily negligent *as a matter of law*. Whether the defendants' cars were far enough away to afford plaintiff reasonable ground for the belief that he could make his turn in safety is a question for the jury.

Plaintiff's evidence raises a jury question of whether defendants were guilty of at least ordinary negligence, and, if so, whether plaintiff was contributorily negligent.

As to whether plaintiff's evidence would permit a finding of willful or wanton negligence on defendants' part, we hold that it would permit such a finding.

Normally, contributory negligence on a plaintiff's part does not bar recovery when the willful or wanton conduct of a defendant is a proximate cause of plaintiff's injuries. *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971).

In his complaint plaintiff alleges that defendants "[o]perated a motor vehicle willfully in speed competition in violation of G.S. 20-141.3(b)." In pertinent part, G.S. 20-141.3(b) provides that "[i]t shall be unlawful for any person to operate a motor vehicle on a street or highway willfully in speed competition with another motor vehicle." A violation of this statute is negligence *per se*. *Boykin v. Bennett*, 253 N.C. 725, 118 S.E. 2d 12 (1961). Plaintiff's evidence showed that about one-half mile before and immediately prior to the accident defendants were driving their cars at night "bumper to bumper" at speeds of 75 to 80 m.p.h. on Tower Hill Road where the speed limit was 45 m.p.h. This evidence, if believed by the jury, is sufficient to support a finding by the jury that defendants "operated their cars wilfully in speed competition in violation of G.S. 20-141.3(b) and that their negligence in this respect proximately caused the collision." *Mason v. Gillikin*, 256 N.C. 527, 530, 124 S.E. 2d 537, 539 (1962); *cf. Hord v. Atkinson*, 68 N.C. App. 346, 315 S.E. 2d 339 (1984). Under the facts of this case, if defendants were found to be in violation of G.S. 20-141.3(b), then it would be a question for the jury whether such negligence was a proximate cause of the accident. *Cf. Harrington v. Collins*, 40 N.C. App. 530, 253 S.E. 2d 288, *aff'd*, 298 N.C. 535, 259 S.E. 2d 275 (1979) (court held that defendant's prearranged racing was, as a matter of law, the proximate cause of the accident).

In *Harrington v. Collins, supra*, we held that a violation of G.S. 20-141.3(a) (prearranged speed competition) constituted "wilful" or "wanton" negligence, as those terms are defined in *Brewer v. Harris, supra*, 279 N.C. at 296-97, 182 S.E. 2d at 350. We hold that a violation of G.S. 20-141.3(b) also constitutes wilful or wanton negligence. Like 20-141.3(a), 20-141.3(b) "by its terms involves

wilful and wanton conduct." *Harrington v. Collins, supra,* 40 N.C. App. at 533, 253 S.E. 2d at 290. As we noted in *Harrington v. Collins,* " 'two motorists racing make a plain and serious danger to every other person driving along the highway, and one which is often impossible to avoid, it is of itself an act of such negligence as to make the racing drivers responsible for damaged [*sic*] caused by it . . . .' " *Id., quoting Boykin v. Bennett, supra,* 253 N.C. at 728, 118 S.E. 2d at 14.

It was error for the trial court to grant defendants' motion for directed verdict.

The Judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. TERRENCE JOSE BUSH

No. 856SC712

(Filed 21 January 1986)

1. Robbery § 4.3— robbery of mother with hatchet—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss an armed robbery charge for insufficient evidence where the evidence showed that defendant had not worked for a time before the crimes occurred; defendant borrowed $10 from his uncle the day before the crimes; on the day of the crimes defendant asked his uncle for additional money; defendant's mother had between $100 and $200 in her pocketbook on the evening when the crimes occurred; defendant entered his mother's bedroom and pulled a hatchet from beneath his coat; defendant held the hatchet by its end and asked his mother how much money she had and where it was; defendant's mother was then hit on the head and her next memory was of being in the hospital; the next morning defendant's uncle observed the mother's pocketbook on the floor of her bedroom; the pocketbook was open and checks and coins lay on the floor; the pocketbook contained no money when it was observed by the investigating officer; and defendant had money in his possession on the day following the crimes.

2. Criminal Law § 42.4— armed robbery with hatchet—hatchet introduced—no error

The trial court did not commit prejudicial error in a prosecution for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury by allowing the State to have a hatchet marked as an exhibit and displayed to the jury during interrogation of the State's witnesses. The evidence showed that defendant lived with his grandmother, that the hatchet was one the grandmother kept at her home, and that defendant had previously used it; moreover, there was substantial evidence that defendant used a hatchet to commit the crimes and the hatchet displayed merely illustrated the type of weapon used. N.C.G.S. 15A-1443(a).

3. Criminal Law § 113.3— instruction on identification—request not in writing—issue not raised by evidence—request denied

The trial court did not err in a prosecution for armed robbery and assault by denying defendant's request for an instruction on identification where the request was not in writing and the evidence presented no question as to whether the victim accurately identified the perpetrator. N.C.G.S. 1-181, N.C.G.S. 15A-1232.

4. Criminal Law §§ 33.2, 113.2— instruction on motive—evidence of defendant's need for funds—no error

The trial court did not err in a prosecution for armed robbery by instructing on motive where there was evidence that defendant had attempted to borrow money prior to the crime. That evidence was relevant to show defendant's need for funds and justified the charge. N.C.G.S. 15A-1232.

5. Criminal Law § 29.1— motion for independent psychiatric exam denied—psychiatric evaluation at Dix Hospital—no error

The trial court did not err by denying defendant's motion for an independent psychiatric exam in a prosecution for armed robbery and assault where the court found without objection or exception that defendant had received a psychiatric evaluation at Dorothea Dix Hospital, but the record does not contain a report of that evaluation. The record thus reveals that the State provided the defendant with competent psychiatric assistance and there was no basis for finding a violation of defendant's constitutional rights. N.C.G.S. 7A-450(b).

6. Criminal Law § 138— refusal to continue sentencing hearing—no cause shown—no error

The trial court in a prosecution for armed robbery and assault did not err by refusing defendant's request for a one and one-half hour continuance of the sentencing hearing where defendant offered no reason why the sentencing hearing should not proceed. N.C.G.S. 15A-1334(a).

7. Criminal Law § 138.34— history of drug use—no link with crime—no mitigating factor

The trial court did not err when sentencing defendant for armed robbery and assault by failing to find as a mitigating factor that defendant had a history of using drugs where the evidence showed only that defendant used marijuana and did not establish any link between defendant's use of marijuana and his culpability for the crimes. N.C.G.S. 15A-1340.4(a)(2)(d).

8. Criminal Law § 138.21— armed robbery of mother with hatchet—especially heinous, atrocious or cruel

The trial court did not err in a prosecution for armed robbery by finding as an aggravating factor that the offense was especially heinous, atrocious or cruel where defendant assaulted and robbed his mother with a hatchet. The armed robbery of a mother by her son produces psychological suffering and victim dehumanization beyond that normally present in armed robbery offenses. N.C.G.S. 15A-1340.4(a)(1)(f).

APPEAL by defendant from *Smith, Donald L., Judge.* Judgments entered 2 April 1985 in Superior Court, HERTFORD County. Heard in the Court of Appeals 18 November 1985.

Defendant appeals from judgments of imprisonment entered upon verdicts of guilty of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury.

Attorney General Thornburg, by Assistant Attorney General David R. Minges, for the State.

Taylor & McLean, by Donnie R. Taylor, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying his motions to dismiss the armed robbery charge for insufficiency of the evidence and in instructing the jury on that offense. He relies primarily on *State v. Holland*, 234 N.C. 354, 67 S.E. 2d 272 (1951).

The test applied in *Holland* was that the evidence " 'must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and to exclude any other reasonable hypothesis.' " *Holland* at 359, 67 S.E. 2d at 275, *quoting State v. Harvey*, 228 N.C. 62, 64, 44 S.E. 2d 472, 474 (1947). That test no longer applies. *See State v. James*, 77 N.C. App. 219, 220-21, 334 S.E. 2d 452, 453 (1985). The proper test is whether there is substantial evidence of all material elements of the offense. *Id.* "If the evidence . . . gives rise to a reasonable inference of guilt, it is for . . . the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E. 2d 835, 838 (1981).

The evidence, in pertinent part, showed that:

Defendant had not worked for a period of time as to which the evidence conflicted. On the day before the crimes occurred he borrowed $10.00 from his uncle to buy gas, and on the day the crimes occurred he asked the uncle for additional money.

On the evening when the crimes occurred defendant's mother had between $100.00 and $200.00 in her pocketbook. Defendant entered his mother's bedroom and pulled a hatchet from beneath his coat. He held the hatchet by its end as he asked his mother how much money she had and where it was. His mother was then hit on the head. Her next memory was of being in the hospital.

The next morning defendant's uncle observed the mother's pocketbook on the floor of her bedroom. The pocketbook was open; checks and coins lay on the floor. When an investigating officer observed the pocketbook it contained no money. On the day following the crimes defendant had money in his possession.

We hold that the foregoing constituted substantial evidence from which the jury could reasonably infer that defendant committed the robbery. The court thus did not err in denying the motions to dismiss and in instructing on the robbery offense.

[2] The court allowed the State, over objection, to have a hatchet marked as an exhibit and displayed to the jury during interrogation of the State's witnesses. Defendant argues that the witnesses could only testify that this hatchet "looked similar" to or "look[ed] the same" as the one used in perpetrating the crimes, and that since no evidence connected the particular hatchet to the crimes it had no logical relevance and the court should not have allowed the witnesses to testify regarding it.

The evidence showed that defendant lived with his grandmother, that the hatchet was one the grandmother kept at her home, and that defendant had previously used it. Defendant thus had access to the particular hatchet, and it was at least the same as or similar to the one used in perpetrating the crimes. This evidence sufficed to establish a relevant connection between the hatchet and the crimes. *See State v. Andrews*, 56 N.C. App. 91, 95, 286 S.E. 2d 850, 853, *disc. rev. denied and appeal dismissed*, 305 N.C. 587, 292 S.E. 2d 7 (1982); *State v. White*, 48 N.C. App. 589, 593, 269 S.E. 2d 323, 325 (1980); *State v. Morehead*, 16 N.C. App. 181, 183, 191 S.E. 2d 440, 442 (1972).

Assuming error, *arguendo*, we hold it nonprejudicial. There was substantial evidence that defendant used a hatchet to commit the crimes, and the hatchet displayed merely illustrated the type of weapon used. There is no reasonable possibility that the jury would have reached a different result absent display of this exhibit. *See* N.C. Gen. Stat. 15A-1443(a). We thus find this contention without merit.

[3] Defendant contends the court erred in denying his request for "an instruction on . . . identification." The court stated, as one reason for its denial, that the request was not in writing. *See* N.C. Gen. Stat. 1-181. Moreover, the evidence presented no question as to whether the victim accurately identified the perpetrator. The victim's identification testimony was not equivocal. The defense presented was not mistaken identification but alibi, *i.e.*, that defendant was somewhere else when the crimes occurred. The court thus could "declare and explain the law arising on the evidence," N.C. Gen. Stat. 15A-1232, without instructing on identification. It did instruct on the alibi defense. This contention is without merit.

[4] Defendant contends the court erred by instructing on motive. He argues that evidence that he attempted to borrow money prior to the crimes is "too speculative to be of any probative value and did not justify . . . [the] charge."

The evidence that defendant attempted to borrow money on the day before and the day of the crime was relevant to show his need for funds. *State v. Romero*, 56 N.C. App. 48, 54, 286 S.E. 2d 903, 907, *disc. rev. denied*, 306 N.C. 391, 294 S.E. 2d 218 (1982); *see* 1 H. Brandis, North Carolina Evidence Sec. 83 at 304-06. Since the evidence was properly admitted, it was proper for the court to instruct thereon in explaining the law arising on the evidence. N.C. Gen. Stat. 15A-1232.

[5] Defendant contends the court erred in denying his motion for an independent psychiatric examination. He argues that the examination was necessary to aid in determining whether to pursue an insanity defense at trial and whether to seek a finding of a mitigating factor based on mental condition at sentencing.

There is no violation of an indigent defendant's constitutional rights to due process and equal protection by the trial court's

refusal to appoint an additional psychiatric expert where the State has provided competent psychiatric assistance. *State v. Barranco*, 73 N.C. App. 502, 506, 326 S.E. 2d 903, 907 (1985), citing *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980), and *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1211 (1976). In denying the motion the court found, without objection or exception, that defendant, on his motion, had received a psychiatric evaluation at Dorothea Dix Hospital. The record does not contain a report of that evaluation. Thus, so far as the record reveals the State has provided defendant with competent psychiatric assistance, and we have no basis for finding a violation of his constitutional rights.

Defendant's constitutional argument is based in part on *Ake v. Oklahoma*, 470 U.S. ---, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985). The holding of *Ake* is "that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." 470 U.S. at ---, 105 S.Ct. at 1097, 84 L.Ed. 2d at 60. The record contains no basis for finding that defendant made a preliminary showing that his sanity at the time of the offenses was likely to be a significant factor at trial. Assuming that such a showing was made, the record contains no basis for finding that the psychiatric assistance the State provided failed to meet the requirements of *Ake*.

The statutory right of an indigent criminal defendant to expert assistance is based upon N.C. Gen. Stat. 7A-450(b), which requires the State to provide the defendant "with counsel and other necessary expenses of representation." *Barranco, supra.* Our Supreme Court has interpreted the provision for "other necessary expenses of representation" to require expert assistance "only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial." *State v. Gray*, 292 N.C. 270, 278, 233 S.E. 2d 905, 911 (1977). The decision as to whether such a showing is made depends upon the circumstances of each case, is within the sound discretion of the trial judge, and will not be disturbed on appeal absent an abuse of that discretion. *State v.*

Tatum, 291 N.C. 73, 82, 229 S.E. 2d 562, 567-68 (1976); *Barranco* at 507, 326 S.E. 2d at 907.

The record does not contain evidence offered in support of defendant's motion. As noted, the court found, without objection or exception, that defendant had received a psychiatric evaluation at Dorothea Dix Hospital. The record does not contain a report on that evaluation. We thus find no basis for concluding that the appointment of an additional psychiatrist would have materially assisted defendant or that he was denied a fair trial by the refusal to grant his request.

[6] Defendant contends the court erred in failing to grant his request for a one and one-half hour continuance of the sentencing hearing. After the jury returned its verdict and was polled, the court asked, "Anything else for the defendant?" Defense counsel responded, "Your Honor, may we pray judgment at 2 o'clock?" The court replied, "No, sir. We're going to get rid of it right now." Defense counsel did not object and offered no reason why the hearing should not proceed at that time.

A defendant must show "good cause" for continuance of a sentencing hearing. G.S. 15A-1334(a). That determination is within the trial court's discretion. *In re Gallimore*, 59 N.C. App. 338, 340, 296 S.E. 2d 509, 511 (1982); *State v. McLaurin*, 41 N.C. App. 552, 555, 255 S.E. 2d 299, 301 (1979), *cert. denied*, 300 N.C. 560, 270 S.E. 2d 113 (1980). Because defendant offered no reason why the hearing should not proceed, he failed to show "good cause" for the continuance and the court did not abuse its discretion in denying his request.

[7] Defendant contends the court erred in failing to find as a mitigating factor that he had a history of using drugs. He apparently relies on the following statutory mitigating factor: "The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." N.C. Gen. Stat. 15A-1340.4(a)(2)(d).

The State's evidence at trial showed that defendant was not living with his mother because she had asked him to leave the house "[f]or taking drugs." Defendant confirmed this in his testimony, indicating that he only smoked marijuana. At the sentencing hearing no evidence was presented regarding defendant's use

of drugs. The only representation by counsel was: "[Defendant] tells me that he's got no problems with drugs and he does use marijuana. He admitted that to me, but as far as hard drugs, he's just not."

"While a mental or physical condition, such as [drug abuse], may be capable of reducing a defendant's culpability for an offense, . . . evidence that the condition exists, without more, does not mandate consideration as a mitigating factor." *State v. Salters*, 65 N.C. App. 31, 36, 308 S.E. 2d 512, 516 (1983), *disc. rev. denied*, 310 N.C. 479, 312 S.E. 2d 889 (1984); *see also State v. Grier*, 70 N.C. App. 40, 47-49, 318 S.E. 2d 889, 894-95 (1984). The evidence here showed only that defendant used marijuana. It did not establish any link between defendant's use of marijuana and his culpability for the crimes. The court thus was not required to find his use of marijuana as a mitigating factor. *Salters, supra; Grier, supra.*

[8] The court found as an aggravating factor that each offense was especially heinous, atrocious or cruel. N.C. Gen. Stat. 15A-1340.4(a)(1)(f). Since only a single blow was necessary to prove an element of the assault offense, and the evidence established the infliction of multiple blows, defendant correctly concedes that the court could properly find this factor as to the assault offense. *See State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983). He argues, however, that the factor was improperly found as to the armed robbery offense.[1]

In determining whether an offense is especially heinous, atrocious, or cruel, "the focus should be on whether the facts . . . 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). Clearly evidence of the assault established brutality not normally present in an armed robbery. Because the assault was a joined offense of which defendant was contemporaneously convicted, however, to aggravate the robbery offense based on evidence of the assault would be improper. *See State v. West-*

1. We note that defendant had previously stated in his brief that "there was ample evidence that the crime was especially heinous."

moreland, 314 N.C. 442, 448-50, 334 S.E. 2d 223, 227-28 (1985); *State v. Lattimore*, 310 N.C. 295, 299, 311 S.E. 2d 876, 879 (1984); *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154 (1985).

The only other evidence on which the court could have based the finding was that of the parent-child relationship between the victim and the defendant. In *State v. Blalock*, 77 N.C. App. 201, 334 S.E. 2d 441 (1985), a father was convicted of assaulting his son with a deadly weapon inflicting serious injury. This Court held proper a finding that the offense was especially heinous, atrocious, or cruel, stating: "The perpetrator of the offense . . . was the victim's father. This in itself rendered the offense dehumanizing beyond the normal." *Blalock* at 205, 334 S.E. 2d at 444. This statement is equally applicable to the converse situation presented here. In the usual armed robbery the perpetrator and the victim are strangers. The victim's psychological reaction thus does not involve emotions which the parent-child relationship evokes. The armed robbery of a mother by her son, by contrast, involves those emotions and thus produces psychological suffering and victim dehumanization beyond that normally present in armed robbery offenses. We thus hold that application of the *Blackwelder* test to the facts presented renders proper the finding that the armed robbery offense was especially heinous, atrocious, or cruel.

We caution, however, that the "especially heinous, atrocious, or cruel" factor cannot be based on a parent-child relationship when, as for example in incest, the relationship is an element of the offense. N.C. Gen. Stat. 15A-1340.4(a)(1); *see State v. Young*, 67 N.C. App. 139, 143-44, 312 S.E. 2d 665, 669 (1984). We caution further that the holdings here and in *Blalock* are grounded in the unique nature of the parent-child relationship and do not necessarily extend to other degrees of consanguinity. We note that our Supreme Court, without discussing the effect of the relationship involved, has held the finding of the "especially heinous, atrocious, or cruel" factor to be error in a case in which the defendant pled guilty to second degree murder in the death of his brother. *State v. Higson*, 310 N.C. 418, 423, 312 S.E. 2d 437, 440 (1984).

We find that defendant had a fair trial free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

REECE CLARK, EMPLOYEE v. BURLINGTON INDUSTRIES, INCORPORATED, EMPLOYER, AND AMERICAN MOTORIST INSURANCE COMPANY, CARRIER

No. 8510IC449

(Filed 21 January 1986)

1. **Master and Servant § 68— workers' compensation—occupational hearing loss—ambient noise level controlling**

The Industrial Commission erred in denying compensation to plaintiff employee on the ground that noise in his ears was reduced below 90db by the provision and use of protective devices, since the 90db limit of N.C.G.S. 97-53(28), which establishes a conclusive presumption that exposure to noise of less than 90db is not harmful, is the ambient noise level.

2. **Master and Servant § 68— workers' compensation—occupational hearing loss—protective devices—provision by employer—no defense to claim arising after provision and use**

Language of N.C.G.S. 97-53(28)i that "[t]he regular use of employer-provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise," when read in conjunction with other provisions of the statute, does not allow an employer who provides protective devices a complete defense to any claim arising after the date of provision and use; rather, the language means that regular use of protective devices constitutes removal from exposure only for purposes of triggering the statutory six-month waiting period established by the first sentence of the section, and thus it allows the employee to file a claim while continuing in the employment.

3. **Master and Servant § 68— workers' compensation—occupational hearing loss—augmentation of disability—last employer liable for entire disability**

If plaintiff employee could show any augmentation of his occupational hearing loss, however slight, proximately resulting from his employment with defendant, and occurring after 1 October 1971, the date new provisions of the Workers' Compensation Act went into effect which allowed compensation for occupational hearing loss related to long-term exposure to harmful noise, then defendant could properly and constitutionally be liable for the entire disability.

APPEAL by plaintiff from opinion and award of the full Commission filed 22 January 1985. Heard in the Court of Appeals 30 October 1985.

Plaintiff appeals from the denial of his claim for compensation for occupational hearing loss.

Lore & McClearen, by R. Edwin McClearen, for plaintiff-appellant.

Smith Moore Smith Schell & Hunter, by J. Donald Cowan, Jr., for defendant-appellees.

EAGLES, Judge.

Plaintiff worked for defendant Burlington Industries from 1951 to 1976, and from 1979 to his retirement in 1983. He worked in Burlington's "weave rooms," where power looms made continuous noise at or above the 90 decibel (db) level. (During the period 1976-1979 plaintiff worked in home maintenance and was not exposed to loud mechanical noise.) On 1 October 1971, new provisions of the Workers' Compensation Act went into effect which allowed compensation for occupational hearing loss related to long-term exposure to harmful noise. Shortly thereafter, Burlington issued hearing protective devices and began a program of regular testing. Plaintiff was identified by Burlington as a hearing problem case.

In February 1983, plaintiff filed this claim. The medical testimony indicated that plaintiff had in fact suffered substantial hearing loss resulting from exposure to loud noise in Burlington's plants. Plaintiff suffered the great majority of this hearing loss prior to 1 October 1971, but he also suffered some slight loss after that time. This later loss, according to the medical expert, could not be definitively traced to a single cause.

Deputy Commissioner Shuping denied compensation, finding that the loss of hearing after 1971 was due either to variations in audiometric testing equipment or to aging, and that there was no occupationally caused increase, however slight, in the loss of hearing existing as of 1 October 1971. Deputy Commissioner Shuping ruled in effect that upon being provided hearing protection devices by Burlington, plaintiff was removed from exposure to harmful noise. Accordingly, plaintiff could not and did not suffer further injurious exposure. The only time period in which injurious exposure could have occurred after 1 October 1971 was 1 October (effective date of Act) to 11 October 1971 (date of provi-

sion of protective devices), and this exposure did not contribute to plaintiff's hearing loss.

On appeal by plaintiff, the full Commission affirmed denial of compensation, with Commissioner Clay dissenting. The Commission's majority opinion stated that the provisions of G.S. 97-53(28) allowed no compensation for hearing loss existing prior to the Act's effective date, and that the ear protection equipment issued by Burlington reduced the noise level *in plaintiff's ears* below 90db beginning in 1972. On that logic, the majority adopted and affirmed Deputy Commissioner Shuping's opinion and award.

Commissioner Clay wrote in his dissent that plaintiff had in fact suffered compensable loss of hearing, since (1) there was evidence he suffered some loss of hearing after 1 October 1971, (2) the hearing protection devices failed to actually remove plaintiff from exposure to harmful noise and (3) compensation for hearing loss occurring before 1 October 1971 would be compensable, provided there was some loss after the date. From the decision of the full Commission, plaintiff appealed.

I

Our review of decisions of the Industrial Commission is limited in scope, and usually this court determines solely whether there is any competent evidence to support the Commission's findings and whether these in turn support the Commission's conclusions of law. Where, however, the Commission finds facts or fails to find sufficient facts while acting under a misapprehension of law, it is sometimes necessary to remand the case so that the evidence may be considered by the Commission in its true legal light. *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 314 S.E. 2d 833 (1984). We find that to be the case here and accordingly remand.

II

[1] The full Commission found as grounds for denying compensation that the noise in plaintiff's ears was reduced below 90db by the provision and use of protective devices. The Commission relied on G.S. 97-53(28)a, which establishes a conclusive presumption that exposure to noise of less than 90db is not harmful. *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 303 S.E. 2d 795 (1983). The 90db level is consistent with federal maximum permissible noise exposure levels. *Id.; see* 29 C.F.R. 1910.95 (1982).

The federal noise protection regulations have been adopted by reference by the North Carolina Department of Labor, 13 N.C.A.C. 7C.0101(a)(18) (1985). However the federal regulations do not allow permissible noise exposure levels to be measured in the ear. The federal regulatory structure relies on engineering and administrative controls to reduce workplace noise; individual protective devices may be used only in a supplementary role. *See* 46 Fed. Reg. 4078 (1981). Although the federal OSHA has questioned the economic and technological feasibility of this regulatory approach, it remains in effect. *Id.* Federal, hence North Carolina, industrial noise monitoring requirements require noise to be measured in the workplace. We may not rely merely on what level of noise may reach an employee's ear. The original noise protection rule did require individual monitoring for high risk employees, but even there the microphone was to be placed not at the eardrum, but instead not less than two inches nor more than two feet from the employee's ear. 29 C.F.R. 1910.95(g)(2)(ii)(D) (1982) (stayed pending further rulemaking). Rather than focus monitoring on exposure at the ear, federal OSHA, in response to industry pressure, now relies on required area monitoring. 46 Fed. Reg. 42622, 42623-24 (1981). Employer contentions that compliance with the 90db standard should be measured inside the hearing protective device, rather than in the workplace, have been rejected. The federal Occupational Safety and Health Review Commission has insisted instead that ambient noise first be reduced to the lowest feasible level. *In re Flxible Corp.*, 12 O.S.H.C. 1053 (1984) (rejecting contention that noise should be measured inside helmet); *In re Turner Co.*, 4 O.S.H.C. 1554 (1976) (plain language of regulations sufficed to summarily reject contention).

While the Industrial Commission's interpretation of G.S. 97-53(28) is entitled to due consideration, the final say rests with the courts. *In re Broad and Gales Creek Community Assoc.*, 300 N.C. 267, 266 S.E. 2d 645 (1980). In determining the legislative intent and interpreting the statute, we consider *inter alia* the historical reasons for the statute's enactment and its relationship and interplay with other statutes and regulations. *See Carolinas-Virginias Assoc. of Bldg. Owners and Managers v. Ingram*, 39 N.C. App. 688, 251 S.E. 2d 910, *disc. rev. denied*, 297 N.C. 299, 254 S.E. 2d 925 (1979). In light of the regulatory framework discussed above,

we hold that the 90db limit in G.S. 97-53(28) is the ambient noise level, and that the Commission accordingly acted under a misapprehension of law in ruling otherwise.

III

[2] It appears that the Commission may have drawn its interpretation from G.S. 97-53(28)i, upon which Deputy Commissioner Shuping relied. That section reads in full:

> No claim for compensation for occupational hearing loss shall be filed until after six months have elapsed since exposure to harmful noise with the last employer. The last day of such exposure shall be the date of disability. *The regular use of employer-provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise.* (Emphasis added.)

The emphasized language, taken alone, apparently would allow an employer who provided protective devices a complete defense to any claim arising after the date of provision and use. *See* G.S. 97-53(28)k (allowing defense that employee did not use devices regularly).

The emphasized language must however be interpreted in context and in a manner which harmonizes with the other provisions of the statute and gives effect to the whole. *See Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980); *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). Applying these accepted principles, it quickly becomes clear that the emphasized language means that regular use of protective devices constitutes removal from exposure *only for purposes of triggering the statutory six-month waiting period* established by the first sentence of the section. Otherwise, the employee would be faced with the choice of waiting until he had left the employment altogether or leaving the employment solely to enable him to file a claim. As we interpret the statute, it simply allows the employee to file a claim while continuing in the employment. *See Thomas v. Bethlehem Steel Corp.*, 63 N.Y. 2d 150, 470 N.E. 2d 831, 481 N.Y.S. 2d 33 (1984) (similar effect of New York statute). We have discovered no decisions from states having statutes similar to ours which interpret them otherwise. *See id.*; N.J. Stat. Ann. Section 34:15-35.20 (West

Supp. 1985). The providing of protective devices does not establish any absolute bar to claims for hearing loss, and the Commission erred in so interpreting G.S. 97-53(28)i.

The actual effectiveness of individual hearing protective devices has not been definitively established; there are many problems associated with their use. 46 Fed. Reg. 4078, 4151-53 (1981). The federal OSHA has cautioned employers that manufacturers' ratings for their devices "may be unrealistically high," and that real life conditions will not necessarily duplicate laboratory test results. 46 Fed. Reg. 42622, 42629 (1981). Under these circumstances, a rule that provision of hearing protective devices removes employees from exposure to harmful noise as a matter of law is clearly erroneous.

IV

[3] We must also address the Commission's ruling that G.S. 97-53(28) allows no compensation for loss of hearing existing prior to the effective date of the statute, 1 October 1971. The amending act relied on by the Commission provides in relevant part:

> This act shall be in full force and effect from and after October 1, 1971, and shall apply only to cases in which the *last injurious exposure* to harmful noise in employment was subsequent to October 1, 1971. (Emphasis added.)

1971 N.C. Sess. Laws c. 1108, s. 3. Nothing in this section or the statute itself expressly mandates that hearing loss existing prior to 1 October 1971 is not compensable, as long as the last injurious exposure occurred after that date.

In *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979), the Supreme Court held that a byssinosis claim filed in 1975 could be entertained by the Commission, even though the worker last worked for the employer in 1958. The law as of the time of disability controls. The court rejected contentions that allowing the claim was unconstitutionally retroactive, in that no rights arose until the worker became disabled, even though that might occur many years after the last employment. G.S. 97-53(28)i specifically provides that *disability* occurs on the last day of exposure to harmful noise. Plaintiff alleged that in this case the day of disability was 11 February 1983, his last day of work for defendant, eleven years after the effective date of G.S. 97-53(28).

In *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983), the Supreme Court reaffirmed the interpretation of "last injuriously exposed" as "an exposure which proximately augmented the disease to any extent, however slight." *Id.* at 89, 301 S.E. 2d at 362, *quoting Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 22 S.E. 2d 275, 277 (1942). Upon a finding of augmentation, the responsible employer and/or carrier becomes liable for the entire claim under our occupational disease statutes. *Id.* The Supreme Court approved this statutory definition and scheme, aware that it might cause some unfairness in apportioning liability in individual cases. (We note that the General Assembly declined to change this scheme by rejecting liability apportionment legislation in 1984 and 1985.) We hold that words "last injurious exposure" in 1971 N.C. Sess. Laws c. 1108, s. 3 must have the same meaning.

Following the principles of *Wood, supra,* and *Rutledge, supra,* we conclude that if plaintiff could show any augmentation of his condition, however slight, proximately resulting from his employment with Burlington, and occurring after 1 October 1971, then defendant Burlington could properly and constitutionally be liable for the entire disability. This is especially appropriate here, since Burlington does not deny that plaintiff has suffered occupational hearing loss and that his entire exposure to harmful noise came while employed with Burlington. The Commission's ruling that no compensation may be awarded for the loss of hearing existing prior to 1 October 1971 must also be reversed since it too was based upon an error of law.

V

Although the Commission adopted and affirmed Deputy Commissioner Shuping's findings of fact, and although these might suffice to deny compensation in this case, the Commission explicitly acted under the misapprehensions of law we have discussed above. At this stage of the litigation, it is therefore inappropriate for this court to consider the evidence at length. We vacate the Commission's order and remand so that the evidence may be considered in its true legal light.

Vacated and remanded.

Chief Judge HEDRICK and Judge MARTIN concur.

CARSON F. CALLOWAY v. SHUFORD MILLS AND AMERICAN MUTUAL INSURANCE COMPANY

No. 8510IC432

(Filed 21 January 1986)

1. **Master and Servant § 68— occupational exposure to cotton dust—significant aggravation of chronic obstructive pulmonary disease—evidence sufficient**

The evidence was sufficient to support the Industrial Commission's finding and conclusion that plaintiff's exposure to respirable cotton dust while employed with defendant significantly aggravated the severity of his chronic obstructive pulmonary disease where the only medical expert to testify in the case identified as causative factors smoking, which he discounted as a minor factor, exposure to cotton dust, and hyper-reactive airways disease; testified that plaintiff's exposure was probably one cause of his chronic obstructive pulmonary disease; and testified that the greater part of plaintiff's present obstruction was either caused by or aggravated by his occupational exposure. N.C.G.S. 97-53(13) (1985).

2. **Master and Servant § 68— chronic pulmonary disease—partial disability—subsequent employment at higher wage**

The Industrial Commission did not err by concluding that a chronic pulmonary disease caused plaintiff to be permanently partially disabled, despite evidence that he worked in the packing room at a wage higher than he had ever before earned after his lung disease was diagnosed, because the Commission found without exception that plaintiff performed unsatisfactorily at that job because of his lack of concentration. N.C.G.S. 97-2(9) (1985).

3. **Master and Servant § 69— chronic pulmonary disease—credit for wages earned after disability—remanded for further findings**

An Industrial Commission award of compensation was remanded for further findings on the issue of wages earned after plaintiff was found to be disabled where the Commission gave defendant a credit for "any wages earned by plaintiff" as a night watchman for defendant after he was given a medical leave of absence for his chronic obstructive pulmonary disease. N.C.G.S. 97-30, N.C.G.S. 97-47.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission entered 16 November 1984. Heard in the Court of Appeals 29 October 1985.

Charles R. Hassell, Jr., for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe, Gregory C. York, and Martha W. Surles, for defendant appellants.

BECTON, Judge.

I

Plaintiff, Carson Calloway, filed a claim under North Carolina's Workers' Compensation Act, seeking benefits for disability resulting from an occupational disease. A Deputy Commissioner concluded that Calloway was permanently partially disabled as a result of his chronic obstructive lung disease and awarded three hundred weeks of benefits plus medical expenses and costs. The Commission then modified this opinion and award to allow a credit for wages earned by Calloway since he was determined to be disabled. Defendants Shuford Mills and American Mutual Insurance Company appeal, contending the Commission erred in finding and concluding that: (1) Calloway had an occupational disease; (2) Calloway was permanently partially disabled; and (3) defendants were entitled to a credit only for wages earned by Calloway after he was found to be disabled. Although we find no error on the first two issues, we remand for further findings on the issue of defendants' entitlement to credit.

II

Carson Calloway was born on 28 April 1922 and attended school through the third grade. He worked in cotton textile mills for approximately thirty-four years between 1940 and 1982. During his employment, much of which was spent in the card room, he was exposed to respirable cotton dust. Calloway testified that he began smoking when he was ten or twelve years old and smoked "at most" one or one and one-half cartons per week. He quit smoking in 1948 because he was experiencing a cough in the mornings. He first noticed respiratory problems in the early 1960's, when he experienced shortness of breath. Initially, his symptoms were worse during the early part of the working week and seemed to improve on weekends. By 1978 to 1980, when he was working in the card room at Sure Spun (a Shuford Mills plant), symptoms troubled him throughout the week.

In 1980, after performing poorly on a company-administered breathing test, Calloway was sent to see two pulmonary specialists, Dr. Hart and Dr. Owens, the latter of whom was the only medical expert to testify in this case. Dr. Owens gave Calloway a physical examination and had pulmonary function tests per-

formed. Dr. Owens concluded that Calloway had chronic obstructive pulmonary disease with chronic bronchitis and a 25% to 35% impairment of lung function, and he recommended that Calloway be placed in a working environment where he would not be exposed to cotton dust or other respirable irritants. In accordance with this recommendation, Calloway began to work in the packing room at Spun Set (another Shuford Mills plant). He was moved from that job to the synthetic card room in March of 1982, but the fumes from polyester processing irritated his breathing to the extent that on 7 March 1982, he was given a medical leave of absence. Subsequently, he was laid off, but he resumed working part time at Sure Spun in July 1982 as a night watchman.

III

[1] The defendants first argue that the Commission erred in finding that claimant had an occupational disease. Under N.C. Gen. Stat. Sec. 97-53(13) (1985), an occupational disease is "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." In order for chronic obstructive lung disease to be an occupational disease, it is necessary to prove that

> the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or are significant causal factors.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 101, 301 S.E. 2d 359, 369-70 (1983); *compare with Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E. 2d 101, 106 (1981) (former standard of causation).

The Commission found that Calloway has chronic obstructive pulmonary disease. It also found that:

> 20. Plaintiff's exposure to respirable cotton dust while employed with the defendant/employer was injurious to plaintiff and caused further injury to him by significantly ag-

gravating the severity of his chronic obstructive pulmonary disease.

* * *

23. There is no mechanism which can separate quantitatively how much of plaintiff's chronic obstructive pulmonary disease was caused by his exposure to cotton dust versus his exposure to cigarette smoking versus his underlying susceptibility.

24. As a result of chronic obstructive pulmonary disease which was caused by and significantly aggravated by plaintiff's exposure to cotton dust in his employment with defendant/employer, plaintiff is only able to perform sedentary or light work in a clean air environment.

25. As of March 8, 1982, plaintiff was and remains permanently partially disabled as a result of chronic obstructive pulmonary disease that was due to, aggravated, augmented and accelerated by, causes and conditions peculiar to plaintiff's employment i.e. exposure to respirable cotton dust in an "at risk" area of the mill.

Defendants assert that these findings are deficient in that they "failed to address the primary question of the actual cause of the claimant's chronic obstructive lung disease." Defendants misunderstand the currently applicable standard in this area. *Rutledge* expressly replaced the former standard of actual causation with a liberalized standard of causation whereby exposure to cotton dust need only be a significant causative or contributing factor in the disease's development.

Dr. Owens identified three causative factors of Calloway's chronic obstructive lung disease: (1) smoking (which he expressly discounted as a "minor factor" in the disease's development), (2) exposure to cotton dust, and (3) hyper-reactive airways disease, which is characterized by an abnormal amount of "reactivity"—inflammation, smothering and bronchospasms—upon exposure to airways irritants. Dr. Owens testified that Calloway's exposure was probably one cause of his chronic obstructive pulmonary disease. He also testified:

> I would think that the greater part of his present obstruction is either caused by or aggravated by his occupational exposure.

This evidence is, in our estimation, sufficient to support the Commission's finding and conclusion to the effect that Calloway's "exposure to respirable cotton dust while employed with the defendant employer . . . significantly [aggravated] the severity of his chronic obstructive pulmonary disease." Our Supreme Court recently deemed even more equivocal medical testimony sufficient to support a finding of significant contribution. *See Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 570-71, 336 S.E. 2d 47, 49-50 (1985) (A physician testified: "[S]he probably has obstructive impairment caused by cotton dust exposure," and "I feel that there is an element of pulmonary impairment present which could have been contributed to by her cotton dust exposure.").

Furthermore, we find the Commission's use of the language "significantly aggravating" sufficient under *Rutledge. See Gibson v. Little Cotton Mfg. Co.*, 73 N.C. App. 143, 325 S.E. 2d 698 (1985) (A finding that both claimant's "smoking history and his exposure to cotton dust were significant etiologic factors in the development of his lung disease" satisfies *Rutledge.*); *cf. Adkins v. Fieldcrest Mills, Inc.*, 71 N.C. App. 621, 322 S.E. 2d 642 (1984) (a finding that claimant's lung disease was caused by smoking "and contributed to and aggravated by his cotton dust exposure" required remand under *Rutledge*). We note that the opinion and award of the Deputy Commissioner in the case at bar, and that of the Commission, were rendered subsequent to the filing of *Rutledge.*

IV

[2] Defendants next argue the Commission erred in finding and concluding that Calloway's pulmonary impairment caused him to be permanently partially disabled. "Disability" is the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. Sec. 97-2(9) (1985); *see Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982) (identifying requisite findings to support conclusion of disability). A claimant able to work and earn some wages, but less than he or she was receiving at the time of injury, is partially disabled. *See*

Little v. Anson County Schools Food Service, 295 N.C. 527, 246 S.E. 2d 743 (1978). The burden of showing the existence and degree of disability is on the claimant. *Hilliard.* Disability is a legal conclusion, *id.*, and, as such, will be binding on the reviewing court if supported by proper findings. *See Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E. 2d 743 (1982).

Defendants argue that Calloway has not suffered a diminution in his wage-earning capacity as a result of an occupational disease because the evidence conclusively showed he had worked in the packing room at $5.51 per hour, a wage higher than he had ever before earned, *after* his impairing lung disease was diagnosed. We disagree. The Commission found without exception that Calloway performed unsatisfactorily at this job in the packing department because of "his lack of concentration on the details that the job required." Calloway had only a third grade education. These and other findings, as well as the evidence, demonstrate that although he was capable of performing less skilled jobs at the mill, which he did for more than thirty years, he had difficulty in a position requiring greater skills. Individual, intellectual and vocational considerations may be taken into account on the issue of disability. *See Hundley v. Fieldcrest Mills, Inc.*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982) (relying on *Little*). Thus, it was not error for the Commission to conclude that Calloway was permanently partially disabled.

V

[3] The defendants' final argument is that the Commission erred in allowing defendants a credit only for the wages actually earned by Calloway after he was found to be disabled. Calloway testified that he was rehired by defendant Shuford Mills as a night watchman in July 1982, working an average of eighteen hours per week at $4.96 per hour. Although the Deputy Commissioner found that Calloway had not worked since 7 March 1982 and therefore did not allow defendants any credit for wages earned by Calloway subsequent to that date, the Commission made the following modification in its opinion and award:

> [W]e note that the evidence is unclear concerning plaintiff's work history following the date he was determined to be permanently partially disabled. Under G.S. 97-30, the plaintiff is entitled to compensation at the rate of 66⅔'s percent, the dif-

ference between his average weekly wage prior to disability and his average weekly wage immediately thereafter. The compensation allowed by Deputy Commissioner Bryant assumes plaintiff has earned no income since March 7, 1982. The record is unclear on this point. Defendants are entitled to a credit for any wages earned by plaintiff since that time.

The Commission granted defendants a credit "for any wages earned by plaintiff in the 300 weeks since March 8, 1982."

Defendants argue that the Commission improperly based its award of credit upon Calloway's actual future earnings rather than his wage-earning capacity. Defendants rely on N.C. Gen. Stat. Sec. 97-30 (1985) which sets compensation for partial incapacity at two-thirds of the difference between a claimant's "average weekly wages before the injury and the average weekly wages which he is *able to earn* thereafter . . ." for a maximum of three hundred weeks. (Emphasis added.) The defendants reason that the Commission's order will allow them a credit only if Calloway continues to work and will allow Calloway to select future employment without regard to his actual wage-earning capabilities. In our opinion, however, implicit in the Commission's finding that Calloway is entitled to compensation at two-thirds the difference between his wages prior to disability and "his average weekly wages immediately thereafter" is a finding that the wages actually earned by Calloway after 7 March 1982 were the wages he was capable of earning. In this connection, we note it was defendant Shuford Mills who rehired Calloway as a night watchman; presumably, they placed him in a job commensurate with his wage-earning capabilities. Furthermore, if at some future point defendants feel Calloway is no longer earning the wages he is capable of earning, the modification provisions of N.C. Gen. Stat. Sec. 97-47 (1985) are available to them. *See Edwards v. Smith & Sons*, 49 N.C. App. 191, 270 S.E. 2d 569 (1980), *disc. rev. denied*, 301 N.C. 720, 274 S.E. 2d 228 (1981) ("Change of condition" can refer to an injured employee's physical capacity to earn.).

Calloway concedes, however, in both his brief and during oral argument, that his case should be remanded for more specific findings under G.S. Sec. 97-30. We agree that a remand is necessary for further findings on the issue of the wages earned by Calloway since 7 March 1982, so that the exact amount of credit

may be set and compensation properly calculated.[1] On remand, the Commission may reopen the proceedings to take additional evidence if it determines on the record that there is insufficient evidence to make further findings necessary to determine the proper amount of credit.

Affirmed in part; vacated in part; and remanded.

Judges WEBB and COZORT concur.

BETTY EVANS DOBSON AND HUSBAND, FRANK TIM DOBSON v. GLORIA HUNT HONEYCUTT AND DONALD D. HONEYCUTT

No. 8529SC743

(Filed 21 January 1986)

1. Trial § 31— peremptory instructions

The trial court did not err in refusing to give plaintiffs' requested peremptory instruction as to defendant's negligence that, "[W]hen you come to the First Issue, the Court instructs you, that if you find the facts to be as the evidence tends to show, you will answer that Issue YES," since the instruction was not an appropriate peremptory instruction in that it did not give the jury a choice as to whether they would accept or reject the evidence but instead amounted to a request for a directed verdict.

2. Automobiles § 90.10— crossing center line—failure to mention in instructions

In an action for negligent operation of an automobile, the trial court's recapitulation of the evidence, failing as it did even to mention the compelling direct and circumstantial evidence that defendant's car was in plaintiff's car's lane of travel when the collision occurred, failed to give equal stress to the contentions of the parties; furthermore, the court erred in its final mandate to the jury by omitting any reference to the negligence of defendant in driving to the left of center, or crossing the center line, a vital aspect of the case.

Judge PARKER concurring in the result.

APPEAL by plaintiffs and defendants from *Hyatt, Judge.* Judgments entered 13 and 14 February 1985 in MCDOWELL Coun-

---

1. Although defendants excepted to the Commission's findings as to Calloway's average weekly wage *prior* to his injury, they did not discuss that point in their brief, and that finding therefore is binding upon us. *See* N.C. Rules App. Proc., Rule 28(a).

ty Superior Court. Heard in the Court of Appeals 5 December 1985.

Plaintiffs brought an action against defendants for negligent operation of defendant Donald Honeycutt's automobile by his wife, defendant Gloria Honeycutt. Defendants counterclaimed against plaintiffs for the negligent operation of plaintiff Frank Dobson's automobile by his wife, plaintiff Betty Dobson.

At trial, plaintiffs' evidence on the question of negligence consisted of the testimony of Highway Patrolman J. A. Jones and plaintiff Betty Dobson. Jones testified in summary as follows. At about 5:00 p.m. on 20 March 1982, he investigated a collision between automobiles driven by Betty Dobson and Gloria Honeycutt. His investigation disclosed that Mrs. Dobson was driving her Buick automobile in a southeasterly direction along Harmony Grove Road, a two lane rural paved road. Mrs. Honeycutt was driving her Dodge automobile in the opposite direction. The collision occurred at a curve on a hill where the road was marked by a double yellow line. The collision occurred at about 4:45 p.m. When Jones arrived on the scene, the Dobson car was off the left side of the road, the front end against an embankment and the rear of the car on the paved portion of the road. Jones found tire marks leading from about one foot inside Dobson's lane of travel to the rear tires of Dobson's car, for a distance of about 48 feet. He also found a fresh gouge mark in the pavement about one foot inside Dobson's lane of travel. The mark was about three feet long. The left front tire of the Dobson car was burst and the left front tire and frame were "kicked back" some. The left front portion of the Dobson car was damaged. There was debris all over the road. Jones interviewed Mrs. Dobson at the scene. She told him that when she came over the crest of the hill, she saw the car on her side of the road and they "hit" on her side of the road. Jones interviewed Mrs. Honeycutt at the scene, but she did not remember the collision. Jones also talked with Mrs. Honeycutt's 6-year-old son at the scene, who told him, "My mom lost control of the car and hit the man and the other car." Before the collision, his mother said, "Look out, the man is going to hit us." When he arrived, Jones found the Honeycutt car partially off the road, with the front about 1½ feet from the center line.

Mrs. Dobson testified that she was driving along Harmony Grove Road in her right hand lane of travel. When she came

"across the hill" she saw the Honeycutt car in her lane of travel. Dobson had "no place to go." The collision occurred about three feet inside Dobson's lane of travel. When the impact occurred, it punctured Dobson's tire and sent her "varying" to the left into an embankment. The left side of the Honeycutt car struck the left side of the Dobson car.

Defendants' evidence consisted of the testimony of Barry Mingle and Eugene Edwards, members of the Nebo Fire Department, and Mrs. Honeycutt. Mrs. Honeycutt did not remember the collision, recalling nothing after she left home until being placed in an ambulance. Both Mingle and Edwards arrived at the scene soon after the collision and gave first aid. Each observed some debris near the Honeycutt car, but did not recall seeing debris in Dobson's lane of travel.

At the close of the evidence, the trial court granted plaintiffs' motion for a directed verdict as to defendants' counterclaim. The jury answered the issues of defendant Gloria Honeycutt's negligence in defendants' favor. From judgment entered on the verdict, plaintiffs appealed. Defendants appealed from the dismissal of their counterclaim.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert B. Byrd and Sam J. Ervin, IV; and Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Philip J. Smith, for plaintiffs.

Watson and Hunt, by Frank H. Watson and Charlie A. Hunt, Jr.; and Coats & Pool, by Donald F. Coats, for defendants.

WELLS, Judge.

Plaintiffs contend that the trial court erred in its instructions to the jury. We agree and award plaintiffs a new trial. Defendants contend the trial court erred in dismissing their counterclaim. We disagree and affirm the trial court's order.

Plaintiffs' Appeal

[1] Plaintiffs first assign error to the trial court's refusal to give a peremptory instruction as to defendant Gloria Honeycutt's negligence. The requested instruction was as follows: "[W]hen you come to the First Issue, the Court instructs you, that if you find the facts to be as the evidence tends to show, you will answer

that Issue YES." Peremptory instructions in an appropriate case have long been accepted practice in North Carolina. *See* 12 *Strong's N.C. Index*, Trial § 31 (3d ed. 1978) and cases cited therein and Shuford, *N.C. Civ. Prac. & Proc.* § 51-4 (2d ed. 1981) and cases cited therein. When all the evidence offered suffices, if true, to establish the controverted fact, the Court may give a peremptory instruction—that is, if the jury finds the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Denial of an alleged fact raises an issue as to its existence even though no contradictory evidence has been offered. *Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726 (1961); *see also Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971).

While we view the evidence in this case as entitling plaintiffs to an appropriate peremptory instruction, the instruction requested by plaintiffs was not appropriate and amounted to a request for a directed verdict. An appropriate peremptory instruction must make it clear that the jury should be guided by what they find the greater weight of the evidence to be and should make it clear that the jury may accept or reject the evidence: they may answer the issue either *yes* or *no*, that is, that they have a choice as to how they answer the issue. *See, e.g.*, an approved form of instruction stated in *Terrell v. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E. 2d 124 (1971) and N.C. Pattern Jury Instructions—Civil 101.65 (1982). This assignment is overruled.

[2] In their second and third assignments of error, plaintiffs contend that in its instructions to the jury, the trial court failed to properly recapitulate the evidence and failed to properly apply the law to the evidence. At the time of the trial, the controlling statute, N.C. Gen. Stat. § 1A-1, Rule 51(a) of the Rules of Civil Procedure, provided:

> In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties.

The trial court's summary of the evidence, in pertinent part, was as follows:

> The plaintiffs have offered evidence tending to show that on March 20th, 1984 at about 4:45 P.M., Mrs. Betty Evans Dobson was driving a 1976 Buick automobile in a southeasterly direction on a rural paved road in McDowell County; that her automobile collided with a 1973 Dodge automobile travelling in a northwesterly direction on the same rural paved road in McDowell County; that the 1973 Dodge automobile was driven by Mrs. Gloria Honeycutt; that the collision occurred southeast and left of the hillcrest . . . .
>
> The defendants offered evidence tending to show that on March 20th, 1984, at about 4:45 P.M., Mrs. Gloria Honeycutt was driving a 1973 Dodge automobile in a northwesterly direction on a rural paved road in McDowell County; that her son, age 6, was with her; that she does not remember the wreck; that her son told Officer Jones that she said "look out, that man is going to hit us, before she lost control of her car." That her automobile collided with the 1976 Buick automobile driven by Mrs. Betty Evans Dobson which was travelling in a southeastern direction on the same rural paved road in McDowell County . . . .

This statement of the evidence, failing as it did to even mention the compelling direct and circumstantial evidence that the Honeycutt car was in the Dobson car's lane of travel when the collision occurred, failed to give equal stress to the contentions of the parties.

In its final mandate, the trial court applied the law to the evidence as follows:

> Finally, as to this issue, I instruct you that if the plaintiff has proved by the greater weight of the evidence that at the time of the collision, the defendant was negligent in one or more of the following respects either in that she operated her motor vehicle without keeping a reasonable lookout or without keeping it under proper control or without driving her vehicle as nearly as practicable within a single lane. I say, if the plaintiff has proved by the greater weight of the evidence that the defendant was negligent in any one or

more of these respects and if the plaintiff has further proved by the greater weight of the evidence that such negligence was a proximate cause of plaintiff's injury and damage, it would be your duty to answer this issue in favor of the plaintiff. On the other hand, if considering all the evidence, the plaintiff has failed to prove such negligence or proximate cause, then it would be your duty to answer this issue "no" in favor of the defendant.

This instruction totally omitted any reference to the negligence of defendant Gloria Honeycutt in driving to the left of center (or crossing the center line), a vital aspect of this case.

For errors in the jury instructions, there must be a new trial.

Defendants' Appeal

Plaintiffs' motion for a directed verdict on defendants' counterclaim tested the legal sufficiency of the evidence to take the question of plaintiffs' negligence to the jury and support a verdict for defendants. On the motion, defendants' evidence must be taken as true, giving defendants the benefit of every reasonable inference to be drawn therefrom. Plaintiffs' motion was not properly allowed unless it appears as a matter of law that defendants could not recover of plaintiffs upon any reasonable view of the facts which the evidence reasonably tended to establish. If, when so viewed, the evidence is such that reasonable minds could differ as to whether defendants were entitled to recover of plaintiffs, the motion was not properly granted. *See Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982) and cases cited therein. Applying these principles to the evidence in this case, we conclude that there was no evidence more than a scintilla of negligence on the part of Betty Dobson, *Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980) and that plaintiffs' motion was properly allowed.

The results are:

As to plaintiffs' appeal,

New trial.

As to defendants' appeal,

No error.

Judge ARNOLD concurs.

Judge PARKER concurs in the result.

Judge PARKER concurring in result.

I concur in the result, but I would overrule plaintiffs' first assignment of error regarding the peremptory instruction for a different reason. Under the authority of *Electro Lift, Inc. v. Miller Equipment Company*, 270 N.C. 433, 154 S.E. 2d 465 (1967), a trial judge in giving a peremptory instruction in his charge to the jury must give the jury the opportunity for either an affirmative or negative response, and I agree with the majority that the proper form for the instruction is as set forth in the civil pattern jury instructions. However, in my view plaintiffs' request in the case at bar was a sufficient request for a peremptory instruction. There is ample case authority suggesting that the request made by plaintiffs is a peremptory instruction. In fact, in *Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726 (1961), the court suggested that the words "if you find the facts to be as all the evidence tends to show" are a peremptory instruction. Rodman, J., writing for the Court stated:

> When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. (Citing cases.)

255 N.C. at 376, 121 S.E. 2d at 728. *See also Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966).

However, I am of the opinion that this assignment of error should be overruled for the reason that upon the evidence presented plaintiff was not entitled to a peremptory instruction and the trial judge did not err in denying the request.

AMOCO OIL COMPANY v. C. B. GRIFFIN, JR. AND AUBREY HARRELL

No. 852SC487

(Filed 21 January 1986)

1. **Guaranty § 1— continuing guaranty—change of terms—no release from liability**

There was no merit to defendant's contention that the guaranty in question applied only to debts incurred during 1970 pursuant to a 1970 contract between plaintiff and the principal debtor or only to debts incurred prior to 7 April 1981 when a new contract was entered between plaintiff and the principal debtor, that a change in credit terms and increase in the amount of credit extended discharged him, or that he was entitled to an accounting upon request, since the guaranty expressly stated that it was a continuing guaranty, the object of which is to enable a principal debtor to have credit over an extended time and to cover successive transactions, and the guaranty expressly provided that it was to remain in effect despite the making of any new contract, without notice to defendant of the new contract, that defendant's liability continued despite any modifications to credit terms and amounts, and that any type of accounting was waived.

2. **Guaranty § 2— mutual mistake—validity of execution—summary judgment proper**

The trial court did not err by failing to find that the guaranty in question was signed through mutual mistake of fact, rendering it void, where defendant asserted mutual mistake in his answer and reasserted the defense in his own affidavit offered to oppose summary judgment, but did not set forth specific facts showing that there was a genuine issue of fact for trial; nor did the court err in failing to find a genuine issue of material fact precluding summary judgment regarding the validity of the execution of the guaranty where defendant denied "having any knowledge of ever having executed such a guarantee," but did not set forth specific facts to support his denial.

3. **Guaranty § 2— continuing guaranty—action not barred by statute of limitations**

There was no merit to defendant's contention that an action on a guaranty was barred by the statute of limitations or laches since the guaranty in question was a continuing one; defendant's liability arose at the time of the default of the principal debtor which occurred on 1 July 1983; and plaintiff filed its complaint on 30 September 1983, well within the statutory limitation. Furthermore, the fact that the principal debtor was discharged in bankruptcy from the obligation which the guaranty stood behind did not terminate any disability defendant might have had as guarantor.

4. **Rules of Civil Procedure § 56.5— no findings of fact in order**

Findings of fact in a summary judgment order are ill advised because they indicate a question of fact was presented and resolved by the trial court.

Amoco Oil Co. v. Griffin

APPEAL by defendant, C. B. Griffin, Jr., from *Griffin, William C., Jr., Judge.* Judgment entered 8 February 1985 in Superior Court, MARTIN County. Heard in the Court of Appeals 1 November 1985.

Plaintiff instituted this action on 30 September 1983 in Wake County alleging that: on 20 May 1970 defendants C. B. Griffin, Jr. and Aubrey Harrell agreed to be guarantors of any indebtedness contracted by the principal debtor Harrell Oil Company, Inc.; defendants are stockholders in Harrell Oil Company, Inc.; as of 1 July 1983 plaintiff had extended credit in the sum of $121,849.73 to the principal debtor; on 1 July 1983 the principal debtor filed a petition in the United States Bankruptcy Court; and neither the principal debtor nor the defendants had paid any indebtedness. The complaint sought recovery against the defendant guarantors for $121,849.73, plus interest and costs.

Defendant C. B. Griffin, Jr. filed an answer which included an allegation that defendant Aubrey Harrell also had filed a petition in the United States Bankruptcy Court. The answer set forth numerous defenses and prayed to void the guaranty agreement, reform it, or discharge defendant's obligations to perform. Thereafter, Griffin moved the court for a change of venue. On 6 February 1984 the court ordered the case to be transferred to Martin County. On 2 July 1984, with leave of court, defendant Griffin filed a supplemental answer. Plaintiff moved for summary judgment. Plaintiff supported his motion with depositions, answers to interrogatories, admissions by defendant and the affidavit of a handwriting expert. Defendant Griffin responded to the summary judgment motion by submitting to the court answers to interrogatories and an affidavit of the defendant C. B. Griffin, Jr. On 8 February 1985 summary judgment was granted in favor of plaintiff. Plaintiff was awarded $121,849.73 with interest from 28 September 1983, plus costs. Defendant C. B. Griffin, Jr. appeals.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Kenneth Wooten and Carson Carmichael, III, for plaintiff appellee.

Pritchett, Cooke & Burch, by W. L. Cooke, for defendant appellant.

JOHNSON, Judge.

The main issue on appeal is whether the court properly granted summary judgment in favor of the plaintiff. Summary judgment is proper when the pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56 (1983); *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Once plaintiff has made and supported its motion for summary judgment, under section (e) of Rule 56 the burden is on the defendant to introduce evidence in opposition to the motion setting forth "specific facts showing that there is a genuine issue for trial." G.S. 1A-1, Rule 56(e); *Stroup Sheet Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 258 S.E. 2d 77 (1979). The nonmovant then must come forward with a forecast of his own evidence. *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979). An answer filed by defendant which only generally denies the allegations of the complaint fails to raise a genuine issue of fact. *Stroup Sheet Metal, supra.* An affidavit which merely reaffirms the allegations of the defendant's answer is also insufficient. *Cameron-Brown Capital Corp. v. Spencer*, 31 N.C. App. 499, 229 S.E. 2d 711 (1976), *disc. rev. denied*, 291 N.C. 710, 232 S.E. 2d 203 (1977).

A guaranty of payment is an absolute promise to pay the debt of another if the debt is not paid by the principal debtor. *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). The enforceability of the guarantor's promise is determined primarily by the law of contracts. *Gillespie v. DeWitt*, 53 N.C. App. 252, 259, 280 S.E. 2d 736, 741 (1981); *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904). When the terms of a guaranty are clear and unambiguous, the construction of the agreement is a matter of law for the court. *North Carolina Nat'l Bank v. Corbett*, 271 N.C. 444, 156 S.E. 2d 835 (1967).

Based upon the foregoing rules of law regarding summary judgments and guaranties, we shall address defendant's assignments of error. The plaintiff movant for summary judgment presented the following evidence to support its pleadings: the signed guaranty agreement, an itemized statement of the debt, depositions of both defendants, responses to requests for admissions by

C. B. Griffin, Jr. and an affidavit of a handwriting expert. Defendant Griffin's forecast of evidence offered to oppose summary judgment consisted of plaintiff's answers to interrogatories and an affidavit by the defendant himself.

The guaranty at issue provides in pertinent part:

> [The undersigned gurantors guarantees] absolutely and unconditionally to [plaintiff] . . . the prompt payment of all sums of money now unpaid by [Harrell Oil] . . . for merchandise and other property and/or services . . . or any other indebtedness legally created by [Harrell Oil] in favor of [plaintiff] . . . .
>
> . . . .
>
> The [defendants] hereby expressly waives notice of acceptance of this guaranty, notice of any and all transactions between [plaintiff and Harrell Oil] and notice of any and all defaults in payment by [Harrell Oil]. The undersigned hereby expressly agrees that this guaranty shall not be modified, abrogated or in any manner affected by: . . . any *change* in credit terms . . .; any *modification* in any contracts . . . between [plaintiff] and [Harrell Oil]; termination of any contract and making of any *new* and different contract; . . . and the undersigned expressly consents and agrees that any such *change*, extension, *modification*, cancellation, renewal, or settlement may be made without notice to [defendant] and without affecting in any manner the continued validity of this guarantee.
>
> . . . .
>
> This instrument shall be considered as a general and continuing guaranty . . . .

(emphasis added).

The guaranty also provides that it is to remain in full force and effect even after the death of defendant. Termination occurs only upon notice by defendant in writing sent by registered mail.

[1] Defendant contends that the guarantee applies to debts incurred only during 1970, pursuant to a 1970 contract between plaintiff and Harrell Oil Company. In the alternative, defendant

contends that the guarantee applies to only debts incurred prior to 7 April 1981 when a new contract was entered between plaintiff and the principal debtor, that this new contract extinguished defendant's liability under the guaranty. We disagree.

A continuing guaranty is defined to be a guaranty the object of which is to enable the principal debtor to have credit over an extended time and to cover successive transactions. *Hickory Novelty Co. v. Andrews*, 188 N.C. 59, 123 S.E. 314 (1924). As quoted above, the guaranty *sub judice* expressly states that it is a continuing guaranty. Moreover, the guaranty also expressly provides that it is to remain in effect despite the making of any *new* contract, without notice to the defendant of the new contract. The clear language of the guaranty rules.

Defendant next contends that a change in credit terms and two-fold increases in the amount of credit extended discharged defendant. We disagree. Again, the guaranty contract itself expressly provides defendant's liability continues despite any *modifications* to the credit terms and amounts, with defendant expressly waiving notice of such changes. The clear and unambiguous terms of the guaranty also defeat defendant's contention that the court erred by failing to find defendant Griffin was entitled to an accounting upon request. The guaranty expressly waives "any type of accounting."

[2] Next defendant contends that the court erred by failing to find that the guaranty was signed through mutual mistake of fact, rendering it void. Defendant asserted mutual mistake as a defense in his answer. Defendant merely reasserts the defense in his own affidavit offered to oppose summary judgment. There is no other evidence in the record to support defendant's contention. Such a general assertion set forth in defendant's answer and merely repeated in his affidavit is insufficient to meet a defendant's burden to set forth specific facts showing there is a genuine issue of fact for trial. *Stroup Sheet Metal, supra; Cameron-Brown, supra.* Defendant's assignment of error on this point is overruled.

Defendant contends that the court erred by not finding a genuine issue of material fact precluding summary judgment regarding the validity of the execution of the guaranty. In *Pearce Young Angel Co. v. Becker Enterprises, Inc.*, 43 N.C. App. 690, 695, 260 S.E. 2d 104, 107 (1979), the defendant denied "having any

knowledge of ever having executed such a guarantee." This Court held that the defendant's statement of denial in his affidavit did not satisfy his burden, did not constitute "specific facts" showing that there was a genuine issue for trial; hence summary judgment was deemed proper.

In the case *sub judice* the guaranty shows the purported signature of defendant Griffin and the signature of co-guarantor defendant Aubrey Harrell. Harrell admits his signature. The signature of R. L. Wilson appears as witness to Griffin's signature. Griffin stated at his deposition that he owns and operates Woodville Supply Company in Lewistown and employed R. L. Wilson at the time the guaranty was executed in Lewistown. Plaintiff produced an affidavit of a handwriting expert who vouched for the authenticity of defendant's signature. Plaintiff, by producing evidence in support of its contention, has successfully shifted the burden to the nonmovant defendant to come forward with a forecast of his own evidence. *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 291 S.E. 2d 852 (1982), *cert. granted*, 306 N.C. 751, 295 S.E. 2d 486 (1982); *Durham, supra.*

Defendant stated in his answer, "[t]hat this defendant does not recall execution of the guaranty. . . ." He merely reasserted the denial in his affidavit opposing summary judgment. Both parties had the benefit of discovery. Defendant's discovery yielded no evidence to support the legitimacy of his denial. As in *Pearce Young Angel*, defendant failed to set forth specific facts sufficient to raise a genuine issue of material fact regarding the validity of the execution. This assignment of error is overruled.

[3] Next defendant contends the court erred by failing to find the action barred by the statute of limitations or laches. We disagree. As stated earlier, the guaranty in the case *sub judice* is a continuing guaranty, which enables the principal debtor to have credit over an extended and indefinite period of time, *Hickory Novelty Co. v. Andrews, supra*, until such time as defendant gives written notice of termination. A guarantor's liability arises at the time of the default of the principal debtor on the obligations which the guaranty covers. *Gillespie v. DeWitt, supra* at 258, 280 S.E. 2d at 741. On these facts the default occurred 1 July 1983, hence the principal debtor's claim arose on that date. The plaintiff filed its complaint 30 September 1983, well within the statutory

limitation. Furthermore, when a guaranty by its express terms creates a primary obligation from guarantor to principal debtor, the fact that the principal debtor had been discharged in bankruptcy from the obligation which the guarantee stood behind did not terminate any liability he might have had as guarantor. *Exxon Chemical Americas v. Kennedy*, 59 N.C. App. 90, 295 S.E. 2d 770 (1982). Thus the bankruptcy of Harrell Oil Company offers defendant no relief.

[4] In defendant's last assignment of error defendant Griffin contends the trial court erred by failing to find facts in support of summary judgment. This assignment of error is without merit. A trial judge is not required to make findings of fact for summary judgment. *Mosley v. National Fin. Co.*, 36 N.C. App. 109, 243 S.E. 2d 145 (1978), *cert. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978). This Court has previously held that findings of fact in a summary judgment order are ill advised because they indicate a question of fact was presented and resolved by the trial court. *Carroll v. Rountree*, 34 N.C. App. 167, 237 S.E. 2d 566 (1977).

We have considered defendant's remaining assignments of error and view that they are without merit. We conclude, after careful examination of the record presented on this appeal, that no genuine issue of material fact exists. We find the court's entry of summary judgment and its order that defendant C. B. Griffin, Jr. pay the indebtedness of the principal debtor according to the unambiguous terms of the guaranty should be

Affirmed.

Chief Judge HEDRICK and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES TERRY LITCHFORD

No. 8525SC577

(Filed 21 January 1986)

1. Burglary and Unlawful Breakings § 6— felonious breaking or entering—intent to commit larceny omitted from final mandate—no error

The trial court did not commit plain error in a prosecution for felonious breaking or entering by omitting the element of intent to commit larceny from

its final mandate because the court had just previously instructed the jury on all the elements of felonious breaking or entering. N.C.G.S. 14-54(a), Rule of App. Procedure 10(b)(2).

2. **Larceny § 8.2— larceny of narcotics from pharmacy—jury instructions—reference to individual rather than corporate ownership—no error**

The trial court in a prosecution for felonious larceny did not submit to the jury a possible theory of conviction which was not supported by the evidence or the indictment, and there was no plain error in the court's instruction, where the indictment charged that the stolen property was the personal property of Burke Pharmacy, Inc.; the evidence showed that Burke Pharmacy, Inc. owned the stolen narcotics and that the drugs were so labeled; that Dan Rhodes owned and operated Burke Pharmacy, Inc.; that Rhodes in his testimony referred to Burke Pharmacy, Inc. as his drugstore and the stolen products as "my" drugs; defense counsel fell into the pattern of referring to Burke Pharmacy, Inc. and Burke Pharmacy's drugs as Rhodes' drugstore and Rhodes' drugs; and the court charged the jury concerning narcotics belonging to Dan Rhodes. The stolen property belonged to Dan Rhodes in his role as the owner and operator of Burke Pharmacy, Inc. and it cannot be said that the instructional mistake had a probable impact on the jury's finding of guilt.

3. **Criminal Law § 138.42— insubstantial loss by victim—larceny stopped in progress—no mitigating factor**

The trial court did not err in a felonious breaking or entering and felonious larceny prosecution by failing to find as a non-statutory mitigating factor that the victim suffered only insubstantial loss where the police stopped defendant's accomplice in the middle of the larceny.

APPEAL by defendant from *Owens, Judge*. Judgments entered 22 February 1985 in Superior Court, BURKE County. Heard in the Court of Appeals on 24 October 1985.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General James C. Gulick for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Louis D. Bilionis for defendant appellant.

COZORT, Judge.

The State's evidence tended to show the following:

On the evening of 2 February 1984, Officer Carl Burleson of the Morganton Police Department caught Edward Marshall inside the Burke Pharmacy, Inc. Earlier, Officer Burleson had spotted a van in the area. Found on the floor of the pharmacy was a duffel bag containing several types of drugs and a change box. Those

drugs had been removed from the pharmacy's prescription department. Also found in the pharmacy was a walkie-talkie radio.

Marshall testified that he and the defendant, James Terry Litchford, had a discussion in Louisville, Kentucky, about breaking into a drug store and developed a plan to do so. The plan called for Marshall to get a doctor to write a prescription for him and for Marshall to take it to a drugstore. While the druggist filled the prescription, Marshall would watch to see where the drugs were stored. Later that night, he and the defendant would return to the drugstore. Defendant would pull the cylinder out of the front door, and Marshall would enter the building and take the drugs. Then, Marshall would call the defendant on a walkie-talkie and defendant would pick up Marshall. Bobby McGuffin was enlisted to get the walkie-talkies and a radio scanner. McGuffin also owned the van to be used.

The three men left Kentucky and arrived in Morganton, spending the night in a motel room registered to Marshall. The following morning, Marshall obtained a prescription and had it filled at Burke Pharmacy, Inc. That night, defendant pulled the cylinder out of the door of Burke Pharmacy, Inc., and then drove off with McGuffin while Marshall entered the building to obtain the drugs. While inside the pharmacy Marshall heard a message over the walkie-talkie to "get out." Immediately thereafter, Officer Burleson caught Marshall.

Mr. Dan Rhodes testified that he is the owner of Burke Pharmacy, Inc. and was the owner on 2 February 1984. Mr. Rhodes further testified that the narcotics found in the duffel bag on the floor of the pharmacy were "my narcotics." Each bottle of pills had Rhodes' wholesaler's identification number and a sticker with the word "Burke" on it. Rhodes further testified that he neither gave anyone permission to go into Burke Pharmacy after he closed it on 2 February 1984, nor did he give anyone permission to take the narcotics from Burke Pharmacy.

The defendant put on an alibi defense. Diane Pittman, the sister of defendant's girl friend, testified that on the night of 2 February 1984, defendant was at her apartment in Louisville, Kentucky. Brenda Erwin, a schoolteacher from Louisville, testified that she remembered seeing the defendant at Diane Pitt-

man's apartment on the night of 2 February 1984 as well as the next day.

The jury returned verdicts of guilty of felonious breaking or entering and guilty of felonious larceny. Defendant received consecutive sentences of five years each for the felonious breaking or entering and the felonious larceny convictions.

[1] Defendant's first assignment of error brought forth in his brief is that the "trial court committed plain error in its mandate to the jury on the charge of felonious breaking or entering; on the grounds that an essential element of the crime—that there be an intent to commit a felony therein—was omitted." Considering the jury charge as a whole, we find the trial court's omission of an essential element of felonious breaking or entering in its final mandate does not constitute plain error.

The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. G.S. 14-54(a). Here the indictment charged that the defendant broke and entered Burke Pharmacy, Inc., with the intent to commit larceny.

In its final mandate to the jury on the breaking or entering charge the trial court instructed as follows:

> So I charge you that if you find from the evidence beyond a reasonable doubt that on or about February 2nd, 1984, the defendant Terry Litchford acting by himself or acting together with Edward Marshall and Bobby McGuffin removed the lock from the building occupied by Burke Pharmacy, Inc. for the purpose of permitting entry, or that Edward Marshall entered the building acting together with the defendant Terry Litchford and Bobby McGuffin, it would be your duty to return a verdict of guilty of breaking or entering as to the defendant Terry Litchford. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty with respect to the breaking or entering charge.

This instruction omitted the third essential element of felonious breaking or entering: that the breaking or entering be done with the intent to commit a felony or, as in this case, larceny therein. The defendant, however, did not object to the court's instruction

and is precluded by North Carolina Rules of Appellate Procedure, Rule 10(b)(2) from challenging the instruction on appeal unless it constitutes plain error. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). The test for plain error is as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."
>
> *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original) . . . .

Id. 307 N.C. at 660, 300 S.E. 2d at 378. Having examined the entire record as directed by *State v. Odom, supra*, including construing the jury charge contextually as a whole, *State v. Brackett*, 218 N.C. 369, 11 S.E. 2d 146 (1940), we find no plain error.

While defendant argues that the trial court in its final mandate incorrectly omitted the third essential element of felonious breaking or entering, defendant concedes that "[e]arlier in its instructions, the court properly noted that the specific intent to commit the felony of larceny was an element of the crime." In fact, this instruction was given immediately prior to the final mandate. In light of the fact that the trial court had just previously instructed the jury on all the elements of felonious breaking or entering, we find that its omission of the third element in its final mandate does not constitute plain error. In this case we cannot say that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

The second and third assignments of error brought forth in defendant's brief are based on the trial court's instructions to the jury on the offense of felonious larceny.

[2] During its instructions on felonious larceny the trial court instructed the jury, in part, that to find the defendant guilty it had to find:

> the defendant . . . took and carried away a quantity of narcotic drugs belonging to *Dan Rhodes* without the consent of *Dan Rhodes*, . . . intending at that time to deprive *Dan Rhodes* of the use of the property permanently . . . . [Emphasis added.]

The indictment, however, charged that the stolen property was the personal property of Burke Pharmacy, Inc. Defendant argues that because the trial judge erroneously charged the jury that it had to find that Dan Rhodes owned the stolen property, he is entitled to have his felonious larceny conviction reversed or, in the alternative, is entitled to a new trial.

Again, we note that defendant never objected to the trial court's instructions on the felonious larceny charge and therefore is barred from assigning error based upon the instructions unless they constitute plain error.

Defendant argues that the trial court's charging the jury that it had to find Dan Rhodes was the owner of the stolen property amounts to presenting a theory of the crime which was neither supported by the evidence nor charged in the indictment. *See State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); and *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). We disagree.

It is the rule in this State "that the trial court should not give instructions which present to the jury possible theories of conviction which are either not supported by the evidence or not charged in the bill of indictment," and "that where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory." *State v. Taylor*, 304 N.C. 249, 274-75, 283 S.E. 2d 761, 777-78 (1981).

Here, defendant was charged with felonious larceny of personal property belonging to Burke Pharmacy, Inc. The evidence shows that Burke Pharmacy, Inc. owned the stolen narcotics, that the drugs were so labeled, and that Dan Rhodes owned and operated Burke Pharmacy, Inc. Through Dan Rhodes' testimony, the State established that "the legal name of Burke Pharmacy" is Burke Pharmacy, Incorporated." In his testimony Rhodes quite naturally referred to Burke Pharmacy, Inc., as his drugstore or pharmacy and the stolen narcotics as "my" drugs. Even defense counsel fell into this pattern of equating Burke Pharmacy, Inc. and Burke Pharmacy's drugs as Rhodes' drugstore and drugs. Twice during his cross-examination of Rhodes, defense counsel referred to Burke Pharmacy, Inc., as "your [Rhodes'] store" and "your pharmacy." Also, in asking Rhodes about the inventory of stolen drugs other than Dolphine, defense counsel inquired: "You got none of the others." Technically, it would have been better for the trial court to have charged the jury that it had to find Burke Pharmacy, Inc., was the owner of the stolen narcotics rather than Dan Rhodes. Such a misstatement by the trial court, however, does not amount to submitting to the jury a possible theory of conviction which is neither supported by the evidence nor the indictment. This is especially true where defense counsel, in his questions, and witness Rhodes, in his answers, equated Burke Pharmacy, Inc., with Rhodes.

Furthermore, it is true that "allegations of ownership described in the bill of indictment [for felonious larceny] are essential." *State v. Crawford*, 29 N.C. App. 117, 119, 223 S.E. 2d 534, 535 (1976). "If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit." *State v. Greene*, 289 N.C. 578, 585, 223 S.E. 2d 365, 370 (1976). Here there was no fatal variance for, as defendant concedes, both the indictment and the evidence show Burke Pharmacy, Inc., was the owner of the stolen property. The stolen drugs "belonged" to Dan Rhodes in his role as owner and operator of Burke Pharmacy, Inc. There was no plain error in the trial court's instructions on felonious larceny because it cannot be said that the instructional mistake "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 379 (1983).

[3] We next review defendant's assignment of error that the trial court erred in failing to find, as a nonstatutory mitigating factor at sentencing, that the victim suffered only insubstantial loss. This assignment of error is without merit. The victim's loss was insubstantial because the police stopped defendant's accomplice in the middle of the larceny. The Fair Sentencing Act did not intend that a defendant be rewarded with a sentence less than the presumptive simply because the police kept him from being successful in his crime.

Lastly, we have reviewed defendant's remaining assignment of error and find no merit in it.

No error.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. RICHARD DALE JOHNSON

No. 8512SC726

(Filed 21 January 1986)

Homicide § 21.4— defendant as perpetrator of crime—insufficiency of evidence

The trial court in a homicide prosecution erred in denying defendant's motion to dismiss where the evidence tended to show that the victim's body was found in a motel room; he had engaged in some sexual activity at or about the time of his death; his automobile in which he arrived at the motel was found in a parking lot at Ft. Bragg within two hours of the time he checked into the motel; defendant was stationed at Ft. Bragg at the time of the murder; there was no evidence that defendant and the victim knew each other, were ever seen together, or had any association or relationship whatsoever; there was no evidence that defendant was ever in the motel room where the victim's body was found or that defendant was ever in or about the victim's automobile; there was nothing in defendant's statements to officers which would in any way connect defendant to the murder; and analysis of hair samples revealing that nine hairs from the motel bed coverings and one hair taken from a towel beneath the victim's car were microscopically consistent with defendant's hair was insufficient, standing alone, to take the case to the jury.

Judge JOHNSON concurs in the result.

State v. Johnson

APPEAL by defendant from *Farmer, Judge*. Judgment entered 12 February 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 January 1986.

Defendant was indicted and tried for the first degree murder of Luther Bailey. The State's evidence tends to show the following: On 11 February 1983 the nude body of Luther Bailey was found by a maid in Room 319 of the Holiday Inn on Highway 301 in Fayetteville. The body was lying on its back with blood on its head, face, chest, and the palms and backs of its hands. There were also bloodstains on the wall, television set, television stand, and a dresser. There were two open jars of Vaseline in the room. The right side of the deceased's head was severely bruised, and his right eye was swollen shut. The officer investigating the incident collected all the bed coverings, clothing, a piece of carpet, and several pieces of wallpaper. He also dusted the entire room for fingerprints, and collected blood samples from the sink and bathtub.

Dr. R. L. Thompson, a forensic pathologist with the Office of the Chief Medical Examiner in Chapel Hill, examined the body and performed an autopsy on it on 12 February 1983. He collected anal and oral swabs and smears which contained semen and a petroleum-type jelly. He also collected fingernail scrapings and clippings, swabs of the blood on each hand, samples of head and pubic hair, a blood sample, and a set of fingerprint impressions. Dr. Thompson testified that during his autopsy he found several bruises on the head, face, and limbs of the deceased, some small lacerations on the face and inside the lips, and abrasions on the back of the left hand and on both legs around the knees. He also found fractures of the nasal bone, the hyoid bone, the larynx, three ribs on the right side, and the upper jaw on both sides. Dr. Thompson further testified that in his opinion Bailey had suffered a blunt force trauma which was not immediately fatal and had died from some form of strangulation. He testified that the strangulation was not by means of fingers or a rope, but rather by some force or pressure which he could not identify.

Luther Bailey's brother testified that he had last seen his brother at about 4:00 p.m. on 10 February. He further stated that his brother was approximately five feet ten inches tall and characteristically kept the driver's seat in his Buick pushed way back. He had no knowledge as to whether his brother was homosexual.

The desk clerk at the Holiday Inn testified that Luther Bailey checked in "around ten-fifteen" on the evening of 10 February and that he had previously made a reservation. She also testified that the victim's automobile was a Buick and that the license plate number was TCY-212.

Luther Bailey's Buick was found by an Army sergeant in a parking lot at Fort Bragg between 11:00 p.m. and midnight on 10 February 1983. He noticed the car again the next day and then informed the military police. Eighteen thousand men lived within a half-mile radius of the lot where the car was found. When the police searched the car, they found a white towel underneath the car, which was later found to have several hairs on it. They also dusted the car for fingerprints. No traces of blood were found either inside or outside the car.

On 16 April 1983 at approximately 10:10 p.m., the Fayetteville police desk received a telephone call. The caller identified himself as Dale Johnson and said he had information to give the police about his roommate, named Richard Johnson, who was killing people in the Fayetteville area. The caller said a reward had been offered in connection with one of the killings but that he was not interested in the reward. He also asked for a police officer to come talk to him at the VFW Club, but no officer was immediately available. For reasons not readily apparent from the record in this case, the police did not follow up on the call until 10 days later. On 26 April 1983, a police officer went to the VFW Club and asked the manager about defendant. The manager stated that defendant was a frequent visitor at the club, but could not positively place defendant at the club on 16 April. Also on 26 April 1983, two officers went to the 307th Medical Battalion and spoke with defendant, who waived his Miranda rights. Defendant denied ever being at the Holiday Inn, but said he went to the VFW Club all the time. He said he did not have a roommate with a name similar to his. Defendant stated that "[i]f any queer would try anything" with him, he would "stomp their ass." Defendant then gave the officers samples of his head hair, pubic hair, and blood, and impressions of his fingerprints.

Sometime later defendant was discharged from the Army and moved to California. On 23 May 1983 defendant was arrested and two Fayetteville police officers came to California to inter-

view him. Defendant, in response to questions, stated, "I don't remember being at the Holiday Inn," and "if I did [kill Bailey], I don't recall."

Defendant then told the officers about nightmares he had been having concerning some of his experiences in Vietnam. He wrote out a statement as follows:

> I have been drinking for several years very heavily at times. At times, I have a hard time remembering what happened after drinking. I have had nightmares about experiences in Vietnam.
>
> Several months ago, I started having nightmares about being in a fight, sometimes awakening in a cold sweat. In this nightmare, I was confronted by a white male about my age and a little taller than I. We are in a small room and something happened to cause the man to hit me with his fist. I hit him back. There was a brief fist fight. He falls down, I kick him. I turned to leave the room, walking outside. I turned to see him getting up and he is on his hands and knees.

Defendant returned to Fayetteville with the officers and was interrogated again on 26 May 1983. Asked "What would you do if a homosexual made an overt action towards you?" defendant answered, "I would try to beat the shit out of him." Asked if he had a drinking problem, defendant said yes. Asked if he had killed Luther Bailey, defendant said, "I'm not going to deny it. I'm not going to admit killing anyone. I just don't remember."

None of the fingerprints found in the motel room or in Luther Bailey's car matched those of defendant. All of the blood in the room was consistent with Bailey's blood group, which was Type O. The mattress pad had two semen stains, one from a person with Type O blood and one from a person with Type A blood, which was defendant's blood type. Type A blood is common to 40% of the population. There was also testimony showing that defendant was a secretor, which is true of 80% of the population. Thus defendant was a Type A secretor and a member of a pool of people comprising 32% of the population.

An SBI agent testified regarding the analysis of hair samples taken from Luther Bailey and defendant. Of about 49 hairs recovered from the motel room and the towel found under the car, the

agent found nine hairs useless for comparison, seven pubic hairs and seven head hairs microscopically consistent with Luther Bailey's hairs, three Negro pubic hairs, and twelve Caucasian head and pubic hairs not consistent with either Bailey or defendant. Ten pubic hairs were found to be microscopically consistent with defendant's hair. Nine of these ten hairs came from the bed coverings and one came from the towel found beneath Bailey's car.

The agent further testified that an examination of hair can never be used as the basis for a positive personal identification because it reveals nothing about the age or sex of a person, or when the hair was deposited.

Defendant offered no evidence, and his motion to dismiss was denied. The case was submitted to the jury on the issues of first and second degree murder. The jury returned a verdict of guilty of second degree murder, and from a judgment of thirty years imprisonment entered on the verdict, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Steve Nimocks and Associate Attorney General Randy Meares, for the State.

Assistant Appellate Defender Geoffrey C. Mangum, for defendant, appellant.

HEDRICK, Chief Judge.

We consider only the question of whether the trial court erred in denying defendant's motion for judgment as of nonsuit. In ruling on this question we assume that all the evidence challenged by defendant on appeal was properly admitted.

The State's approach to this case on appeal is summed up and illustrated by the unusual statement in its brief that ". . . the State, in the case at bar, produced substantial evidence raising more than a reasonable inference that defendant did, with malice and without premeditation or deliberation, murder Luther Bailey. Defendant has not presented any evidence to rebut this strong inference that he committed the murder." In response to this assertion, defendant contends that "[a]ll of the State's evidence does no more than create a suspicion that defendant killed Luther Bailey. . . ."

After considering all of the evidence in the light most favorable to the State, and giving to the State the benefit of every inference reasonably deducible from the evidence, we hold that the evidence, when so considered, is hardly sufficient to raise even a suspicion that defendant killed Luther Bailey. The evidence in the record before us is insufficient to support the jury's verdict of guilty, and thus the trial court erred in denying defendant's motion to dismiss.

There are several examples of the lack of substantial evidence against defendant in this case. There is no evidence that defendant and the victim knew each other, were ever seen together, or had any association or relationship whatsoever. There is no evidence that defendant was ever in the motel room where the victim's body was found, nor is there any evidence that defendant was ever in or about the victim's automobile. The evidence falls far short of raising an inference that defendant made the phone call to the police on 16 April 1983, and even if such an inference may be reasonably deducible from the evidence, it does nothing more than show that somebody was killing people in Fayetteville. It does not disclose that defendant killed Bailey.

Furthermore, there is absolutely nothing to be gleaned from defendant's statements to the officers that would in any way connect defendant to the murder in the motel room. Defendant's statements that he had a dream regarding a fight in a "small room," and that he would likely react violently if approached by a homosexual do nothing whatsoever to strengthen the State's case. And finally, defendant's statement to the officers that "I'm not going to deny it. I'm not going to admit killing anyone. I just don't remember," does not supply the critical bit of evidence necessary to support a finding that defendant committed the crime with which he is charged.

We note further that evidence of microscopic hair analysis is insufficient to take a case to the jury absent some other substantial evidence of guilt. *State v. Stallings*, 77 N.C. App. 189, 334 S.E. 2d 485 (1985). This is so because "comparative microscopy . . . serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity." *Id.* at 486.

From the record we determine that the theory of the investigating officers and the prosecution appears to be that the victim was homosexual, and that defendant killed him as a result of sexual advances made by the victim toward defendant. The only evidence in the record tending to show that the victim was homosexual is that the victim had engaged in some sexual activity at or about the time of his death, but this evidence falls far short of establishing as a fact that the victim was indeed homosexual. The same evidence would support a finding that the victim was homosexually raped and killed. There is nothing in the record to indicate that the investigating officers made any effort to determine whether the victim was homosexual. Indeed, the record before us is remarkable for what it fails to show rather than what it discloses.

For example, although the victim's brother stated that Bailey left Rocky Mount at approximately 4:00 p.m. to go to Chapel Hill and then to Fayetteville, there is nothing in the evidence to indicate that the investigators made any effort whatsoever to trace the victim's activities between the time he left Rocky Mount and his arrival at the motel at 10:15 p.m. on 10 February 1983. Although much is said about the fact that the victim's automobile was observed parked at Fort Bragg between 11:00 and 12 midnight on 10 February, the evidence does not disclose the distance between the motel and the place where the automobile was parked. Although the police apparently received the telephone call described in the evidence on 16 April 1983, there is no explanation in the record as to why such vital evidence was ignored for ten days. If defendant and the victim engaged in a fight such as that described in the evidence, and if the victim, as described, was so much larger than defendant, if would seem to follow that defendant would have at least suffered some injuries in the fight; yet there is nothing in the evidence to indicate that the investigators made any effort to determine whether defendant actually bore any evidence of physical injuries as a result of such a fight. Such evidence could possibly have been obtained from defendant's associates at Fort Bragg, yet there is no showing that anyone was ever asked if defendant bore any physical injuries around 11 February 1983.

We have carefully examined the evidence in the record before us and conclude that it is insufficient to raise an inference

that defendant killed Luther Bailey. The record is devoid of substantial evidence of defendant's guilt. The trial court erred in denying defendant's motion for judgment as of nonsuit.

Reversed.

Judge JOHNSON concurs in the result.

Judge PHILLIPS concurs.

TOWN OF EMERALD ISLE, BY AND THROUGH ITS MAYOR, RICHARD SMITH, AND ITS DULY ELECTED BOARD OF COMMISSIONERS, AND RICHARD SMITH, A. B. CREW, BEAULAH PASE, AND WALT GASKINS, INDIVIDUALLY v. THE STATE OF NORTH CAROLINA, JAMES B. HUNT, GOVERNOR, RUFUS EDMISTEN, ATTORNEY GENERAL, JAMES A. SUMMERS, SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, AND JANE S. PATTERSON, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION

No. 853SC389

(Filed 21 January 1986)

1. **Constitutional Law § 4— constitutionality of statute restricting vehicular beach access—standing to sue**

The Town had standing to challenge the constitutionality of Ch. 539 of the 1983 North Carolina Session Laws because the Town was threatened with direct and immediate injury. The constitutionality of Ch. 539 was thus properly before the trial court regardless of whether the individual plaintiffs had standing.

2. **Statutes § 2.4— street right-of-way to beach closed by General Assembly—violation of local act prohibition**

Ch. 539 of 1983 Session Laws, which directed the State to acquire public pedestrian beach access in the vicinity of Bogue Inlet and which closed the Inlet Drive right-of-way at Emerald Isle to non-emergency vehicular traffic, violated the prohibition in Art. II, § 24(1)(c) of the North Carolina Constitution against local acts discontinuing highways, streets or alleys. Ch. 539 was a local act; the ordinary understanding of the word "street" is that it is a place for the passage of motor vehicles used by the public; and, although the power of municipalities to regulate their streets is derived from and is subject to control by the General Assembly, the General Assembly must exercise its power within the limits of the North Carolina Constitution.

3. **Statutes § 4.2— unconstitutional portion of local acts severed—erroneous**

The trial court erred by holding that the parts of Ch. 539 of 1983 North Carolina Session Laws which it had held unconstitutional could be severed

from the remainder of the Chapter where the legislative intent was for there to be only pedestrian access to the acquired property; that part of the Chapter being unconstitutional, the entire Chapter must fail.

Judge PHILLIPS dissenting.

APPEAL by defendants from *Phillips, Judge.* Judgment entered 8 February 1985 in Superior Court, CARTERET County. Heard in the Court of Appeals 24 October 1985.

Plaintiffs brought this declaratory judgment action to challenge the constitutionality of 1983 N.C. Sess. Laws Ch. 539, § 1. That Act provides:

> The Department of Natural Resources and Community Development, in cooperation with the Town of Emerald Isle, is hereby directed to acquire real property by purchase or condemnation, make improvement for and maintain facilities for the provision of public pedestrian beach access in the vicinity of Bogue Inlet. The town shall not be required to expend local funds to acquire real property, but shall be responsible for maintaining the facility. Public beach access facilities in the vicinity of Bogue Inlet shall include parking areas, pedestrian walkways, and rest room facilities, and may include any other public beach access support facilities. Insofar as is feasible, said facility shall include all lands inletward of the dune adjacent to the terminus of Inlet Drive and the adjacent portion of Bogue Court, as well as such adjacent properties necessary to provide adequate parking and support facilities. Notwithstanding any other law or authority to the contrary, beach access facilities in the vicinity of Bogue Inlet after the installation of said public pedestrian beach access facility shall not include facilities for vehicular access to the beach, including but not limited to the use of the Inlet Drive right-of-way for vehicular access; provided that such prohibition shall not apply until the pedestrian beach access facility is opened; after the installation of said public pedestrian beach access facility, motor vehicles are hereby prohibited from being operated on the ocean beaches and dunes adjacent to and within Blocks 51, 52, 53 and 54 of Emerald Isle; provided that this vehicular access prohibition shall not apply to reasonable access by public service, police, fire, rescue or other emergency vehicles.

Plaintiffs and defendants both moved for summary judgment. It was stipulated that the Inlet Drive right-of-way is a dedicated public street which is maintained by the Town of Emerald Isle.

The trial court granted plaintiffs' motion for summary judgment on the following grounds: (1) Chapter 539 violates the N. C. Constitution, Article II, sec. 24(1)(c) prohibition against local acts which authorize "the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys." (2) Chapter 539 is a local act concerning subject matter directed or authorized to be accomplished by general laws, in violation of N. C. Constitution, Article XIV, sec. 3. (3) Chapter 539 grants an exclusive emolument or privilege to property owners along the beach where vehicles are to be prohibited, in violation of N. C. Constitution, Article I, sec. 32. (4) Chapter 539 takes the vested property right of plaintiff Town in the dedicated right-of-way of Inlet Drive without due process of law as required by N. C. Constitution, Article I, sec. 19. The court held that the parts of Chapter 539 which it held unconstitutional could be severed from the rest of the Chapter. It ordered the defendants to comply with those parts of the Chapter which it had not held to be unconstitutional. Defendants appealed.

Stanley and Simpson, by Richard L. Stanley, for plaintiff appellees.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Daniel F. McLawhorn, for defendant appellants.

WEBB, Judge.

[1] Defendants first contend the individual plaintiffs lack standing to challenge Chapter 539, and therefore the trial court erred in denying defendants' motion to dismiss. This contention does not raise a question which would constitute reversible error since the constitutionality of Chapter 539 was also challenged by plaintiff Town. Defendants do not contest the standing of the Town on this issue, and we hold that the legal rights of plaintiff Town were threatened with direct and immediate injury from Chapter 539 so as to give the Town standing to challenge the Act. Thus the issue was properly before the trial court regardless of whether the individual plaintiffs have standing, and we need not decide this question.

[2] The Constitution of North Carolina, Article II § 24 provides in part:

> (1) The General Assembly shall not enact any local, private, or special act or resolution:
>
> . . . .
>
> (c) Authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys;
>
> . . . .

In *Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781 (1936) the General Assembly had adopted a law which closed a street in the Town of Spruce Pine. Our Supreme Court held that this act violated the section of the constitution then in effect which corresponds to the above section. We believe we are bound by *Glenn* to hold that Chapter 539 of the 1983 Session Laws violates Article II § 24 of the Constitution of North Carolina. Chapter 539 provides among other things that "vehicular access" with the exception of "public service, police, fire, rescue or other emergency vehicles" is excluded from the Inlet Drive right-of-way. Inlet Drive is a public street within the Town of Emerald Isle. We hold that Chapter 539 is a local act which discontinues a street.

The appellants contend, relying on *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978); *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E. 2d 888 (1961) and Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340 (1967), that Chapter 539 is not a local act. They argue that an act is not necessarily a local act because it applies to only one unit of the state government. They argue that the test is whether "any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories." If this be the test we believe Chapter 539 is a local act. It does not create a class at all. It directs that vehicular travel be discontinued on a certain street in Emerald Isle. There is no classification which would require other streets to be so restricted in similar circumstances.

The appellants also contend that Chapter 539 does not discontinue a street because pedestrian traffic and public service and

emergency vehicles will be allowed to use it. We believe the ordinary understanding of the word "street" is that it is a place for the passage of motor vehicles used by the public. When the public is deprived of the use of such an area its use as a street is discontinued. The appellants also argue that the power of municipalities to regulate their streets is derived from and is subject to control by the General Assembly and the General Assembly has done no more than it had the power to do in this case, that is it has regulated a street. We agree with this principle. The General Assembly must exercise its power to regulate streets, however, within the limits of the Constitution which it has not done in this case.

Since we have held that Chapter 539 of the 1983 North Carolina Session Laws violates Article II, Section 24(1)(c) of the Constitution of North Carolina, we do not pass on that portion of the judgment of the superior court which holds it violates other parts of the Constitution.

[3] The superior court held that the parts of the section which it held unconstitutional could be severed. It ordered the defendants to comply with the remainder of the act. We hold that this was error. If the parts of a statute are interrelated and mutually dependent and one part is unconstitutional the whole statute must fail. *See Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980), *rehearing denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981) and *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). Chapter 539 provides that its purpose is "for the provision of public pedestrian beach access." We believe from reading Chapter 539 that the legislative intent is that there shall be pedestrian access only to the acquired property. We do not believe the General Assembly would have adopted Chapter 539 unless vehicular traffic could be excluded. Now that we have held this part of the Chapter unconstitutional the entire Chapter must fail.

We affirm in part, reverse in part, and remand for a judgment consistent with this opinion.

Affirmed in part; reversed in part.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion Chapter 539 does not violate the North Carolina Constitution, Art. II, Sec. 24, because it would merely restrict the use of the street, not close it. When a street is "closed," the public is deprived of its use and title to the land comprising the right of way usually reverts to the abutting owners. G.S. 160A-299(c); 39 Am. Jur. 2d *Highways, Streets, and Bridges* Sec. 184 (1968). But instead of closing the street involved, Chapter 539 expressly permits its continued use as a way by the public, albeit in a restricted manner. Whether a way is a street is not determined by the unrestricted passage of motor vehicles over it, as the majority indicates. A street is but a public way or road in a city, town or village, Black's Law Dictionary 1274 (5th ed. 1979), and streets for public use were established long before motor vehicles existed. The use of vehicles upon streets may be regulated, controlled and restricted, if done in a reasonable manner, 60 C.J.S. *Motor Vehicles* Sec. 31 (1969), and Chapter 539 is such a regulation, in my opinion. *Glenn v. The Board of Education of Mitchell County*, 210 N.C. 525, 187 S.E. 781 (1936) has no application, because the special act tested there did undertake to close the street by transferring the land involved to the school board; which, of course, would have prevented the public from using it as a way.

STATE OF NORTH CAROLINA v. WILLIE ISAAC WHITE

No. 851SC617

(Filed 21 January 1986)

Constitutional Law § 49— defendant appearing pro se—no effective waiver of counsel

The trial court erred in permitting defendant to go to trial without the assistance of counsel where there was nothing in the record to indicate that defendant ever wished to go to trial without the assistance of some counsel; instead the record clearly tended to show that defendant signed the waiver of his right to assigned counsel with the expectation of being able to retain private counsel and that he only proceeded to trial *pro se* because he thought he had to based on what the trial judge had told him at arraignment and the fact that he had signed a waiver; defendant's initial retention of private counsel, his remarks at arraignment indicating that he wished to retain private

counsel, and his request to confer with a certain attorney prior to the presentation of evidence should have alerted the court to defendant's lack of desire to proceed without the assistance of counsel; and even if defendant had clearly indicated that he desired to proceed *pro se* when the case was called for trial following the continuance to obtain private counsel, the trial court was required at that point to make the inquiry described in N.C.G.S. 15A-1242, which was not done in this case.

APPEAL by defendant from *Watts, Judge*. Judgment entered 13 February 1985 in PASQUOTANK County Superior Court. Heard in the Court of Appeals 29 October 1985.

Defendant, who appeared at trial *pro se*, was convicted of felonious possession of marijuana and misdemeanor possession of cocaine. From a judgment of imprisonment entered upon the convictions, he appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David R. Minges, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Geoffrey C. Mangum, for defendant.

WELLS, Judge.

Defendant argues that the trial court failed to make the thorough inquiry required by N.C. Gen. Stat. § 15A-1242 (1983) prior to permitting him to proceed to trial without the assistance of counsel and therefore he cannot be deemed to have made a knowing and voluntary waiver of his constitutional right to counsel and must be granted a new trial.

The pertinent facts are as follows: At defendant's arraignment on 7 January 1985, defendant's privately retained counsel, Janice Cole, requested to be allowed to withdraw as counsel for defendant because she had not been paid her fee. The court granted her request. The following exchange between defendant and the court then occurred:

> THE COURT: . . . Now, you are charged with a serious offense of felonious possession of marijuana. That is punishable by a maximum punishment of five years. You're also charged with misdemeanor possession of cocaine, which carries a two-year maximum punishment, for a total of seven years for the two charges combined. Do you understand that?

MR. WHITE: Yes, sir.

THE COURT: Do you understand what you are charged with? Do you understand the nature of the charges? You're not supposed to possess either marijuana or cocaine, do you understand that?

MR. WHITE: Yes, sir.

THE COURT: You've been sitting here all day near about and you've heard what I've said to other people. You have to make one of three choices. You can represent yourself, you can hire your own lawyer, but if you hire your own lawyer, you're going to have to do it between now and 9:30 tomorrow morning. Or, if you want me to appoint an attorney for you, —in other words, if you want a lawyer and you can't afford one, I will appoint one for you. Do you understand that?

MR. WHITE: Yes, sir.

. . .

MR. WHITE: Can I say something, your Honor? I just started to working. All I need is till around about February.

THE COURT: Well, all right. If you want to do that, I'll tell you how to do it. Then you would have to give up your right to court-appointed counsel today and sign a waiver saying you did not want court-appointed counsel. Now, if you're willing to do that, then you can hire your own lawyer and I'll continue your case until February without any problem or difficulty. I'll give you that much time. But come February, if you haven't hired Ms. Cole or whatever lawyer you want to hire,—and I recommend you hire her since she's familiar with the case. But whoever you want to hire, you better have them with you when you come in here in February, because if you don't, you'll have to come without any. You're going to be running on four flats then, I'll guarantee. So, is that what you want to do?

MR. WHITE: Yes, sir.

THE COURT: All right. Let him sign a waiver then. Do you understand you are giving up your right to court-appointed counsel?

MR. WHITE: Yes, sir.

Defendant then signed a form entitled "WAIVER OF RIGHT TO ASSIGNED COUNSEL" and the court continued the case until 11 February 1985.

When the case was called for trial, the court informed the potential jurors that defendant had waived his right to counsel and had elected to represent himself. There is no indication in the record that when the case was called for trial the court made any inquiry of defendant concerning his failure to retain counsel or his desire to proceed *pro se*. The parties proceeded with jury selection after which court recessed for the day. When court convened the next morning, defendant requested leave of the court for a few minutes in which to contact a local attorney, Glenn Austin. The request was allowed and attorney Austin was summoned to a conference room adjacent to the courtroom. After speaking with Austin for several minutes, defendant returned to the courtroom. The Court asked defendant whether he had the conversation with Austin which he had wanted to have and whether he was ready to proceed in his own behalf. Defendant responded affirmatively and the trial began with defendant proceeding without the assistance of counsel.

After the judgment against him was entered, defendant gave notice of appeal. When the trial judge stated that he would probably have to appoint the Appellate Defender to represent defendant on appeal, defendant asserted: "No. I got an attorney. He's in the State Legislature now. Frank Ballance. My sister got in contact with him last night. He said he would represent me." The court responded, "Well, you told me in January you were going to have a lawyer to represent you when you signed your waiver. . . ." The court then adjudicated defendant to be indigent and appointed the Office of the Appellate Defender to represent defendant on appeal, with leave to defendant to retain private counsel if he or his family so desired.

The Sixth Amendment of the Constitution of the United States as applied to the states through the Fourteenth Amendment guarantees an accused in a criminal case the right to the assistance of counsel for his defense. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). "The right to counsel is one of the most closely guarded of all trial rights." *State v. Colbert*, 311 N.C. 283, 316 S.E. 2d 79 (1984). Implicit in the right to

counsel is the right of a defendant to refuse the assistance of counsel and conduct his own defense. *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981), *citing Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975).

An accused's waiver of the right to counsel and decision to proceed *pro se* must be a voluntary relinquishment of a known right.

> [T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562.

State v. Thacker, 301 N.C. 348, 271 S.E. 2d 252 (1980). *Cf. Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981) (right to counsel at custodial interrogation); *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981) (defendant's statement in psychiatric evaluation used against him). Such waiver may not be presumed from a silent record. *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245 (1969). Rather, as our Supreme Court stated in *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981): "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." "Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Id.* Thus, a defendant's waiver of his right to assigned counsel does not constitute a waiver of all right to counsel. *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984); *State v. Graham*, 76 N.C. App. 470, 333 S.E. 2d 547 (1985).

When a defendant clearly indicates that he wishes to proceed *pro se*, he may be permitted to do so only after the trial judge makes thorough inquiry and is satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

G.S. § 15A-1242; *State v. McCrowre, supra.* The inquiry described in G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed *pro se. State v. McCrowre, supra.*

As in *State v. McCrowre, supra,* there is nothing in the record here which indicates that defendant ever wished to go to trial without the assistance of some counsel. Rather, all indication in the record is to the contrary. The record clearly tends to show that defendant signed the waiver of his right to assigned counsel with the expectation of being able to retain private counsel and that he only proceeded to trial *pro se* because he thought he had to based on what the trial judge had told him at arraignment and the fact he signed the above waiver. Defendant's initial retention of private counsel, his remarks at arraignment indicating that he wished to retain private counsel and his request to confer with attorney Austin prior to the presentation of evidence certainly should have alerted the court to defendant's lack of desire to proceed without the assistance of counsel.

Even if defendant had clearly indicated that he desired to proceed *pro se* when the case was called for trial on 11 February 1985, the trial court was required at that point to make the inquiry described in G.S. § 15A-1242. Such was not done in this case. We conclude that in the absence of (1) a clear indication by defendant that he wished to proceed *pro se* and (2) the inquiry required by G.S. § 15A-1242, it was error to permit defendant to go to trial without the assistance of counsel. Accordingly, we hold that defendant is entitled to a new trial.

New trial.

Judges ARNOLD and PARKER concur.

RONALD H. GALLIMORE, EMPLOYEE, PLAINTIFF v. DANIELS CONSTRUCTION COMPANY, EMPLOYER, AND U. S. FIDELITY & GUARANTY INSURANCE CO., CARRIER, DEFENDANTS

No. 8518IC531

(Filed 21 January 1986)

1. **Master and Servant § 93.2— workers' compensation—hearsay testimony—similar evidence admitted without objection—no error**

There was no prejudicial error where the Industrial Commission allowed plaintiff to testify that the Duke University Compensation Office had told him that he would not be admitted to the hospital without an authorization from the insurance carrier where defendants failed to object to later testimony by plaintiff that he had not been admitted to the hospital because he lacked funds or insurance to pay the bill or to testimony from defendant's senior adjuster that implicitly included the insurance company's understanding that the hospital would not admit the patient without company authorization. N.C.G.S. 8C-1, Rule 802.

2. **Master and Servant § 75— hospital expenses—defendant's failure to act on request for authorization—bad faith**

The Industrial Commission did not err by ordering defendants to pay plaintiff's medical expenses incurred beyond the 31 May cutoff date of an approved compromise agreement where the Commission found that the insurance company had agreed to pay all necessary medical expenses through 31 May and plaintiff had waived any and all rights to reopen a claim for further compensation; plaintiff urgently needed medical attention relating to his industrial injury but was denied admission to the hospital until the insurance company authorized the hospitalization or until funds were advanced; plaintiff's doctor wrote the insurance company that plaintiff urgently needed readmission; the letter was dated 12 May and was received by the person handling plaintiff's claim on behalf of the insurance company on 16 May; defendant took no action; and defendant admitted that it did not authorize the hospitalization because it wouldn't have to pay if the hospitalization could be delayed until after May 31. Defendants breached their duty of good faith and fair dealing by acting to delay the treatment until after 31 May; however, defendant was only liable for the portion of the costs that would have been incurred prior to 31 May if defendant had acted properly and in good faith.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and Award filed 12 February 1985. Heard in the Court of Appeals 19 November 1985.

The Industrial Commission awarded plaintiff compensation benefits and adopted as its own the Opinion and Award of the hearing commissioner, which in pertinent part provided:

This matter, which is one of admitted liability and was thereafter the subject of an approved Compromise Settlement Agreement, was heard . . . upon the issue of defendants' obligation for the payment of medical expenses pursuant to the terms of said agreement . . . which . . . provided that "defendants shall pay all medical expenses incurred by plaintiff as a result of the injury through May 31, 1983, and no further, when bills for the same have been submitted to the Commission through the insurance carrier."

. . . .

FINDINGS OF FACT

1. Due to his use and subsequent abuse, of narcotic drugs in an attempt to control the chronic pain syndrome resulting from the injury by accident giving rise hereto and thus as a direct, natural and unavoidable consequence of the same injury, plaintiff developed, prior to May 31, 1983, a dependence to one of such drugs; namely, Tylox, and as a direct result thereof was then un [sic] urgent need of a readmission to Duke University Medical Center for further treatment of his chronic pain syndrome with its associated drug dependence and depression. Although defendants were aware, as a result of Dr. Gianturco's May 12, 1983 correspondence directed thereto, of not only plaintiff's urgent need to be rehospitalized for further medical treatment, but the reasons therefor; by May 23, 1983 correspondence directed to the Industrial Commission and based upon their assertion that plaintiff's drug dependency was not related to his compensable May 2, 1978 back injury, they refused to authorize the same and therefore, while he had incurred the urgent need for the disputed further medical treatment prior to the date in question (May 31), plaintiff was not then independently financially able to obtain the needed hospital admission and was only thereafter (in June of the same year) able to do so by making a $1,000.00 advance to the involved institution.

2. In that the hereinabove described further medical treatment was not only designed to effect a cure of, or provide needed relief from, plaintiff's chronic pain syndrome with its associated drug dependency and depression, which,

as aforesaid, arose as a direct, natural and unavoidable consequence of the injury by accident giving rise hereto, but subsequently tended to do so; the same medical treatment is of the type that defendants are obligated to provide and the fact that he did not actually obtain his needed hospital admission until after May 31, 1983 is irrelevant to defendants present obligation to bear the costs thereof when plaintiff's inability to earlier do so was a direct result of defendants unjustified refusal to authorize the same treatment.

* * * *

. . . .

CONCLUSIONS OF LAW

For the reasons stated in the findings of fact hereinabove, defendants are obligated to provide all medical expenses incurred by plaintiff as a result of his disputed June 1, 1983 admission to Duke University Medical Center when bills for the same are submitted, through the carrier, to the Industrial Commission for approval and are approved by the Commission, including as part thereof, reimbursement of his $1,000.00 advance made to the same institution in order to obtain the admission thereto. G.S. 97-25.

* * * *

Based upon the foregoing findings of fact and conclusions of law the undersigned enters the following

AWARD

1. Defendants shall pay all of plaintiff's medical expenses resulting from his disputed June 1, 1983 admission to Duke University Medical Center when bills for the same are submitted, through the carrier, to the Industrial Commission for approval and are approved by the Commission, including as part thereof direct reimbursement to plaintiff of the $1,000.00 advance made by him to the same institution or to obtain the hospital admission thereto. . . .

From the Opinion and Award of the Industrial Commission, defendants appealed to this Court.

Stephen E. Lawing for plaintiff appellee.

Wyatt, Early, Harris, Wheeler & Hauser, by Kim R. Bauman, for defendant appellants.

ARNOLD, Judge.

[1] Defendants contend that the Commission erred in allowing plaintiff to testify concerning his conversations with persons in the Duke University Compensation Office. Defendants assert such testimony was hearsay, material and prejudicial. Specifically defendants cite the following:

> Q. (Mr. Lawing, attorney for plaintiff) Go ahead tell us about that.
>
> A. (Plaintiff) Okay. They had me up—the bed there April 29 to be in, but they couldn't admit me on account of the—there was no authorization of insurance to pay for the bill and . . .
>
> MR. BAUMAN (attorney for defendants): Objection as to that portion of his testimony.
>
> THE COURT: That is Duke Compensation office telling you this?
>
> A. Yeah.
>
> THE COURT: Let me just—that was their compensation office telling you without an authorization of the carrier, they would not admit you?
>
> A. Yeah, I'm sorry.
>
> THE COURT: Overruled . . .

Assuming *arguendo* that this testimony was hearsay and should have been excluded per Rule 802 of the North Carolina Rules of Evidence, defendants failed to object to the following testimony by plaintiff:

> Q. (Mr. Lawing) And, were you admitted [to the hospital] on April 29 of 1983?
>
> A. (Plaintiff) No.

Q. Why not?

A. No funds to pay the bill and no insurance.

It is the well-established rule that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character. *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979); *Moore v. Reynolds*, 63 N.C. App. 160, 303 S.E. 2d 839 (1983). Defendants in this instance waived the benefit of their objection.

The testimony of defendants' own witness Gregory Victor Haaker, the Senior Insurance Adjuster for defendant U. S. Fidelity & Guaranty Insurance Co., also renders harmless any alleged prejudicial effect of the admission of the testimony in question. The witness Haaker testified that he received a letter on 16 May 1983 from Dr. Gianturco stating that plaintiff urgently needed to be hospitalized. The witness also testified that the insurance company took no action after receiving the letter because the company knew it would not have to pay for the hospitalization if such hospitalization occurred after 31 May 1983—the last date for which the insurance company was obligated under the compromise agreement for the costs of defendants' medical treatment. Implicit in this testimony is the insurance company's understanding that the hospital would not admit the patient without company authorization.

[2] Defendants also contend that the Commission erred in ordering them to pay plaintiff's medical expenses incurred beyond the 31 May 1983 "cutoff date" of the approved compromise agreement because defendants have fully complied with the terms of the agreement by paying every medical bill submitted to them which was incurred prior to 31 May 1983. Defendants further argue there is no evidence of fraud, misrepresentation, undue influence or mutual mistake necessary to set aside the terms of the agreement.

However, the issue in this case is neither the validity of the agreement nor whether all bills incurred prior to 31 May 1983 have been paid, but rather the conduct of defendants in view of the intent of the compromise agreement. Every contract or agreement implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties. 17 Am. Jur.

2d, Contracts § 256; Restatement, Contracts 2d § 205. In determining whether or not defendants have breached this duty of good faith and fair dealing, we are bound by the findings of fact of the Industrial Commission. G.S. 97-86. The facts as found and adopted by the Commission reveal the following: The insurance company agreed to pay all necessary medical expenses incurred by the plaintiff through 31 May 1983, while plaintiff waived any and all rights to reopen a claim for further compensation. Plaintiff urgently needed medical attention relating to his industrial injury but was denied admission to the hospital until the insurance company authorized the hospitalization or until funds were advanced. Plaintiff's doctor wrote the insurance company that "Mr. Gallimore urgently needs readmission to Duke Hospital for treatment. . . ." The letter was dated 12 May 1983 and was received by Gregory Victor Haaker, the person handling plaintiff's claim on behalf of the insurance company, on 16 May 1983. In spite of receiving this correspondence, defendants took no action and did not authorize the urgently needed hospitalization. Mr. Haaker stated at trial the reason why no action was taken:

> Q. (Mr. Lawing) And, the reason you didn't [authorize the hospitalization] was because you knew you wouldn't have to pay it, if you could delay it until after May 31, didn't you?
>
> A. That's my recollection.

We find defendants have breached their duty of good faith and fair dealing by acting to delay the treatment until after 31 May 1983. Therefore defendants may not now claim that plaintiff cannot recover the expenses incurred after that date.

We do not however find that defendants should be responsible for all the costs of the medical treatment. Defendants were not notified of the need to grant the authorization until 16 May 1983. Plaintiff's hospitalization lasted 17 days. Even if defendants had acted promptly and in good faith, the medical treatment would have carried past the 31 May 1983 "cutoff date." We therefore remand this case to determine how soon after notification the insurance company could have reasonably granted the authorization and to determine what portion of the costs would have then occurred prior to 31 May 1983, for which defendant is liable.

Modified and remanded.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. VIC DAMONE DAYE

No. 8515SC2

(Filed 21 January 1986)

1. **Criminal Law § 138.15— resentencing hearing—new aggravating factor found —no error**

A trial court in a resentencing hearing may find an aggravating factor that was not found in the original sentencing hearing.

2. **Criminal Law § 138.14— resentencing—new determination of aggravating and mitigating factors**

On resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court.

3. **Criminal Law § 142.4— restitution—amount unsupported by evidence**

Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence, and there was no evidence in this case to support a recommendation that defendant pay $5,000 restitution as a condition of work-release. N.C.G.S. 15A-1343(d); N.C.G.S. 148-33.2(c).

APPEAL by defendant from *McLelland, Judge*. Judgment entered 14 September 1984 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 September 1985.

Attorney General Lacy Thornburg, by Special Deputy Attorney General Daniel C. Oakley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

BECTON, Judge.

Defendant, Vic Damone Daye, appeals from the second sentencing hearing for his conviction on a guilty plea to second degree murder. The first sentence of thirty years was vacated

because the trial court erred in finding as an aggravating factor that defendant was a danger to himself. *State v. Daye*, No. 8315SC1110 (N.C. Ct. App. filed 1 May 1984). On 14 September 1984, the trial court resentenced defendant to twenty-five years, ten years more than the presumptive term, justified by the findings that defendant was a danger to others, that he had prior convictions, and that these aggravating factors outweighed the mitigating factors.

Defendant contends on appeal that the sentencing court committed reversible error by (1) finding an aggravating factor that was neither urged by the State nor found by the first sentencing court, thus placing defendant twice in jeopardy; (2) failing to conduct a *de novo* sentencing hearing and treating an aggravating factor found in the first sentencing hearing as the law of the case, and (3) recommending that defendant pay $5,000 restitution as a condition of work release. We hold there was no error in the trial court's finding of a new aggravating factor, but we remand for error in the trial court's treatment of the factor previously found. We also hold that the recommendation of restitution was erroneous. Thus, we vacate the sentence and that part of the judgment recommending restitution, and we remand for resentencing *de novo* and more specific findings on the issue of restitution.

I

[1] The first issue on appeal is whether a trial court in a resentencing hearing may find an aggravating factor that was not found in the original sentencing hearing. The Supreme Court recently answered this question in the affirmative. *See State v. Jones*, 314 N.C. 644, 336 S.E. 2d 385 (1985).

In *Jones*, the Supreme Court held that, at a *de novo* resentencing hearing brought about by a defendant, the trial court may find altogether new aggravating, as well as mitigating factors "without regard to the findings in the prior sentencing hearings." Therefore, there was no error on this assignment in the case at bar.

II

[2] Defendant next asserts that the trial court erred during resentencing by treating the prior finding in aggravation that defendant was a danger to others, found in the original sentenc-

ing hearing and approved on appeal, as the law of the case. We agree. In light of the holding in Part I, *supra*, we hold that on resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court. This may require no more than a review of the record and transcript of the trial or original sentencing hearing, at least when no additional evidence is offered at the resentencing hearing. We reject what appears to be an inconsistent argument by the State that the resentencing process is *de novo* when the court reexamines the evidence to find new aggravating factors but is restricted when the court is asked to reexamine the evidence to reconsider factors already found.

The State argues that the language in *State v. Mitchell*, 67 N.C. App. 549, 552, 313 S.E. 2d 201, 203 (1984) controls this case:

> These two aggravating factors were among those found at the first hearing. In the first appeal these same factors were analyzed and found to be without error. Thus, under the doctrine of the law of the case the earlier ruling of approval is binding upon us.

A moment's reflection reveals that this Court in *Mitchell* was discussing the doctrine as it applied to the *appellate* court on a second review of the same two factors. The quoted language does not apply to a trial court conducting a *de novo* review of the evidence.

It is clear from the transcript that the trial court misapprehended the law and felt constrained to find the aggravating factor previously found and upheld:

> MR. MOSELEY: It's simply our position that when the court reviews a trial judge's decision on sentencing, if there's any evidence to support that trial judge at that time, then the answer is, it is supported by record, and it's not to say that the Court of Appeals ruled the same way. Therefore, I would contend that this Court is not bound to rule the same way that Judge Preston did on the same evidence, because this judge looks at the facts afresh, weighing all of the things before it for a new trial *de novo* on sentencing. It is a new

rehearing sentencing. And because Judge Preston found that fact and it's supported by the record, this Court nevertheless is not bound to find that same fact even on the same evidence. That's our position.

THE COURT: Thank you. I understood that to be your position in the first place. But I'm of the opinion that the law of the case is that there are two factors, one aggravating, one mitigating, that have been established in this case, and if the Court finds any factors at all, aggravating or mitigating, it is obliged to find those two. Now whether or not the Court will then—this Court will then find that aggravating or mitigating outweigh is certainly not the law of the case. That's not established in this case. But this case firmly holds that there are two factors, one mitigating, to wit: That before arrest he acknowledged wrongdoing, and the other aggravating, that he is dangerous to others. Those are established. They are the law of the case.

We agree with defendant's trial counsel that the resentencing court must take its own look at the evidence in determining the presence of each factor. Of course, if an appellate court has squarely ruled that certain evidence does not support a certain factor, and the identical evidence is offered at the resentencing hearing to support the same factor, the trial court is bound by the appellate ruling, not because it is the law of the case, but because it is binding precedent directly on point. This is not a limitation on the *de novo* nature of the resentencing proceeding; rather, it is a recognition that the trial court's rulings are always governed by applicable appellate decisions.

III

[3] Finally, defendant contends the trial court erred in recommending that defendant pay $5,000 restitution as a condition of work-release when that amount was not supported by the evidence. We agree.

An order of restitution as a condition of work-release must be supported by evidence adduced at trial or at sentencing. *State v. Killian*, 37 N.C. App. 234, 238, 245 S.E. 2d 812, 815-16 (1978); N.C. Gen. Stat. Sec. 15A-1343(d) (1983). A recommendation of restitution as a condition of work-release is not binding on the Parole

Commission or Department of Corrections. *State v. Arnette*, 67 N.C. App. 194, 196, 312 S.E. 2d 547, 548 (1984). The State asserts that, although restitution *orders* under G.S. Sec. 15A-1343(d) must be supported by the evidence, perhaps *recommendations* need not be. The State's argument is not fully discussed in its brief, but it appears to be that since G.S. Sec. 15A-1343(d) refers only to "orders," not "recommendations," that the latter are not subject to the same statutory requirement. We disagree. Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence. *Killian.* Although G.S. Sec. 15A-1343(d) refers to orders, N.C. Gen. Stat. Sec. 148-33.2(c) (1983) refers to orders *and* recommendations of restitution and states that they both "shall be in accordance with the applicable provisions of G.S. Sec. 15A-1343(d)." Even though recommendations of restitution are not binding, we see no reason to interpret the statutes of this State to allow judges to make specific recommendations that cannot be supported by the evidence before them.

We also hold that in this case the evidence was insufficient to support the recommendation of restitution. The following discourse was the only evidence regarding the appropriate amount of restitution:

> THE COURT: Mr. Hunt [district attorney], is there any matter of restitution that should be brought to the attention of the Court?
>
> MR. HUNT: Your Honor, the family indicated to me that they had a $5,000 life insurance policy on the decedent that was not sufficient to cover the medical—the funeral expenses. They've indicated to me that they were in excess of $5,000.
>
> THE COURT: Well, then, are you asking me to recommend that the defendant pay in excess of $5,000? That's not very specific, you know.
>
> MR. HUNT: $5,000; $5,000; Your Honor, that would be specific, and that amount would just absorb the amount of the debt.

Although we need not discuss the propriety of basing a recommendation on the unsworn statements of the district attorney—

because the parties had previously stipulated to this procedure—we believe there must be something more than a guess or conjecture as to an appropriate amount of restitution. Restitution is not intended to punish defendants, but to compensate victims. There is no predetermined fine or presumption of damages.

For the reasons set forth above, we vacate the sentence and the order of restitution and remand for further proceedings consistent with this opinion.

Vacated and remanded.

Judges WEBB and MARTIN concur.

BETTY TROUGHT v. JACK RICHARDSON, FRED BROWN, AND PITT COUNTY MEMORIAL HOSPITAL, INC.

No. 853SC419

(Filed 21 January 1986)

1. **Privacy § 1— public disclosure of private facts—12(b)(6) dismissal proper**

The trial court did not err by dismissing plaintiff's claim for invasion of privacy for failure to state a claim upon which relief could be granted where defendants were alleged to have told employees of the hospital and one person not an employee who attended an employee's meeting that plaintiff had been discharged for a lack of credibility. The tort of invasion of privacy by public disclosure of private facts consists of the disclosure to the public of facts which are true and which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. The individual defendants here had the right to make this much of a public disclosure without being held liable.

2. **Master and Servant § 10.2— wrongful discharge—violation of implied covenant of good faith—12(b)(6) dismissal proper**

The trial court did not err by dismissing plaintiff's claim for wrongful discharge under N.C.G.S. 1A-1, Rule 12(b)(6), where plaintiff alleged that she was discharged in violation of the covenant of good faith implied in any employment contract for complying with state law and hospital policies. Plaintiff did not have a contract for any definite term and could be discharged at any time by defendant, and her allegation was not sufficient to come within the exception created by *Sides v. Duke Hospital*, 74 N.C. App. 331.

3. **Master and Servant § 10.2— wrongful discharge—failure to follow procedure in personnel manual—allegation that manual part of contract—12(b)(6) dismissal improper**

The trial court erred by granting defendants' Rule 12(b)(6) motion for dismissal of plaintiff's claim for wrongful discharge based on a lack of cause and a failure to follow the procedures in a personnel manual where plaintiff sufficiently alleged that the policy manual was a part of her employment contract.

4. **Trespass § 2; Torts § 1— intentional infliction of mental distress—reporting to other employees reason for plaintiff's discharge—12(b)(6) dismissal proper**

The trial court did not err by granting defendants' Rule 12(b)(6) motion for dismissal of plaintiff's claim for intentional infliction of severe emotional distress where defendants' conduct in reporting to other employees the reason for plaintiff's discharge did not constitute "extreme and outrageous conduct" or conduct which "exceeds all bounds usually tolerated by decent society."

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 29 January 1985 in Superior Court, PITT County. Heard in the Court of Appeals 29 October 1985.

The plaintiff brought this action as a result of her discharge from the position of Vice President of Nursing Services at the Pitt County Memorial Hospital, Inc. In her complaint she alleged five separate claims, which are as follows: (1) invasion of privacy, (2) slander, (3) wrongful discharge—a, (4) wrongful discharge—b, and (5) intentional infliction of severe emotional distress. As to the claim for invasion of privacy she alleged that in September 1983 Jack Richardson, the President of Pitt County Memorial Hospital, Inc. notified her that she was discharged. Defendant Richardson and defendant Brown who was executive vice president of the hospital met with various groups of employees of the hospital and told them plaintiff had been discharged for a "lack of credibility." A nurse who was not an employee was in one of the groups. She alleged that these actions violated her "right to privacy by intruding on her mental and physical seclusion; constituted public disclosure of private information and placed Plaintiff in a false light before the public eye." She also alleged that the defendants' actions were malicious.

The plaintiff alleged as to the wrongful discharge—a that she had entered into a verbal employment contract with the Hospital in 1979 and after receiving several promotions she was made Vice President for Nursing Services in 1981. She alleged further that

in 1983 she transferred two licensed practical nurses from the emergency room after consulting with Richardson and Brown in regard to the matter. Plaintiff alleged that it would have been a violation of the state Nursing Practice Act to have allowed licensed practical nurses to perform the duties they were performing in the emergency room. She also instituted a hiring freeze for nurses at the behest of Brown and Richardson. There arose a public concern over the transfer of the licensed practical nurses and the hiring freeze. Brown and Richardson determined to discharge the plaintiff rather than explain the matter to the public or order the decisions to be changed. She alleged that discharging her for following the law and hospital policy violated the covenant of good faith and fair dealing implied in the employment contract.

The plaintiff alleged in her wrongful discharge—b claim that at the time she was employed by the Hospital she was required to sign a statement that she had read the personnel manual of the Hospital and agreed to abide by the regulations contained therein and that she understood the benefits available to her under these regulations. She alleged that this statement was intended by the parties to be a part of her employment contract. She alleged further that the manual provides that an employee may be separated only for cause. The manual provides that certain procedures must be followed before an employee may be terminated. The plaintiff was discharged without cause and without following the procedures required in the manual.

In her claim for intentional infliction of severe emotional distress the plaintiff alleged that Richardson and Brown knew that her standing in the nursing profession and her job were the most important aspects of her life. She alleged that the wrongful discharge and slanderous statements by Richardson and Brown displayed a reckless disregard to the likelihood that it would cause severe emotional distress to the plaintiff. It did cause severe emotional distress to the plaintiff.

The defendant moved to dismiss all the plaintiff's claims pursuant to G.S. 1A-1, Rule 12(b)(6). The court granted the defendants' motions as to the claims for invasion of privacy, wrongful discharge—a, wrongful discharge—b, and intentional infliction of severe emotional distress. It denied the motion to dismiss the claim for slander. The plaintiff appealed.

Solberg and Bates-Smith, by Patrice Solberg, for plaintiff appellant.

Mullins and Van Hoy, by Philip M. Van Hoy and James T. Cheatham, for defendant appellees.

WEBB, Judge.

The judgment does not dispose of all claims and is interlocutory. In our discretion we shall determine the appeal.

[1] The plaintiff's first claim is to an invasion of her privacy. There are several types of claims for invasion of privacy which have been recognized by the courts in this country. *See* W. Keeton, *Prosser and Keeton on The Law of Torts* § 117, at 849 (5th ed. 1984). One type is an appropriation, for the defendant's benefit, of the plaintiff's name or likeness. This type of claim was recognized in *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) and *Barr v. Telephone Co.*, 13 N.C. App. 388, 185 S.E. 2d 714 (1972). The plaintiff does not contend that her privacy was invaded by an appropriation. The plaintiff apparently contends that her privacy was invaded by a public disclosure of private facts or by publicity which placed her in a false light in the public eye. Our Supreme Court held in *Renwick v. News and Observer*, 310 N.C. 312, 312 S.E. 2d 405 (1984) that there is no claim for a false light invasion of privacy in this state. If the plaintiff has a claim it is for an invasion of privacy by a public disclosure of private facts. We have not found a case in this state which deals with such a claim but there are cases from other jurisdictions and there is textbook authority on this type of claim. *See Prosser and Keeton on The Law of Torts, supra.*

As we understand the invasion of privacy by a public disclosure of private facts as this tort has developed in other jurisdictions the plaintiff has not stated a claim in this case. The tort consists of the disclosure to the public of facts which are true which disclosure would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. In this case the individual defendants are alleged to have told other employees of the hospital and one person not an employee who attended an employees' meeting that the plaintiff was discharged for a "lack of credibility." We do not believe this is the type of public disclosure which is required for a claim for invasion of privacy. The in-

dividual defendants told a group composed, with one exception, of the plaintiff's fellow employees of the reason for her discharge. In determining whether the plaintiff had a claim we have to assume that the reasons given by Brown and Richardson to the other employees were true. The individual defendants had the right to make this much of a public disclosure without being held liable. It was not error to dismiss the plaintiff's claim for invasion of privacy.

[2] The plaintiff alleged two separate claims for wrongful discharge, denominating one of these claims "a" and the other as "b." In her wrongful discharge—a claim she alleged that she was discharged for complying with state law and the hospital policies. She alleged this is a violation of the covenant of good faith implied in any employment contract. Plaintiff did not have a contract for any definite term. She could be discharged at any time by the defendant hospital. In *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E. 2d 818 (1985) this Court made an exception to this rule in a case in which the plaintiff alleged she was discharged for refusing to commit perjury. In this case there is no such allegation. She alleges that she was discharged for following state law and hospital policy in transferring two licensed practical nurses. Whether this is so is a matter for interpretation. We do not believe this allegation is sufficient to come within or enlarge the exception created by *Sides*. *See Walker v. Westinghouse Elec. Corp.*, --- N.C. App. ---, 335 S.E. 2d 79 (1985). It was not error to dismiss the plaintiff's claim for wrongful discharge—a.

[3] In her claim for wrongful discharge—b the plaintiff alleges that when she was hired she was required to sign a statement that she had read the hospital policy manual which provides she may only be discharged for cause and that certain procedures must be followed in order for her to be discharged. She also alleges the statement she signed was to be a part of her employment contract. She alleged further that she was discharged without cause and without following the procedures of the personnel manual. We believe that on hearing on a Rule 12(b)(6) motion the plaintiff has sufficiently alleged that the policy manual was a part of her employment contract which was breached by her discharge to survive the motion. *Walker v. Westinghouse Elec. Corp., supra.* We reverse the part of the judgment which dismisses the plaintiff's wrongful discharge—b claim.

[4] The plaintiff's last claim is for the intentional infliction of severe emotional distress. The tort of intentional infliction of severe emotional distress consists of "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E. 2d 325, 335 (1981). Our Supreme Court has said that liability arises when the defendant's "conduct exceeds all bounds usually tolerated by decent society" and the conduct "causes mental distress of a very serious kind." *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). We do not believe the conduct of the two individual defendants in reporting to the hospital employees why the plaintiff was discharged constitutes "extreme and outrageous conduct" or conduct which "exceeds all bounds usually tolerated by decent society." The court did not err in dismissing the plaintiff's claim for intentional infliction of severe emotional distress.

For the reasons stated in this opinion we reverse and remand as to the part of the judgment dismissing the plaintiff's claim for wrongful discharge—b. We affirm the dismissal of the other three claims.

Affirmed in part; reversed and remanded in part.

Judges BECTON and COZORT concur.

THE STATE OF TENNESSEE, ON BEHALF OF THE TENNESSEE DEPARTMENT OF HEALTH AND ENVIRONMENT AND THE TENNESSEE WILDLIFE RESOURCES AGENCY v. ENVIRONMENTAL MANAGEMENT COMMISSION OF THE STATE OF NORTH CAROLINA

No. 8510SC590

(Filed 21 January 1986)

1. Administrative Law § 5; Waters and Watercourses § 3.2— dumping industrial wastes into river—consent order issued without hearing—petitioner as "aggrieved person"

A consent special order issued by respondent Commission to a corporation allowing it to discharge effluents into the Pigeon River was issued without a hearing and by its own terms purported to take precedence in some respects over the terms of a proposed National Pollutant Discharge Elimination System

(NPDES) permit to the corporation so that the right of petitioner State of Tennessee to be heard was impaired, and it therefore qualified as an "aggrieved person"; furthermore, petitioner alleged that its property rights in the Pigeon River were affected, and these allegations also established petitioner's "aggrieved person" status. N.C.G.S. 150A-43.

2. **Administrative Law § 5— consent special order—final order**

A consent special order issued by respondent Commission to a corporation pursuant to N.C.G.S. 143-215.2 was a final order by the Commission.

3. **Administrative Law § 5; Waters and Watercourses § 3.2— dumping industrial wastes into river—special consent order—no hearing—contested case**

A consent special order issued by respondent Commission to a corporation allowing it to discharge effluents into the Pigeon River was a "contested case" as required by N.C.G.S. 150A-43, though no adjudicatory hearing was required for the consent special order, since such orders, by statute, have the same force and effect as a special order issued pursuant to a hearing; moreover, though this case arose on its technical basis solely from a challenge to the consent special order, which did not require a hearing, this particular order is alleged to intrude upon the NPDES permit process, which does require such a hearing, and the statutorily created rights of those not parties to the order have been affected and can be contested.

4. **Administrative Law § 5; Waters and Watercourses § 3.2— dumping industrial wastes into river—permit process circumvented—administrative remedies exhausted**

Petitioner exhausted all its administrative remedies within the meaning of N.C.G.S. 150A-43 where respondent contended that petitioner had no remedies whatsoever and could avail itself only of the chance to be heard on the issuance of the new NPDES permit, but petitioner alleged that the consent special order, for which it sought review, was being used to circumvent the permitting process; moreover, petitioner had no other avenue for judicial review, the review provision of the Water and Air Resources Act being applicable only to parties to a Commission order.

APPEAL by petitioner from *Bailey, Judge*. Judgment entered 4 April 1985 in WAKE County Superior Court. Heard in the Court of Appeals 21 November 1985.

On 21 November 1984 the State of Tennessee, on behalf of the Tennessee Department of Health and Environment and the Tennessee Wildlife Resources Agency, filed a petition for judicial review of a consent special order entered into pursuant to N.C. Gen. Stat. § 143-215.2 (1983) by the North Carolina Environmental Management Commission (Commission) and Champion International Corporation (Champion). Respondent Commission filed a motion to dismiss for failure to state a claim upon which relief can be

granted, N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. The trial court granted this motion and petitioner appealed.

Attorney General and Reporter for the State of Tennessee W. J. Michael Cody, by Deputy Attorney General Frank J. Scanlon and Assistant Attorney General Michael D. Pearigen; and Sanford, Adams, McCullough & Beard, by Robert W. Spearman, for petitioner.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel C. Oakley, for respondent Environmental Management Commission.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for respondent Champion International Corporation.

WELLS, Judge.

The sole issue before this Court is whether the trial court erred in granting the Commission's motion to dismiss under Rule 12(b)(6). The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. *Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980). A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim or the disclosure of some fact which will necessarily defeat the claim. *Id.* When making a ruling under this rule, the complaint must be viewed as admitted and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. *Andreson v. Eastern Realty Co.*, 60 N.C. App. 418, 298 S.E. 2d 764 (1983).

The State of Tennessee's petition was made pursuant to N.C. Gen. Stat. § 150A-43 (1983), which reads in pertinent part as follows:

> Any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by

some other statute, in which case the review shall be under such other statute.

Thus, there are five requirements under this statute: (1) plaintiff must be an aggrieved person; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) petitioner must have exhausted administrative remedies; and (5) there must be no other adequate procedure for judicial review. *Dyer v. Bradshaw*, 54 N.C. App. 136, 282 S.E. 2d 548 (1981).

[1] We first examine whether the State of Tennessee may be termed an "aggrieved person." " 'Person aggrieved' means any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision." N.C. Gen. Stat. § 150A-2(6) (1983). "Person" includes any "body politic." N.C. Gen. Stat. § 150A-2(7) (1983).

The State of Tennessee has two interests, one legal and one property, which are substantially affected by the issuance of the Commission's consent special order. A National Pollutant Discharge Elimination System (NPDES) permit, issued pursuant to North Carolina's Water and Air Resources Act, N.C. Gen. Stat. § 143-211 *et seq.*, must be in conformity with the requirements of the Federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, specifically 33 U.S.C. § 1342(b)(3) and (5) (1978), which requires that an affected state must be given notice and opportunity to be heard by the issuing state regarding the terms and conditions of the proposed permit. This federal requirement is reflected in N.C. Gen. Stat. § 143-215.1(c)(2)a and (c)(3) (1983). The Commission is currently in the process of reissuing an NPDES permit to Champion to discharge effluents into the Pigeon River, which flows across North Carolina for twenty-six miles into Tennessee. Petitioner alleges that the dark color and foul odor of the effluent has rendered the river useless to Tennessee citizens and that it desires to have the problem corrected through this State's permitting process. The consent special order was issued by the Commission to Champion pursuant to N.C. Gen. Stat. § 143-215.2 (1983) and does not require a hearing. Petitioner alleges that, by the terms of the consent special order, it purports to take precedence in some respects over the terms of the proposed NPDES

permit to Champion as it is scheduled to be heard.[1] Since this allegation must be taken as true, *Andreson, supra*, it can be seen that petitioner's right to be heard on these aspects of the permit has been substantially impaired. This "procedural injury" is sufficient under G.S. 150A-43 to qualify petitioner as an "aggrieved person." *See Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 265 S.E. 2d 890, *disc. rev. denied*, 301 N.C. 94 (1980).

Also, the State of Tennessee alleges that the consent special order contains provisions substantially identical to provisions it opposes in the proposed NPDES permit, which affects the property rights of the State of Tennessee in the Pigeon River. These allegations also establish petitioner's "aggrieved person" status.

[2] The second issue is whether the consent special order constituted a final decision by the Commission. The statutes are clear on this point. "Any person against whom a special order is issued shall have the right to appeal in accordance with the provisions of G.S. 143-215.5. Unless such appeal is taken within the prescribed time limit, the special order of the Environmental Management Commission shall be final and binding." G.S. 143-215.2(c). The cross-referenced statute deals with the procedure of parties to the order to obtain judicial review of final orders or decisions. G.S. 143-215.5. A consent special order has the same force and effect as a special order issued pursuant to a hearing. G.S. 143-215.2(a). We hold that the consent special order is a final decision by the Commission.

[3] The petitioner next contends that a consent special order is a "contested case," as required by G.S. 150A-43. "Contested case" is defined as "any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing." G.S. 150A-2(2). The Legislature has provided that no special order shall be issued by the Commission without an adjudicatory hearing. G.S. 143-215.2(b). Though such a hearing is not required for a consent special order, consent special orders "shall have the same force and effect as a special order . . . issued pursuant to a hearing." G.S. 143-215.2(a).

1. We do not address in this opinion the problem posed by a consent special order which does not provide that its terms will take priority over terms in an NPDES permit.

Also, though this case arises on its technical basis solely from a challenge to the consent special order, which does not require an adjudicatory hearing, this particular order is alleged to intrude upon the NPDES permit process, which does require such a hearing. The statutorily-created rights of those not parties to the order have been affected and can be contested. The unique procedural overlap here mandates that this consent special order not be treated simply as an action between two parties in which no third party is affected.

We hold that this case was "contested" for the purposes of G.S. 150A-43. To hold otherwise in this case would produce the anomalous result that an NPDES permittee and the Commission could join in a consent agreement to circumvent the procedures of the permitting process. Such a holding would be antithetical to the avowed letter and spirit of federal and North Carolina legislation guaranteeing the public a right to be heard. Where possible, it is the duty of the appellate courts to interpret statutes so as to be consistent with each other. *Orange County v. Dept. of Transportation, supra.*

[4] The petitioner has exhausted all its administrative remedies. In fact, as regards the consent special order, the Commission contends that the petitioner has no remedies whatsoever and can avail itself only of the chance to be heard on the issuance of the new NPDES permit. Since the petitioner alleges that the consent special order is being used to circumvent the permitting process, and we must accept this as true, opportunity to be heard only during the permitting process cannot be an effective remedy for this injury.

Finally, the State of Tennessee has no other avenue for judicial review. The Water and Air Resources Act has a provision for judicial review, N.C. Gen. Stat. § 143-215.5 (1983), but it applies by its terms only to parties to a Commission order. "Person aggrieved," the phrase in G.S. 150A-43 that grants petitioner standing, is not used here. Petitioner's only choice is to use the broader terms of G.S. 150A-43.

Petitioner has fulfilled the five requirements set forth in G.S. 150A-43 for judicial review of an administrative agency action. We hold that the trial court should consider the State of Tennessee's petition on its merits.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. DAISY WARREN WELLS

No. 852SC815

(Filed 21 January 1986)

Constitutional Law § 49— indigent defendant—waiver of right to assigned counsel —N.C.G.S. 15A-1242 not followed

Defendant's conviction for food stamp fraud was vacated where defendant signed a written waiver of the right to assigned counsel but the record indicated that the court did not inquire into whether defendant understood and appreciated the consequences of her decision and comprehended the nature of the charges and proceedings and the range of permissible punishments. N.C.G.S. 15A-1242.

APPEAL by defendant from *Brown, Judge.* Judgment entered 25 March 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 22 November 1985.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General James B. Richmond for the State.

Carter, Archie & Hassell by Sid Hassell, Jr., for defendant appellant.

COZORT, Judge.

Defendant was charged in a proper bill of indictment with food stamp fraud in violation of G.S. 108A-53(a). She signed a written "Waiver of Right to Assigned Counsel" and pled not guilty to the offense. At trial, both the State and defendant presented evidence. A jury found defendant guilty as charged and she was sentenced to the presumptive term of three years for a Class H felony. Defendant appealed.

While represented by counsel on appeal, defendant makes no assignment of error or argument. Rather, defendant's counsel notes that he has "carefully examined the court file and the trial transcript" and finds "no prejudicial error to assign." On behalf of

the defendant, defense counsel requests that we examine the record and transcript and give defendant the benefit of any errors we may find.

Pursuant to *Anders v. California*, 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396 (1967), and the recent opinion of our Supreme Court in *State v. Kinch*, 314 N.C. 99, 331 S.E. 2d 665 (1985), we have reviewed the legal points appearing in the record, transcript and briefs on appeal. While our examination reveals that the evidence was sufficient to support defendant's conviction, we must vacate the conviction because the record shows that defendant was not properly advised of her right to counsel before "waiving" that constitutional right.

In *State v. Thacker*, 301 N.C. 348, 353-54, 271 S.E. 2d 252, 256 (1980), our Supreme Court summarized the law on defendant's waiver of his constitutional right to counsel.

> The right to counsel guaranteed to all criminal defendants by the Constitution also implicitly gives a defendant the right to refuse counsel and conduct his or her own defense. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). Services of counsel cannot be forced upon an unwilling defendant. *Id.; State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); *State v. Morgan*, 272 N.C. 97, 157 S.E. 2d 606 (1967) (per curiam); *State v. McNeil*, 263 N.C. at 267-68, 139 S.E. 2d at 672; *State v. Bines*, 263 N.C. 48, 138 S.E. 2d 797 (1964). However, the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562.

See also State v. Gerald, 304 N.C. 511, 284 S.E. 2d 312 (1981). Recognizing the constitutional principles recited above, our Legislature enacted G.S. 15A-1242 which provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

"[C]ompliance with the dictates of G.S. 15A-1242 fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary." *State v. Thacker*, 301 N.C. 348, 355, 271 S.E. 2d 252, 256 (1980).

Here, unlike in *Thacker*, the record reflects that the trial court did not question the defendant in accordance with G.S. 15A-1242. At defendant's arraignment on 16 July 1984, the following exchange took place between the defendant and the trial court:

COURT: Do you have an attorney, Mrs. Wells?

MRS. WELLS: No sir.

COURT: Do you wish to have one to represent you?

MRS. WELLS: No sir. I'm not able to hire one.

COURT: Pardon?

MRS. WELLS: I'm not able to hire one.

COURT: Do you understand that if you're an indigent person without finds [*sic*] to hire a lawyer the Court can appoint one for you; that if you're later found guilty or plead guilty, then you'll have to repay the State for that attorney's fee. Is that your request?

MRS. WELLS: No sir.

COURT: You want . . .

MRS. WELLS: I'm not able to have a lawyer.

COURT: Well, I just got through telling you . . .

MRS. WELLS: Yes sir.

COURT: . . . that if you don't have the money to hire one, the Court can appoint one for you, but if you're found guilty

or plead guilty, you'll have to repay the State for that attorney's fee at a later time. Do you understand that?

MRS. WELLS: Yes sir.

COURT: You may represent yourself or you may hire your own lawyer or you may request the Court to appoint a lawyer for you.

MRS. WELLS: I'd like to represent myself.

COURT: All right, if you will please step forward and sign a waiver, please, mam.

(The defendant, Daisy Warren Wells, signed paperwriting [*sic*] before the Clerk, Trudy Nelson.)

COURT: If you will step back, please, mam. How do you intend to plead to this charge?

MRS. WELLS: Not guilty, Your Honor.

COURT: O.K. Not guilty. Let the record show the defendant has been arraigned, plead [*sic*] not guilty.

The written Waiver of Right to Assigned Counsel signed by defendant and certified by the trial judge reads as follows:

WAIVER OF RIGHT TO ASSIGNED COUNSEL

As the undersigned party in this action, I freely and voluntarily declare that I have been clearly advised of my right to the assistance of counsel, that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive counsel.

I freely, voluntarily and knowingly declare that I do not desire to have counsel assigned to assist me, that I expressly waive that right, and that in all respects I desire to appear in my own behalf, which I understand I have the right to do.

CERTIFICATE OF JUDGE

I certify that the above named person has been fully informed in open Court of the nature of the proceeding or charges against him and of his right to have counsel assigned by the Court to represent him in this action; that he has elected in open Court to be tried in this action without the assignment of counsel; and that he has,

executed the above waiver in my presence after its meaning and effect have been fully explained to him.

While the certified written waiver asserts that defendant has been informed (1) of the charge against her, (2) the nature of and the statutory punishment for each such charge, and (3) the nature of the proceedings against her, the record discloses that the trial court failed to do any of these things.

The record discloses that the trial court only complied with the first dictate of G.S. 15A-1242. Without compliance with the first and third requirements of G.S. 15A-1242, it cannot be said that the second requirement has even begun to have been satisfied.

A written waiver of counsel is no substitute for actual compliance by the trial court with G.S. 15A-1242. The Constitution requires that waiver of counsel be knowing and voluntary and compliance with G.S. 15A-1242 insures that this requirement has been met. We reaffirm our approval of the type of questions and instructions given by the trial court to the defendant in *State v. Luker*, 65 N.C. App. 644, 650-52, 310 S.E. 2d 63, 67 (1983), *rev'd on other grounds*, 311 N.C. 301, 316 S.E. 2d 309 (1984), when a defendant expresses a desire to waive counsel and represent himself. We recommend to the trial bench adherence to that or similar conduct.

Since the record herein reflects that G.S. 15A-1242 was not complied with, "the judgment entered must be vacated and the case remanded for a determination of whether the defendant is entitled to have counsel appointed to represent [her] in this action." *State v. Hardy*, 78 N.C. App. 175, 179, 336 S.E. 2d 661, 664 (1985).

Vacated and remanded for a

New trial.

Judges WELLS and PHILLIPS concur.

PEERLESS INSURANCE COMPANY v. NATHAN FREEMAN v. GREAT AMERICAN INSURANCE CO.

No. 852DC347

(Filed 21 January 1986)

Insurance § 95.1— automobile liability insurance—cancellation—notice to insured

Where defendant insured accepted third party defendant's offer to renew an automobile liability policy for the period 5 August 1981 through 5 February 1982 by sending $30.00 partial payment of his premium, neither a 14 October 1981 "Automobile Final Notice" nor a 5 November 1981 "Cancellation Notice" was sufficient effectively to cancel defendant insured's liability policy prior to his accident on 8 November 1981, since the earlier communication was made at a time when defendant insured was not in default, and the later communication failed to give 15 days notice of cancellation. N.C.G.S. 20-310(d) and (f).

Judge PHILLIPS concurring.

Judge WEBB dissenting.

APPEAL by the third-party defendant from *Ward, Judge.* Judgment entered 29 January 1985 in District Court, BEAUFORT County. Heard in the Court of Appeals 22 October 1985.

The third-party defendant Great American Insurance Company appeals from an order denying its motion for summary judgment and allowing a motion for summary judgment in favor of Nathan Freeman. On 8 November 1981 Freeman was involved in an automobile accident resulting in damages which were paid by Peerless Insurance Company under an uninsured motorists policy. Peerless sued Freeman to collect the damages and Freeman filed a third-party complaint against Great American. Plaintiff and third-party defendant filed motions for summary judgment and Freeman stipulated that the motion of Peerless against him could be allowed, which was done.

The papers filed in support and in opposition to the motions for summary judgment by Freeman and Great American show

that the following matters are not in dispute. On 5 February 1981 Great American issued to Freeman an automobile liability policy. The policy was in effect until 5 August 1981 at which time it was renewed until 5 February 1982. This renewal required payment by Freeman of a premium of $53.77. Great American received $30.00 of this amount on 27 August 1981. On 14 October 1981 Great American mailed to Freeman a document entitled "Automobile Final Notice" which informed Freeman that he owed $25.77 on his premium. Among other things the notice said, "We are anxious to continue your insurance protection, but this cancellation will be effective 11-01-81 at 12:01 a.m. unless we receive payment of $25.77 prior to that date. Payments received after the due date will be automatically refunded, and will not result in continuation of coverage." On 5 November 1981 Great American mailed Freeman a notice that his policy had been canceled effective 1 November 1981. On or about 5 November 1981 Great American received a money order from Freeman in the amount of $25.27 which was refunded to him.

The court denied Great American's motion for summary judgment and granted summary judgment for Freeman. Great American appealed.

Rodman, Holscher & Francisco, by Edward N. Rodman, for plaintiff appellee.

McLendon & Partrick, by Neal Partrick, for defendant, third-party plaintiff appellee.

Williamson, Herrin & Barnhill, by Mickey A. Herrin, for third-party defendant appellant.

JOHNSON, Judge.

The question posed by this appeal is whether Great American had effectively canceled Freeman's liability policy prior to the accident on 8 November 1981. An insurer may terminate automobile liability coverage before the end of a policy period only for the reasons stated in and in compliance with the procedural requirements of G.S. 20-310. *Smith v. Nationwide Mut. Ins. Co.*, 72 N.C. App. 410, 324 S.E. 2d 868 (1985). G.S. 20-310 provides in part:

> (d) No insurer shall cancel a policy of automobile insurance except for the following reasons:

(1) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installation thereof, ...

. . . .

(f) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policy holder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:

. . . .

(2) State the date, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, except that such effective date may be 15 days from the date of mailing or delivery when it is being canceled or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section;

(3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;

When an insured is in default on the payment of a premium within the meaning of G.S. 20-310(d), the notice requirements of G.S. 20-310(f) are triggered. Hence, the threshold issue is whether Freeman was in default on 14 October 1981 when Great American sent the "Automobile Final Notice" giving fifteen days notice of cancellation. He was not. Freeman accepted Great American's offer to renew for the period 5 August 1981 through 5 February 1982 when he sent $30.00 partial payment. *See Smith v. Nationwide Mut. Ins. Co.*, 71 N.C. App. 69, 75, 321 S.E. 2d 498, 502 (1984). Applying $30.00 toward the total due of $53.77, Freeman had paid for coverage through 14 October. Additionally, the "Automobile Final Notice" expressly stated that the amount $25.77 was due at a date certain in the *future*, namely 1 November 1981. Because Freeman had paid for coverage through 14 October and because the October 14 notice showed a prospective due date, Great American could not view Freeman as being in default on the date

14 October. The 14 October attempt to give notice was fatally premature.

The earliest possible date Freeman could be deemed in default pursuant to G.S. 20-310(d)(1) was 2 November. The second letter from Great American, the "Cancellation Notice" of 5 November, could effectively operate as a valid notice of cancellation if it otherwise substantially complied with requirements of G.S. 20-310(f). It did not. Foremost, G.S. 20-310(f)(2) requires fifteen days notice from the date of mailing. The "Cancellation Notice" at issue did not show a date of cancellation at least fifteen days hence; instead it showed a date of cancellation four days *prior* to the mailing. Great American did not meet all statutory requirements of G.S. 20-310 in either the 14 October or the 5 November communications.

Great American argues that to allow such an interpretation of the interrelationship between G.S. 20-310(d)(1) and 20-310(f) allows for the possibility that the insured could receive fifteen days of free coverage. We believe the Legislature was advertent to the possibility of such gaps in the statute. *See Faizan v. Grain Dealers Mut. Ins. Co.*, 254 N.C. 47, 55, 118 S.E. 2d 303, 309 (1961). Any other construction would render the protection offered to the motoring public by these statutes meaningless. *Smith*, 72 N.C. App. at 405, 324 S.E. 2d at 872.

In *Faizan*, the Court construed an alleged notice of cancellation and held that the insured was not covered. *Faizan* can be distinguished on the facts. In *Faizan*, the insured failed to pay any premium at the time of renewal. The Court held that the cancellation of insurance was the result of an *act* of the *insured*, thus the requirements of G.S. 20-310 were not invoked. Here, the insured had accepted the insurance company's offer to renew when he sent and Great American accepted payment in August. Both parties stipulated that renewal had occurred. The attempted cancellation two months after renewal only can be deemed an act of the insurer, thereby invoking G.S. 20-310. Great American did not fulfill its obligations in conformity with G.S. 20-310; therefore, Great American had not effectively canceled Freeman's liability policy prior to the accident on 8 November 1981. The judgment below is

Affirmed.

Judge PHILLIPS concurs.

Judge WEBB dissents.

Judge PHILLIPS concurring.

I concur in the foregoing opinion of Judge Johnson. G.S. 20-310 authorizes the cancellation of automobile liability policies only for the *existing* causes stated and upon *advance* notice as provided therein; it does not authorize either prospective or retroactive cancellation. Since Great American had been paid for coverage through October 14, 1981, its letter of that date was no more than a statement that a payment was due in the future; and the November 5, 1981 letter was equally ineffective as a cancellation, because the required notice was not given.

Judge WEBB dissenting.

I dissent. I believe Freeman was in default when notice was given to him on 14 October 1981. The premium due was $53.77. He could not pay this by sending $30.00 to Great American. I do not believe the notice sent to Freeman expressly stated that $25.77 was due on 1 November 1981. I believe it told him that the payment was past due at the time of the notice and the policy would be cancelled on 1 November 1981 unless payment was received prior to that date. This notice complied with the statutory requirements and Freeman's policy was cancelled effective that date. I vote that it was error not to grant Great American's motion for summary judgment.

STATE OF NORTH CAROLINA v. JACK PRESLEY COEN

No. 8510SC723

(Filed 21 January 1986)

1. Rape and Allied Offenses § 4— second degree sexual offense—conflicting testimony about shower—testimony as to amount of rent excluded—no error

The trial court did not err in a prosecution for attempted second degree sexual offense by excluding testimony concerning the amount of rent the pros-

ecutrix paid for her apartment where defendant had testified that he and the prosecutrix had taken showers and gone to bed, and the prosecutrix had testified that the shower did not work. The proffered testimony as to the amount of rent the prosecutrix was paying had no logical tendency to prove that the shower was in good working order; furthermore, defendant failed to show that the verdict was improperly influenced by the court's ruling and defendant had the practical benefit of the testimony in that the prosecutrix's partial answer before the State objected was not stricken. N. C. Rules of Evidence, Rule 402.

2. **Constitutional Law § 68; Witnesses § 10— second degree sexual offense—witness refused to appear—defendant dilatory in bringing to court's attention—motion for court's assistance denied**

The trial court did not abuse its discretion and did not violate defendant's right to compulsory process in a prosecution for attempted second degree sexual offense in which the condition of the prosecutrix's shower was an issue by denying defendant's motion for assistance in getting the prosecutrix's landlady into court where defendant issued a subpoena for the landlady on the first day of trial; the landlady hung up on the deputy who called to inform her of the subpoena; and defendant asked the court for assistance at approximately 1:30 p.m. on the second day of trial, after his last witness had been called. N.C.G.S. 15A-803(a), Sixth Amendment to the U. S. Constitution.

APPEAL by defendant from *Battle, Judge.* Judgment entered 30 January 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 18 November 1985.

Defendant appeals from a judgment of imprisonment entered upon his conviction of attempted second degree sexual offense.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Wilson Hayman, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

JOHNSON, Judge.

[1] Defendant presents two assignments of error for review. First, defendant contends the trial court erred in sustaining the State's objection to a question posed by defense counsel in cross-examining the prosecutrix, Ms. Hill, concerning the amount of rent she paid for her apartment.

On direct examination Ms. Hill testified that in the early morning hours of 29 June 1984 defendant attempted to force her

to perform fellatio upon him on the living room couch in her Raleigh apartment. On cross-examination by defense counsel, Ms. Hill was asked, "What was the [amount of] rent that you were paying [for your apartment]?" Ms. Hill responded "Two hundred . . ." at which time the State interposed an objection before Ms. Hill completed her answer. The court sustained the objection. The answer was not stricken from the record, nor was the jury instructed to disregard the witness' answer. Subsequently, Ms. Hill testified on *voir dire* that she paid two hundred fifty dollars ($250.00) per month for rent and that although the shower was broken, the water still ran and permitted baths to be taken in the bathtub. After the jury returned, Ms. Hill testified further on cross-examination that neither she nor the defendant had taken a shower on the evening in question, and that the shower in her apartment had not been working since approximately 12 June 1984.

Defendant testified in his own behalf and stated on direct that both he and Ms. Hill took showers in her apartment on the evening in question, that they went to bed together and that he never attempted to force Ms. Hill to perform fellatio.

Defendant also presented evidence through defense witness George Hughes, Chief Engineer at the Velvet Cloak Inn where Ms. Hill worked, that he (Hughes) repaired the shower in Ms. Hill's apartment in April 1984 and that at the time no water would come through the shower head. Mr. Hughes also testified on direct that he had received a request from Ms. Hill to repair the shower on 12 June 1984 but that he had never been able to make the repair because he went on vacation shortly thereafter.

Defendant argues that the amount of Ms. Hill's rent was a relevant circumstance tending to prove that the shower in her apartment was not broken, thus corroborating defendant's version of the facts while tending to impeach Ms. Hill's testimony. We disagree.

> 'Relevant evidence' means 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.

Rule 401, N.C. Rules Evid. Evidence which is not relevant is not admissible. Rule 402, N.C. Rules Evid. If the proffered evidence

has no tendency to prove a fact in issue in the case, the evidence is irrelevant and must be excluded. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979). The proffered testimony as to the amount of rent Ms. Hill was paying for the apartment has no logical tendency to prove that the shower in Ms. Hill's apartment was in good working order on the day in question.

Furthermore, the scope of cross-examination rests largely within the discretion of the trial judge, and the court's ruling will not be disturbed in the absence of a showing that the verdict was improperly influenced by the limited scope of cross-examination. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). In the case *sub judice*, defendant has failed to show that the verdict was improperly influenced by the court's ruling. Moreover, defendant had the practical benefit of the excluded *voir dire* testimony by Ms. Hill that "I paid two hundred fifty dollars a month for rent." In response to a question posed by defense counsel regarding the amount of rent she paid, Ms. Hill replied, "[t]wo hundred . . . ." Although the court sustained the State's objection to this answer that answer was not stricken from the record, nor was the jury instructed by the court to disregard the answer.

[2] Next defendant contends the trial court abused its discretion and violated defendant's Sixth Amendment guarantee for compulsory process for obtaining witnesses in his favor by denying his motion for an order to secure the attendance of a witness.

G.S. 15A-803(a) provides in pertinent part that a judge may issue an order assuring the attendance of a material witness at a criminal proceeding when there are reasonable grounds to believe that the person whom a defendant desires to call as a witness possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought. G.S. 15A-803(d) provides in pertinent part that a material witness order may be obtained upon motion supported by affidavit showing cause for its issuance. A trial judge may not exercise his discretion to issue an order to secure the attendance of a material witness in a manner inconsistent with the Sixth Amendment guarantee that an accused be afforded compulsory process for obtaining witnesses in his favor. *State v. Cyrus*, 60 N.C. App. 774, 300 S.E. 2d 58 (1983), citing *State v. Tindall*, 294 N.C. 689, 242 S.E. 2d 806 (1978).

The trial of this case lasted for two days. On the first day of trial defense counsel issued a subpoena for Mrs. Arthur H. Gold, the prosecutrix's landlady. When a deputy sheriff called Mrs. Gold to inform her of the subpoena she hung up on him. Court convened at 9:30 a.m. the second day of trial. On the second day of trial at approximately 1:30 p.m. after defendant's last witness had been examined and immediately before resting his case defense counsel advised the court that defendant wanted to call Mrs. Gold as a witness but that she was not present although subpoenaed the day before; that Mrs. Gold had previously told him that the shower was working on the day in question; that Mrs. Gold hung up on the sheriff's department when she was called on the first day of trial to be advised of the subpoena. Defense counsel then moved for "the Court's insistence [sic] in getting her to court." Upon finding that defense counsel was dilatory in advising the court of any problem he was having with the witness the court denied his motion.

Our holding in *State v. Cyrus, supra* is dispositive of this assignment of error. In *Cyrus* this Court held that the trial court did not abuse its discretion or violate defendant's Sixth Amendment guarantee to compulsory process for obtaining witnesses in his favor where defense counsel knew before trial that the witness might not appear to testify and did not file a motion for an order to secure the witness' attendance until the morning of trial. *Accord, State v. Poindexter*, 69 N.C. App. 691, 318 S.E. 2d 329, *cert. denied*, 312 N.C. 497, 322 S.E. 2d 563 (1984) (defendant waited until after the close of the State's case-in-chief before requesting the court's assistance in obtaining subpoenas for his witnesses). In the case *sub judice* we find that defendant's own lack of diligence was responsible for the absence of his witness. The trial court did not abuse its discretion and did not violate defendant's right to compulsory process.

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

Schuman v. Investors Title Ins. Co. and Schuman v. Beemer

JACK L. SCHUMAN AND WIFE JEAN O. SCHUMAN; LEONARD LAUFE AND WIFE SYMOINE LAUFE; HARVEY MANN AND WIFE RHODA MANN, PLAINTIFFS v. INVESTORS TITLE INSURANCE COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ROBERT EPTING, THIRD-PARTY DEFENDANT

JACK L. SCHUMAN AND WIFE JEAN O. SCHUMAN; LEONARD LAUFE AND WIFE SYMOINE LAUFE; HARVEY MANN AND WIFE RHODA MANN, PLAINTIFFS v. CHARLES G. BEEMER, CHARLES G. BEEMER, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION, AND ROBERT EPTING, DEFENDANTS

Nos. 8515SC773 and 8515SC796

(Filed 21 January 1986)

Mortgages and Deeds of Trust § 11; Attorneys at Law § 5.1— negligence in drawing deed—not proximate cause of injury

The trial court did not err by dismissing claims of negligence against the attorneys and a claim under a title policy against Investors Title Insurance Company where plaintiffs made a loan to Roger Baker, Inc. to purchase a tract of land; it was agreed that the loan would be secured by a deed of trust on the land which would be subordinated to a deed of trust to secure a construction loan from the Northwestern Bank; the deed was made to Roger Baker rather than to Roger Baker, Inc.; that deed and a deed of trust from Roger Baker, Inc. were recorded; a deed from Roger Baker to Roger Baker, Inc. was recorded a few days later; the deed of trust was not recorded a second time; Roger Baker, Inc. executed a deed of trust to the Northwestern Bank to secure a construction loan; that deed of trust was recorded and became a first lien on the property; Roger Baker, Inc. went into bankruptcy; Northwestern Bank's deed of trust was foreclosed, and the foreclosure sale did not bring enough to pay anything to plaintiffs. The attorneys' negligence did not make plaintiffs' position any worse than it would otherwise have been; plaintiffs would be in the same position even if the title was as it was insured to be; and the Northwestern Bank's lien would not have been affected by any fraud in the procuring of the subordination agreement to which Northwestern Bank was not a party.

APPEAL by plaintiffs from *Bowen (Wiley F.)*, and *Lane, Judges*. Judgments entered 18 May 1984, 28 February 1985, and 18 March 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 5 December 1985.

This action arose out of a real estate transaction in Orange County, North Carolina. A related case has been in this Court. *Schuman v. Roger Baker and Associates*, 70 N.C. App. 313, 319 S.E. 2d 308 (1984). The plaintiffs made a loan to Roger Baker, Inc. to purchase a tract of land. It was agreed that this loan would be secured by a deed of trust on the land and that the deed of trust

would then be subordinated to a deed of trust which would secure a construction loan from The Northwestern Bank. Robert Epting, an attorney, represented Roger Baker, Inc. at the closing when the land was purchased. Charles G. Beemer, an attorney, represented the plaintiffs at the closing. Mr. Beemer did not appear at the closing. The deed was made to Roger Baker, rather than to Roger Baker, Inc. Mr. Epting recorded the deed and a deed of trust from Roger Baker, Inc. to Mr. Beemer as trustee for the plaintiffs. A few days later a deed to the property from Roger Baker to Roger Baker, Inc. was recorded. The deed of trust from Roger Baker, Inc. in favor of the defendants was not recorded a second time.

Roger Baker, Inc. executed a deed of trust to The Northwestern Bank to secure the construction loan which was recorded and became a first lien on the property. Roger Baker, Inc. went into bankruptcy and The Northwestern Bank's deed of trust was foreclosed. The property was sold under the foreclosure and did not bring enough to pay anything to the plaintiffs.

The plaintiffs brought an action against Charles G. Beemer, Charles G. Beemer, P.A. and Robert Epting. They alleged that Charles G. Beemer did not exercise the standard of care normally exercised by attorneys practicing in the Chapel Hill area in that he allowed his clients' funds to be delivered to Roger Baker, Inc. without a deed of trust securing the indebtedness. As to Robert Epting the plaintiffs alleged that as an attorney representing Roger Baker and Roger Baker, Inc. he rendered legal services to which the plaintiffs were intended as beneficiaries. The plaintiffs alleged that for this reason he owed them the duty to exercise reasonable care and professional skill with respect to their interests. They alleged further that he failed to exercise reasonable care and skill by his failure to have the indebtedness to the plaintiffs secured by a deed of trust.

The plaintiffs brought a separate action against Investors Title Insurance Company. They alleged that Investors issued a title insurance policy to them which among other things insured that Roger Baker, Inc. had title to the property and that the deed of trust securing the indebtedness to them constituted a first lien on the property. The plaintiffs' action against Investors was tried and Judge Bowen directed a verdict against the plaintiffs at the end of their evidence.

Judge Lane granted defendant Epting's motion to dismiss under G.S. 1A-1, Rule 12(b)(6) and Judge Bowen granted defendant Beemer's motion for summary judgment. The plaintiffs appealed. This Court consolidated the cases for argument.

Newsom, Graham, Hedrick, Bryson & Kennon, by William P. Daniell and Joel M. Craig, for plaintiff appellants.

Jordan, Brown, Price & Wall, by Charles Gordon Brown and William D. Bernard, for Charles G. Beemer and Charles G. Beemer, P.A., defendant appellees.

Haywood, Denny, Miller, Johnson, Sessoms & Haywood, by George W. Miller, Jr. and Sherry R. Dawson, for Robert Epting, defendant appellee.

Mount, White, Hutson & Carden, P.A., by Richard M. Hutson, II and Stephanie C. Powell, for Investors Title Insurance Company, defendant appellee.

WEBB, Judge.

We hold it was proper to dismiss the claims against the defendants Beemer and Epting. If both the attorneys were negligent in not seeing that Roger Baker, Inc. had title to the property before the deed of trust was recorded and the money disbursed, the plaintiffs still have to show that this negligence was a proximate cause of their injury. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E. 2d 355 (1985). If Beemer and Epting had not been negligent but had performed as plaintiffs intended them to do, the plaintiffs' deed of trust would have been subordinate to the deed of trust of The Northwestern Bank. The negligence did not make the plaintiffs' position any worse than it would have been if there had been no negligence. It is not a proximate cause of their injury. We do not pass on the question of whether Epting was under a duty to the plaintiffs.

We hold it was not error to dismiss the claim against Investors Title Insurance Company. The evidence showed that Investors issued a title insurance policy to plaintiffs which insured that the plaintiffs' deed of trust constituted a first lien on the property. There was an agreement between the parties that the lien created by the plaintiffs' deed of trust would be subordinate to a lien in favor of The Northwestern Bank. The policy excluded

from coverage "liens, encumbrances, adverse claims, or other matters . . . created, suffered, assumed or agreed to by the insured claimant." Since all the evidence showed that the policy excluded coverage for liens agreed to by the plaintiffs and the plaintiffs agreed to the lien in favor of Northwestern, the loss suffered by the plaintiffs on account of Northwestern's lien is excluded from coverage.

The plaintiffs argue that a title insurance policy insures against defects in title existing at the time the policy is written. They contend that the failure to record a deed to Roger Baker, Inc. at the time of the closing with the consequent failure of their deed of trust to secure the indebtedness to them was what caused the loss. They argue that this failure of the record title was insured by their policy and the agreement by which they consented that their lien would be subordinated to the lien of The Northwestern Bank was not the cause of the loss. For this reason they contend they should recover from Investors. We believe the answer to this argument is that if the record title had been as it was insured to be the plaintiffs would be in the same position in which they are. They were not damaged because the record title was not as it was insured to be.

The plaintiffs also argue that if they had gotten a first lien on the property at the time of the closing they could have challenged the subordination agreement on the ground of fraud by Roger Baker. They do not contend there was fraud on the part of The Northwestern Bank. If Roger Baker procured the subordination agreement through fraud to which The Northwestern Bank was not a party, it would not have affected Northwestern's lien. *See* 37 C.J.S. *Fraud* § 61 (1943). We do not believe the appellants were prejudiced by not being allowed to attack the subordination agreement.

Affirmed.

Judges BECTON and COZORT concur.

ANN MILLER JOHNSON v. ROBERT JOHNSON

No. 8523DC317

(Filed 21 January 1986)

Divorce and Alimony § 30— equitable distribution of property—depreciation of separate property—chicken houses—insufficiency of evidence of value

The trial court could properly consider depreciation in the value of plaintiff's separate property—chicken houses—in dividing the marital property, since the marital estate was increased due to activities which decreased the value of the separate property, but the court's failure to find the value of the chicken houses following the marriage and the amount of money needed to repair them at the time of the parties' separation made it impossible for the court on appeal to determine whether the trial court abused its discretion in giving plaintiff a 15% credit in the division of marital property.

APPEAL by defendant from *Ferree, Judge.* Judgment entered 24 October 1984 in District Court, ASHE County. Heard in the Court of Appeals 5 November 1985.

Plaintiff and defendant were married on 11 January 1974 and separated on 2 January 1983. On 3 January 1984 the plaintiff filed for divorce. Defendant counterclaimed seeking equitable distribution. On 24 October 1984 the court entered an order in which it made the following pertinent findings of fact and conclusions of law:

> 7. As of 11 January 1974 the residence of the parties was a small weatherboard house, sheet rocked, consisting of two bedrooms, a living room, a kitchen and a bathroom. The house was in ill repair, there being evidence of damage by termites to the floor, a portion of the walls and some floor joist. In 1976 the parties had the house remodeled and an addition consisting of some fourteen hundred (1400) feet added thereto. The total expenditure for labor, either paid or contributed, and material for the renovation and addition amounted to Thirty Thousand Dollars ($30,000). The fair market value of the premises before the renovation and addition was Twelve Thousand Dollars ($12,000). The fair market value of the premises immediately subsequent to the renovation and addition was Forty Two Thousand Dollars ($42,000).
>
> . . . .

14. As of 11 January 1974, plaintiff owned depreciable property including chicken houses and equipage in an amount exceeding Forty Nine Thousand Dollars ($49,000). Defendant's depreciable property exceeded Six Thousand Dollars ($6,000). Some Seven Thousand Dollars ($7,000) of plaintiff's property as listed was paid for by the parties after marriage. A considerable portion of the parties' net income was derived from the production and sale of poultry. Monies obtained through the labor of both parties went into the accumulation of their marital assets as well as constituting a direct contribution to the enhancement in value of the separate property of the plaintiff.

15. Plaintiff's chicken houses and equipment were relatively new as of 11 January 1974; at the time of the separation of the parties the houses and equipment had deteriorated because of normal wear and tear, as well as benign neglect, to such an extent that massive repairs were necessary for continued use.

16. The disparity in value of property originally held by plaintiff and defendant to be used in the operation of their farm and the depreciation of plaintiff's chicken houses necessitates a credit of fifteen (15) percent to be given to plaintiff in the division of marital property and in the calculation of any direct contribution by defendant to an increase in value of plaintiff's separate property during coverture.

. . . .

1. The parties are entitled to a division of the marital assets of the parties and the defendant is entitled to a reimbursement of the increase in the value of plaintiff's separate property directly contributed to by the defendant during the course of the marriage. The division of marital assets and reimbursement shall be on a 65-35 ratio in order that equity between the parties be had.

From this judgment, defendant appealed.

Vannoy & Reeves, by Jimmy D. Reeves, for defendant appellant.

No brief for the plaintiff appellee.

ARNOLD, Judge.

The defendant first contends the "court erred in finding that 'the fair market value of the premises immediately subsequent to the renovation was Forty-Two Thousand Dollars ($42,000)' because this finding was not supported by evidence in the record." There is evidence in the record that the residence in question was worth twelve thousand dollars ($12,000) prior to its renovation, and there is evidence in the record that approximately thirty thousand dollars ($30,000) were expended during the course of the renovations. Thus, we find evidence in the record to support the court's valuation of the premises in question.

The next question presented for review is whether the court erred by making an unequal division of the marital property because "[t]he disparity in value of property originally held by plaintiff and defendant to be used in the operation of their farm and the depreciation of plaintiff's chicken houses necessitates a credit of fifteen (15) percent to be given to plaintiff in the division of marital property and in calculation of any direct contribution by defendant to an increase in value of plaintiff's separate property during coverture." Defendant argues that the evidence in the record does not support the court's conclusion that an equal division is not equitable.

The first issue presented by this question is whether the court could properly consider the depreciation in the value of plaintiff's separate property when dividing the marital property. G.S. 50-20(c) provides that "[t]here shall be an equal division . . . of marital property unless the court determines that an equal division is not equitable." When a court determines that an equal division is not equitable the statute lists numerous factors that shall be considered in making the division of property. Among the factors to be considered is a catchall provision which provides that the court shall consider "[a]ny other factor which [it] finds to be just and proper." G.S. 50-20(c)(12).

In *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E. 2d 682, 687 (1985), our Supreme Court held that the only factors which may properly be considered under the catchall provision of G.S. 50-20(c)(12) are those factors "which are relevant to the marital economy." Marital economy relates to "the source, availability and use by the wife and husband of economic resources during the course of the

marriage." *Smith* at 86, 331 S.E. 2d at 686. When the wife's separate property was used to create income from which the parties lived during the marriage this enabled them to accumulate more marital property. Because the marital estate was increased due to activities which decreased the value of the separate property, this decrease in separate property through depreciation relates to the economy of the marriage. Thus, the court properly considered this depreciation under G.S. 50-20(c)(12).

Having determined that the court could consider the depreciation in dividing the property, we must now decide whether the court properly divided the property. "In any order for the distribution of property made pursuant to this section, the court shall make written findings that support the determination that the marital property has been equitably divided." G.S. 50-20(j). Once the court has made adequate findings, these findings are binding upon the appellate court if they are supported by competent evidence in the record. *See Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). If the trial court has made adequate findings, which are supported by competent evidence, the court's decision regarding how to divide the property will not be disturbed absent a "clear abuse of discretion." A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985).

The trial court's findings regarding depreciation are inadequate because they fail to show the value of the chicken houses following the marriage, and because they fail to show the amount of money which was needed to repair them. Because of these deficiencies we are unable to determine whether the court abused its discretion in dividing the marital property. The matter is reversed and remanded to the District Court of Ashe County for further findings regarding the issue of depreciation.

Reversed and remanded.

Judges MARTIN and COZORT concur.

STATE OF NORTH CAROLINA v. DWIGHT AUSLEY

No. 8510SC880

(Filed 21 January 1986)

Criminal Law § 149.1— deadlocked jury—mistrial—no appeal by State

The State had no right to appeal from the trial court's order granting defendant's motion to dismiss made after the court had granted a mistrial because of a deadlocked jury. N.C.G.S. 15A-1445(a)(1).

Judge PHILLIPS concurring.

APPEAL by the State from *Battle, Judge*. Judgment entered 25 April 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1986.

Defendant was charged in a proper warrant with misdemeanor child abuse, in violation of G.S. 14-318.2. After hearing evidence for the State and defendant and after due deliberation, the jury returned to open court and stated, through their foreman, that they were unable to agree on a verdict and would not be able to agree if given additional time to deliberate. The court found that the jury was hopelessly deadlocked and declared a mistrial. After the court dismissed the jury, defendant made a motion to dismiss pursuant to G.S. 15A-1227. From the trial court's order granting defendant's motion to dismiss, the State appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney Sylvia Thibaut, for the State.

Boyce, Mitchell, Burns & Smith, P.A., by Lacy M. Presnell, III, and Karen Britt Peeler, for defendant, appellee.

HEDRICK, Chief Judge.

Although neither the State nor defendant addresses this issue in their briefs, we must decide whether the State may appeal the dismissal of the charges.

The State had no right to appeal at common law and statutes granting this right to the State must be strictly construed. *State v. Murrell*, 54 N.C. App. 342, 283 S.E. 2d 173 (1981), *disc. rev. denied*, 304 N.C. 731, 288 S.E. 2d 804 (1982). G.S. 15A-1445, in pertinent part, provides as follows:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

In *Murrell*, the State appealed from the trial court's order granting defendant's motion for judgment as in case of nonsuit for insufficiency of the evidence pursuant to G.S. 15-173. In that case, this Court held that principles of double jeopardy barred further prosecution after a dismissal for insufficiency of the evidence and dismissed the appeal.

In the present case, defendant's motion to dismiss was granted pursuant to G.S. 15A-1227, which provides:

> (a) A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made at the following times:
>
> . . . .
>
> (4) After discharge of the jury without a verdict and before the end of the session.

A motion to dismiss pursuant to this statute tests the sufficiency of the evidence to sustain a conviction and, in that respect, is identical to a motion for judgment as in the case of nonsuit under G.S. 15-173. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Therefore, we follow the decision in *State v. Murrell* and hold that defendant cannot now be placed in jeopardy again upon these same charges, and the State has no right of appeal from the judgment entered.

Appeal dismissed.

Judges JOHNSON and PHILLIPS concur.

Judge PHILLIPS concurring.

This appeal is a vain thing for several reasons. It is not authorized by G.S. 15A-1445(a)(1), the only possible authority for it. If the statute did authorize it pursuing the appeal would accomplish nothing, since under the circumstances recorded defend-

ant's retrial is prohibited by the double jeopardy clause of the Fifth Amendment to the United States Constitution. And in my opinion, the evidence does not warrant a conviction and it is most unlikely that one could ever be obtained in any event. The record indicates that the prosecution was based upon the routine paddling of a fourth grade schoolboy by the school principal at the request of his teacher, the dismissal of the case followed a three day trial and the vote of eleven jurors to acquit, and there is no sound basis for believing that a second venire would view the matter differently from the first.

ALMA JUANITA CAUBLE, EMPLOYEE-PLAINTIFF v. THE MACKE COMPANY, EMPLOYER-DEFENDANT, AND THE CONTINENTAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8510IC777

(Filed 21 January 1986)

Master and Servant § 94.3— review by Industrial Commission—not limited to any competent evidence standard

The Industrial Commission erred by not weighing the evidence and by reversing the decision of the Deputy Commissioner and awarding plaintiff additional benefits, apparently under the mistaken impression that the law required a finding for plaintiff if there was any competent evidence to support such a finding. The plenary powers of the Commission are such that upon review it may adopt, modify or reject the findings of the Hearing Commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and Award filed 15 February 1985. Heard in the Court of Appeals 10 December 1985.

Plaintiff sought additional compensation benefits for disabling seizures allegedly related to an injury she suffered when a thirty to fifty pound box fell from a shelf in the kitchen where she was working and struck her across the left eye. The Industrial Commission reversed the decision of the Deputy Commissioner and awarded plaintiff additional benefits in an Opinion and Award which in pertinent part provided:

> [T]he essence of this case boils down to a *legal* determination of causation; whether in the record there is *any* competent evidence to support a finding of causation between plaintiff's original compensable injury by accident on March 12, 1981 and plaintiff's subsequent seizure-like behavior beginning on June 11, 1981.
>
> * * * *
>
> The Court in *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E. 2d 747 (1981) stated that, "the fact that other evidence in the record does not support such a finding, and seems to contradict it, is of no consequence to this appeal, as the duty of this Court in reviewing the validity of the Award on appeal is to ascertain whether there is *any* competent evidence in the record to support the finding."
>
> * * * *
>
> [T]he Court, in *Buck* [*v. Proctor & Gamble Co.*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981)], stated, "viewing the totality of the expert testimony in the light most favorable to plaintiff, there was '*some* evidence that the accident, at least, might have or could have produced the particular disability in question.' "
>
> * * * *
>
> After considering all of the testimony in the record of the case at hand, and in light of the foregoing well-established principles of law, it is our opinion that there is sufficient competent evidence to support a finding that the injury sustained by plaintiff on March 12, 1981 caused the resulting seizure-like behavior in plaintiff, and thereby producing the particular disability in question. (Emphasis in original.)

From the Opinion and Award of the Industrial Commission, defendants appeal to this Court.

William S. Eubanks for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Martha W. Surles, for defendant appellants.

ARNOLD, Judge.

Defendants contend that the Commission erred in its decision to award plaintiff further compensation because the findings and conclusions of the Commission were based on a misapprehension of the law. We agree.

The plenary powers of the Commission are such that upon review, it may adopt, modify or reject the findings of fact of the Hearing Commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence. *Hollar v. Furniture Co.*, 48 N.C. App. 489, 269 S.E. 2d 667 (1980). The Industrial Commission has the duty and authority to resolve conflicts in the testimony whether medical or not, and the conflict should not always be resolved in favor of the claimant. *Rooks v. Cement Co.*, 9 N.C. App. 57, 175 S.E. 2d 324 (1970).

The Commission in the case at bar did not weigh the evidence. Based on the language in the Opinion and Award, the Commission apparently acted under the mistaken impression that the law required a finding for the plaintiff if there was *any* competent evidence to support such a finding. The authorities cited by the Commission to support this review of the evidence, especially *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E. 2d 747 (1981), apply only to the review of evidence by the Court of Appeals and the Supreme Court of this State.

When, as here, facts are found by the Commission under a misapprehension of the law, we are empowered to remand the case so that the evidence may be considered in its true legal light. *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 314 S.E. 2d 833 (1984). Therefore, the case is remanded to the Industrial Commission to make findings of fact and conclusions of law consistent with this opinion.

Reversed and remanded.

Judges WEBB and WELLS concur.

RAY H. BAYNARD v. SERVICE DISTRIBUTING CO., INC.

No. 8529SC685

(Filed 21 January 1986)

Unfair Competition § 1— supplier limited—retail price set—unfair trade practices

In an action to recover for restraint of trade and unfair trade practices, plaintiff's evidence that he was required to buy his gasoline from defendant and no one else and that defendant set plaintiff's retail prices was sufficient to establish per se violations of N.C.G.S. 75-5(b)(2) and (b)(7).

Judge PARKER concurring in the result.

APPEAL by plaintiff from *Griffin, Judge*. Judgment entered 17 January 1985. Heard in the Court of Appeals 3 December 1985.

Plaintiff brought this action in which he asserted causes of action for breach of contract, for restraint of trade and for unfair trade practices. At the close of plaintiff's evidence, the trial court allowed defendant's motion for a directed verdict on plaintiff's restraint of trade and unfair trade practices causes. The cause for breach of contract proceeded to judgment. Plaintiff has appealed from the granting of defendant's motion for a directed verdict.

J. Nat Hamrick for plaintiff-appellant.

Walker, Palmer & Miller, P.A., by Douglas M. Martin, for defendant-appellee.

WELLS, Judge.

The standards for testing a motion for a directed verdict, N.C. Gen. Stat. § 1A-1, Rule 50(a) of the Rules of Civil Procedure, are well established and need not be repeated here. At trial, plaintiff's evidence tended to show the following events and circumstances.

Defendant is a wholesaler of petroleum products, owning and operating retail service stations. In early December of 1981, defendant leased a Forest City service station to plaintiff for a specified monthly rental. Plaintiff operated the station under the lease until late April or early May of 1982 when defendant was forced to close his business at a loss and give up his lease. During the time he operated the station, plaintiff was told by defendant

that plaintiff had to buy his gasoline from defendant and defendant set plaintiff's retail price from time to time so as to limit plaintiff's profit on gasoline sales to two (2) cents per gallon and on kerosene sales to ten (10) cents per gallon. Plaintiff was not allowed to and did not buy gasoline from any other source. Due to the fact that defendant was charging its wholesale prices to plaintiff and at the same time setting plaintiff's retail prices, plaintiff was put at a competitive disadvantage and also lost some undetermined amount of money on his gasoline sales. The lease agreement between defendant and plaintiff contained no requirement that plaintiff purchase his gasoline from defendant or that plaintiff allow defendant to set his retail prices, but plaintiff encountered such conditions in his dealing with defendant.

Plaintiff contends that these activities, acts or practices on defendant's part constituted violations of N.C. Gen. Stat. §§ 75-5(b)(2) and 75-5(b)(7) (1981), which read as follows:

> (b) In addition to the other acts declared unlawful by this Chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:
>
> (2) To sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales.
>
> (7) Except as may be otherwise provided by Article 10 of Chapter 66, entitled "Fair Trade," while engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of such goods.

We hold that plaintiff's evidence, when viewed in the light most favorable to him, is sufficient to establish *per se* violations

of both G.S. 75-5(b)(2) and (b)(7), and that therefore the trial court erred in granting defendant's motion for a directed verdict. There must be a new trial.

Plaintiff also contends that the trial court erred in not allowing plaintiff an immediate appeal from the trial court's ruling on defendant's Rule 50(a) motion. Plaintiff has neither presented argument or cited any authority in support of this assignment and it is deemed abandoned.

New trial.

Judge ARNOLD concurs.

Judge PARKER concurs in the result.

Judge PARKER concurring in the result.

I concur in the result reached by the majority, but for a different reason. In my view plaintiff's evidence, taken in the light most favorable to plaintiff, is sufficient to raise the inferences that plaintiff (i) was coerced into buying his gasoline from defendant, (ii) was prohibited from setting his own prices for gasoline and (iii) was forced out of his lease with defendant for not paying his account. If these facts were found by the jury, they would, in my judgment, be sufficient to constitute a violation of G.S. 75-1.1. *See Wilder v. Squires*, 68 N.C. App. 310, 315 S.E. 2d 63, *disc. rev. denied*, 311 N.C. 769, 321 S.E. 2d 158 (1984); *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E. 2d 176 (1981), *affirmed and modified on other grounds*, 303 N.C. 675, 281 S.E. 2d 43 (1981).

I do not agree with the majority that the evidence is sufficient to establish a *per se* violation of G.S. 75-5(b)(2) and (b)(7). From the record in this case, I find no evidence that defendant sold gasoline to plaintiff "on condition" that plaintiff not deal in the goods of a competitor, a finding necessary to support a violation of G.S. 75-5(b)(2); nor do I find evidence of any "contract, obligation or agreement" as required by G.S. 75-5(b)(7).

MANTHIE EMANUEL v. ROBERT LEE EMANUEL AND VERLENE EMANUEL

No. 8516DC520

(Filed 21 January 1986)

Limitation of Actions § 11— deed by incompetent—action to set aside barred by statute of limitations

Summary judgment was properly granted for defendants in an action to set aside a deed based on incompetence at the time of execution where plaintiff brought her action seven years and approximately one month after the execution of the deed and approximately four and a half years after plaintiff admits the disability was removed. A cause of action to set aside a deed executed by a person *non compos mentis* must be brought within seven years of the day of execution or three years after the removal of disability, whichever expires later. N.C.G.S. 1-17, N.C.G.S. 1-52.

APPEAL by plaintiff from *Richardson, Judge*. Judgment entered 12 December 1984 in District Court, ROBESON County. Heard in the Court of Appeals 19 November 1985.

On 1 August 1975 plaintiff executed a deed to defendants. Plaintiff instituted this action on 2 September 1982 seeking to impose a constructive trust on the deeded property and to have the deed set aside as being null and void on the ground that plaintiff was incompetent to execute the deed on 1 August 1975. Plaintiff also alleged in her complaint that defendants knew of plaintiff's incompetency when the deed was executed. Based on the allegations of her incompetence on 1 August 1975 and defendants' knowledge of her condition, plaintiff sought $50,000 as punitive damages.

Defendants in their answer alleged plaintiff's claim for relief was barred by the appropriate statute of limitations. Following discovery, defendants moved for summary judgment.

According to plaintiff's own deposition, she became aware sometime in 1977 that she had signed the deed in question and that she had a claim against defendants. The record shows that plaintiff's complaint was not filed until 2 September 1982, more than seven years following the date of the execution of the deed in question on 1 August 1975, and more than four years after the date of 1 January 1978, the latest date upon which plaintiff could be determined to have regained her competence according to her deposition.

The trial court found that plaintiff's complaint alleged a cause of action against defendants for fraud and/or undue influence, and that plaintiff's claim for punitive damages was grounded in that claim. The trial court concluded that plaintiff's complaint was barred by the three-year statute of limitations as set forth in G.S. 1-17 and G.S. 1-52, and therefore granted defendants' motion for summary judgment.

From the judgment, plaintiff appeals to this Court.

Rogers and Bodenheimer, by Hubert N. Rogers, III, for plaintiff appellant.

McLean, Stacy, Henry & McLean, by H. E. Stacy, Jr., for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that her complaint sets forth a cause of action for the imposition of a constructive trust governed by a ten-year statute of limitations. The trial court concluded that plaintiff's action was one based on fraud and/or undue influence. Therefore the court applied the three-year statute of limitations as set out in G.S. 1-17 and G.S. 1-52 in granting defendants' motion for summary judgment.

We hold that neither plaintiff nor the trial court have relied upon the appropriate statute of limitations, but that even so the trial court properly granted defendants' motion for summary judgment.

Plaintiff's complaint alleges a cause of action to set aside a deed based on her incompetence at the time of the execution of the deed. *Ellington v. Ellington*, 103 N.C. 54, 9 S.E. 208 (1889). The deed of one *non compos mentis*, that is of one who is incompetent or insane, is *voidable* and not void. *Id.; Wadford v. Gillette*, 193 N.C. 413, 137 S.E. 314 (1927).

> Assuming the deed to be voidable, the possession under it, as color of title merely, in the absence of any indication of imperfection or infirmity apparent upon its face, would ripen into a good title after the expiration of seven years, unless within three years after the "coming of sound mind" . . ., the person so entitled commence his suit. . . ."

Ellington, 103 N.C. at 56-57, 9 S.E. at 208-09.

The cause of action to set aside a deed accrues upon the execution of the deed. *Id.* A cause of action to set aside a deed executed by a person *non compos mentis* must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. *Id.; see also* G.S. 1-17 and G.S. 1-38.

In the case at bar plaintiff brought her action seven years and approximately one month after the execution of the deed, and approximately four and one-half years after plaintiff admits the disability was removed. Thus, plaintiff's cause of action is barred by the appropriate statute of limitations as herein set forth.

Summary judgment in favor of defendants is

Affirmed.

Judges WELLS and PARKER concur.

GEORGE A. BRYANT, JR., AS EXECUTOR OF THE ESTATE OF GEORGE A. BRYANT, SR.; G. A. BRYANT, JR., AS ATTORNEY-IN-FACT FOR GEORGE A. BRYANT, SR., UNDER POWER OF ATTORNEY; AND GEORGE A. BRYANT, JR., INDIVIDUALLY v. WALTER W. PITT, JR., HARRY G. BRYANT, JOSEPH T. CARRUTHERS, III, MRS. JOHN J. SHORT, AND WILLIAM KEARNS DAVIS

No. 8521SC473

(Filed 21 January 1986)

Attorneys at Law § 10; Trial § 11— conduct of counsel—discipline—proper remedy

The trial court properly granted defendants' motions to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure where plaintiff sought disciplinary action against defendant attorneys for various actions taken or not taken in a civil action pending in another court, since it would have been improper for the trial court in the case at bar to discipline attorneys for conduct committed while practicing before another trial court in a case pending before that court, and plaintiffs' remedy lay either in a timely appeal upon the final disposition of the pending case, had it proceeded to unfavorable judgment, or in a subsequent proceeding, not in the commencement of a separate trial while the first trial was pending.

APPEAL by plaintiff from *Cornelius, Judge.* Order entered 3 January 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 October 1985.

George A. Bryant, Jr., for plaintiff appellant.

Bell, Davis & Pitt, P.A., by William K. Davis, Walter W. Pitt, Jr., and Joseph T. Carruthers, for defendant appellees.

BECTON, Judge.

The trial court granted defendants' motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and plaintiff appeals.

This action arose out of a civil action, *Short v. Bryant*, No. 83CVS4968, *appeal dismissed as interlocutory* (No. 8421SC923 N.C. Ct. App. 1984), *cert. denied* (No. 672P84 N.C. S.Ct. 1985), recently resolved by consent judgment in Forsyth County Superior Court. (Consent Judgment filed 17 September 1985.) George Bryant, Jr., Harry Bryant and Mrs. John Short are the children of George Bryant, Sr., who died in 1983. Prior to his death, George Bryant, Sr., gave George Bryant, Jr., power of attorney. After their father's death, Harry Bryant and Mrs. Short filed an action for an accounting by George Bryant, Jr., under the power of attorney and as executor of the estate of George Bryant, Sr. The plaintiffs amended their complaint in that action to allege mismanagement of funds by George Bryant, Jr.

It is not necessary to detail the proceedings in the trial court in *Short*. Suffice it to say there was extensive litigation over discovery matters, sanctions and other procedural matters. Apparently displeased with the results of his efforts before the trial court in *Short*, Mr. Bryant appealed certain adverse discovery rulings while the case was pending. His appeal was dismissed by this Court as premature (No. 8421SC923), and the Supreme Court denied Mr. Bryant's petition for certiorari (No. 672P84). Mr. Bryant then filed a separate action (the case at bar) against the attorneys representing the plaintiffs in *Short*, even though *Short* was pending, seeking (1) the removal of the plaintiffs' attorney in *Short* (Mr. Pitt and Mr. Carruthers); (2) the removal of defense counsel in the case at bar (Mr. Davis) and a prohibition on his practicing before the court as counsel in any action in which

George Bryant, Jr., is a party; (3) notification by this Court to the State Bar of the alleged misconduct of Pitt, Carruthers and Davis; and (4) reasonable attorney's fees. The trial court dismissed the action under Rule 12(b)(6). We affirm.[1]

As Mr. Bryant correctly notes, a Rule 12(b)(6) motion should not be granted unless it appears the plaintiff is entitled to no relief under any state of facts that could be proved in support of the complaint. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979). We also agree that a superior court has inherent authority to discipline attorneys. *In re Robinson*, 37 N.C. App. 671, 247 S.E. 2d 241 (1978); *cf. In re Northwestern Bonding Co., Inc.*, 16 N.C. App. 272, 192 S.E. 2d 33 (A trial court may discipline an attorney for misconduct occurring outside the courtroom context, upon sworn complaint of district attorney or by the court on its own motion, to protect the administration of justice.), *cert. denied and appeal dismissed*, 282 N.C. 426, 192 S.E. 2d 837 (1972). Nonetheless, we hold that it would have been improper for the trial court in the case at bar to discipline attorneys for conduct committed while practicing before another trial court in a case pending before that court.

The proper forum for Mr. Bryant to litigate the issues raised in the case at bar—the alleged misconduct of Carruthers, Davis and Pitt in *Short*, the allegedly dilatory filing of answers to interrogatories in *Short*, the alleged failure to completely answer interrogatories in *Short*, the filing of documents containing allegedly false statements in *Short*, and allegedly advising and causing witnesses to be unavailable in *Short*—was the trial court that was hearing *Short*. We realize that Mr. Bryant appealed several interlocutory rulings of the trial court in *Short* without success. Nevertheless, Mr. Bryant's remedy lay either in a timely appeal upon the final disposition of *Short*, had it proceeded to unfavorable judgment, or in a subsequent proceeding, not in the commencement of a separate trial while the first trial was pending. We conclude that the trial court did not err in granting defendant's motion to dismiss while *Short* was pending in another court.

1. The first issue is, of course, moot because *Short* is now resolved by consent judgment. The other issues remain justiciable.

When the trial court granted defendant's motion to dismiss, it denied defendants' motion for attorney's fees "without prejudice to defendants' right to pursue said motion at the conclusion of the appeal." We decline defendants' invitation to render an advisory opinion to address whether N.C. Gen. Stat. Sec. 6-21.5 (Cum. Supp. 1985) allows an award of attorney's fees to be based in part on the time and cost involved in an appeal.

For the reasons set forth above, we affirm the decision of the trial court.

Affirmed.

Judges WEBB and COZORT concur.

STATE OF NORTH CAROLINA v. JAMES CHARLES DAVIS

No. 8519SC968

(Filed 21 January 1986)

Criminal Law § 161— failure to follow App. Rule 10—heard in discretion of court—no prejudicial error

Even though defendant failed to follow Rule 10 of the North Carolina Rules of App. Procedure, the Court of Appeals reviewed defendant's assignments and arguments and found no prejudicial error.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 5 June 1985 in Superior Court, CABARRUS County. Heard in the Court of Appeals 13 January 1986.

Attorney General Thornburg, by Assistant Attorney General George W. Lennon, for the State.

Goodman, Carr, Nixon & Laughrun, by George V. Laughrun, II, for defendant appellant.

PHILLIPS, Judge.

Defendant's conviction of felonious larceny is attacked by six purported assignments of error, none of which indicate an acquaintanceship with the provisions of Rule 10 of the N.C. Rules of Appellate Procedure. They are stated as questions rather than

contentions; only two of them refer to an exception; and of the two exceptions referred to one is not to be found in the record or transcript and the other is unnumbered and at the end of two pages of questions and answers that defendant now deems to be prejudicial. For that matter, neither the record nor transcript contains a numbered exception to any ruling by the court. Defendant's purported fourth assignment of error, typical of the others, is as follows:

> IV. DID THE TRIAL COURT ERR WHEN IT ALLOWED TESTIMONY CONCERNING THE DEFENDANT'S PREVIOUS INCARCERATION IN THE STATE OF NORTH CAROLINA'S CASE IN CHIEF?
>
> Assignment of Error No. 4
>
> Exception No. 2 (T pp 76-95)

Yet pages 76 through 95 of the transcript, which contain upwards of a hundred and fifty questions and answers about many different things, only a handful of which were objected to, are unblemished by the word "exception." As Appellate Rule 10 makes plain, these assignments raise no legal question for appellate review and the appeal is dismissible. That the rules of appellate procedure are mandatory, court trials are not to be lightly set aside, and specificity is required of those who would have the process repeated is not just idle legal rhetoric; these principles are fundamental to the efficiency and fairness of our litigation system and the necessity of adhering to them has been pointed out to the profession many times, as the lengthy annotation to Appellate Rule 10 in the current volumes of the North Carolina General Statutes attests. Several of the points covered by the annotation pertinent to this appeal are well but succinctly discussed in *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970). Handling appeals is a grave professional responsibility; one that is neglected all too often in this state, as our reports show. Careful lawyers discharging such responsibilities always repair to the appellate rules and apposite court decisions, and, if examples are needed, either follow the recommended forms contained in the appendix to the appellate rules or others that have expedited and survived appellate review. Such forms are legion and readily available in the archives of every Superior Court in the State, as well as in the files of most lawyers with much appellate experience.

Nevertheless, in our discretion we have chosen to consider all of the purported assignments and the arguments supporting them. In doing so all 27 pages of the record and all 176 pages of the trial transcript have been examined for prejudicial error, but none was found.

No error.

Judges WELLS and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 JANUARY 1986

STANLEY v. WANDA WATSON AND OCCUPANTS No. 8510DC670	Wake (84CVM9203)	Affirmed
STATE v. DYE No. 8520SC660	Moore (84CRS7808) (84CRS7809)	No Error
STATE v. LORUSSO No. 852SC478	Hyde (79CRS46)	Affirmed

FILED 21 JANUARY 1986

BERICO FUELS, INC. v. ROYAL VILLA, INC. No. 8518SC462	Guilford (83CVS7798)	Modified, affirmed and remanded
CENTRAL FIDELITY BANK v. BENDER No. 851SC426	Currituck (84CVS122)	Affirmed
HANEY v. STEPHENSON No. 8528DC946	Buncombe (85CVD451)	Affirmed
LOCKAMY v. BOLTON No. 854DC513	Sampson (80CVD137)	Affirmed in part; vacated in part and remanded
PROCTOR v. PROCTOR No. 8522DC355	Iredell (81CVD753)	Affirmed
RHONEY v. RHONEY No. 8525DC637	Burke (83CVD28)	Affirmed in part; remanded in part
ROSE v. ROSE No. 858SC365	Wayne (83CVS1139)	No Error
STATE v. BURNS No. 8525SC240	Caldwell (84CRS2982)	No Error
STATE v. CANNON No. 853SC938	Pitt (84CRS13716)	No Error
STATE v. EPPS No. 856SC255	Northampton (84CRS1106) (84CRS1192)	No Error
STATE v. JOHNSON No. 8515SC978	Alamance (84CRS10339)	No Error
STATE v. McKINNON No. 8525SC953	Catawba (84CRS18775)	No Error

STATE v. ROBERTS No. 8526SC954	Mecklenburg (83CRS71965)	No Error
STATE v. ROBERTS No. 8514SC299	Durham (83CRS38649) (83CRS38650) (83CRS38651) (83CRS38652)	New Trial
STATE v. SHARPE No. 8528SC766	Buncombe (84CRS16650)	No Error
TAYLOR v. HAWKINS No. 853SC582	Craven (83CVS612)	No Error
WELLS v. BULOW No. 8522SC584	Davidson (84CVS0979)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 4. Hearings of Administrative Agencies

A hearing officer in a contested certificate of need case did not err by precluding testimony of petitioner's expert witnesses. *Mt. Olive Home Health Care Agency, Inc. v. N.C. Dept. of Human Resources*, 224.

§ 5. Availability of Review by Statutory Appeal

The State of Tennessee was an "aggrieved person" who could seek judicial review of a consent special order issued by the Environmental Management Commission to a corporation allowing it to discharge effluents into the Pigeon River. *State of Tennessee v. Environmental Management Comm.*, 763.

A consent special order issued by the Environmental Management Commission to a corporation allowing it to discharge effluents into the Pigeon River was a "contested case" within the meaning of G.S. 150A-43. *Ibid.*

APPEAL AND ERROR

§ 4. Theory of Trial in Lower Court

The ten-day time limit to give notice of appeal was not tolled by defendants' motion to amend judgment where defendants thereafter withdrew their motion to amend and there was never a judicial determination of the motion. *Landin Ltd. v. Sharon Luggage Ltd.*, 558.

§ 7.1. Estoppel to Appeal Favorable Judgment

Plaintiff employee was not an aggrieved party and had no standing to appeal the trial court's decision to allow the jury to decide whether plaintiff's employer's negligence concurred with that of defendant in causing plaintiff's injuries. *Absher v. Vannoy-Lankford Plumbing Co.*, 620.

§ 24. Necessity for Objections, Exceptions and Assignments of Error

Appeal is dismissed for failure to comply with appellate rules where appellants failed to place any exceptions or assignments of error in the record on appeal and seek to appeal rulings on a number of separate causes of action and to argue rulings on their requests for discovery. *Ellis v. Williams*, 433.

Defendants could not raise on appeal an alleged erroneous instruction where they did not object at trial. *Martin v. Hare*, 358.

§ 30.2. Sufficiency of Assignments of Error

Plaintiff's assignment of error was overruled where he assigned error to the exclusion of testimony but did not include in the record what the testimony would have been. *Hicks v. Reavis*, 315.

§ 42. Conclusiveness of Record

The trial court did not err by refusing to include in the record on appeal an affidavit filed by plaintiff where the affidavit was not before the court or considered when the court passed on plaintiff's motion for summary judgment. *Land-of-Sky Regional Council v. Co. of Henderson*, 85.

ASSAULT AND BATTERY

§ 14.1. Sufficiency of Evidence of Assault with Deadly Weapon

There was no error in a prosecution for assault with a deadly weapon inflicting serious injury in the denial of defendant's motion to dismiss at the close of the State's evidence and his motion to set aside the verdict. *S. v. Lilley*, 100.

ASSAULT AND BATTERY — Continued

§ 14.3. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury

The evidence was insufficient to support defendant's conviction of felonious assault of his mother. *S. v. Hollingsworth*, 578.

§ 15.2. Instructions on Assault with Deadly Weapon Inflicting Serious Injury

There was no prejudicial error in a prosecution for assault with a deadly weapon inflicting serious injury where the trial court erroneously instructed the jury that when the victim entered defendant's bedroom, he saw defendant holding a gun pointed in the victim's sister's direction. *S. v. Lilley*, 100.

§ 15.6. Instructions on Self-Defense

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by instructing the jury that one who is the aggressor in an altercation cannot claim self-defense unless he abandons the fight. *S. v. Lilley*, 100.

The trial court's instruction on the rule of restoration of the right to act in self-defense by an aggressor was sufficient to avoid plain error. *Ibid.*

§ 15.7. Instruction on Self-Defense not Required

There was no plain error in a prosecution for assault with a deadly weapon inflicting serious injury in the trial court's failure to instruct the jury that defendant had no duty to retreat in his own home. *S. v. Lilley*, 100.

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by failing to give an instruction on the right to defend one's habitation. *Ibid.*

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

The trial court did not err by dismissing claims of negligence against attorneys for erroneous deed preparation where the attorneys' negligence did not make plaintiffs' position any worse than it would otherwise have been. *Schuman v. Investors Title Ins. Co. and Schuman v. Beemer*, 783.

§ 7. Fees Generally

The trial court did not abuse its discretion in denying attorney fees to the prevailing party in an action for unfair trade practices. *Varnell v. Henry M. Milgrom, Inc.*, 451.

§ 10. Disbarment Generally

It would have been improper for the trial court in the case at bar to discipline attorneys for conduct committed while practicing before another trial court in a case pending before that court. *Bryant v. Pitt*, 801.

AUTOMOBILES AND OTHER VEHICLES

§ 2.4. Revocation of License; Proceedings Related to Drunk Driving

Petitioner's refusal to provide a third necessary breath sample could properly be deemed a willful refusal so as to support revocation of her driver's license. *Watson v. Hiatt, Com'r of Motor Vehicles*, 609.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 5. Sale and Transfer of Titles to Vehicles Generally

The U.C.C. rather than the M.V.A. controls in determining whether the purchaser of an automobile or a finance company which has an inventory security agreement with the dealer will bear the loss caused by the dealer's failure to pay the finance company money received from the purchaser. *N. C. National Bank v. Robinson*, 1.

The evidence was sufficient to support a determination by the Commissioner of Motor Vehicles that respondent automobile dealer's poor sales performance was primarily due to economic or market factors beyond his control and that petitioner's failure to renew its franchise agreements with respondent was without cause. *General Motors Corp. v. Kinlaw*, 521.

The Commissioner of Motor Vehicles exceeded his authority in ordering petitioner to enter into a five-year motor vehicle dealer sales agreement with respondent. *Ibid.*

§ 5.4. Sale of Vehicles; Protection of Bona Fide Purchasers

An automobile purchaser may be a "buyer in the ordinary course of business" as that term is used in the U.C.C. even though the certificate of title has not yet been reassigned. *N. C. National Bank v. Robinson*, 1.

Where a used automobile was held in inventory and displayed for sale by a dealer with no warning that defendant finance company had a security interest in it under an inventory security agreement, and the dealer failed to pay the finance company for the vehicle when it was sold, the purchasers took free of any security interest defendant finance company may have had. *Ibid.*

§ 46. Opinion Testimony as to Speed

The trial court did not err in an action arising from an automobile collision by admitting testimony that defendants' car had been traveling at a high rate of speed but excluding testimony that the car had been going 85 or 100 miles per hour where the witnesses had only heard defendants' car or caught a glimpse of the headlights. *Hicks v. Reavis*, 315.

The trial court did not err in an action arising from an automobile collision by excluding the testimony of a highway patrolman regarding the speed of defendants' car. *Ibid.*

§ 90.10. Failure to Instruct on Negligence

The trial court erred in failing to recapitulate evidence that defendant was driving to the left of the center line of the highway at the time of an accident. *Dobson v. Honeycutt*, 709.

§ 91.3. Issues as to Willful and Wanton Conduct

The trial court erred in directing verdicts for defendants on the ground that plaintiff was contributorily negligent in an intersection accident where the evidence did not establish plaintiff's contributory negligence as a matter of law but presented a jury question on that issue, and where plaintiff's evidence of defendants' speed competition on the highway would permit a finding of willful or wanton negligence by defendants as a proximate cause of the accident. *Lewis v. Brunston*, 678.

§ 113.1. Sufficiency of Evidence of Homicide

The trial court did not err in denying defendant's motion to dismiss a death by vehicle charge, though defendant drove within the posted speed limit, where there

AUTOMOBILES AND OTHER VEHICLES — Continued

was evidence that she was driving faster than was reasonable and prudent under existing conditions. *S. v. Stroud*, 599.

§ 126.3. Manner of Administration of Breathalyzer Test

The record established that a chemical analyst followed the required operational procedure when he collected two breath samples from defendant with a breathalyzer. *S. v. Lockwood*, 205.

A regulation of the Commission for Health Services instructing a breathalyzer operator to collect a second breath sample when the words "blow sample" reappear on the machine complied with a statute requiring the Commission to designate the time requirement between the first and second breath test. *Ibid.*

The trial court did not err in a prosecution for manslaughter, DWI, and driving on the wrong side of an interstate highway by allowing an expert witness to testify that the average person displayed a certain rate of decline in blood alcohol concentration and that defendant's BAC would have been approximately .13 at the time of the accident. *S. v. Catoe*, 167.

The trial court did not err in allowing an officer to testify that a chemical analysis of defendant's breath showed that defendant's alcohol concentration was "0.14 grams of alcohol per 210 liters of breath" rather than "0.14 grams of alcohol per 100 milliliters of blood." *S. v. Midgett*, 387.

§ 130. Punishment for Drunk Driving

The finding of a blood alcohol content of 0.20 is not required for the court to make a finding of "gross impairment" as an aggravating factor for driving while impaired. *S. v. Harrington*, 39.

BAILMENT

§ 3.3. Sufficiency of Evidence

Plaintiffs established a prima facie case of bailment and the trial court was required to instruct on that issue in an action arising from the overland transportation of a boat. *Martin v. Hare*, 358.

BURGLARY AND UNLAWFUL BREAKINGS

§ 6. Instructions

The trial court did not commit plain error in a prosecution for felonious breaking or entering by omitting the element of intent to commit larceny from its final mandate. *S. v. Litchford*, 722.

CONSPIRACY

§ 1. Elements of Civil Conspiracy

A civil action may not be maintained for conspiracy to give false testimony. *Hawkins v. Webster*, 589.

§ 4.1. Sufficiency of Indictment for Criminal Conspiracy

An indictment sufficiently alleged the offense of conspiracy to forge an endorsement on a tax refund check. *S. v. Nicholson*, 398.

§ 5.1. Admissibility of Statements of Coconspirators

The trial court erred in admitting hearsay statements made by a coconspirator a week after the conspiracy had ended that he could get cocaine from defendant. *S. v. Gary*, 29.

CONTRACTS — Continued

§ 34. Sufficiency of Evidence of Interference with Contract

The trial court properly entered summary judgment for the individual defendant in plaintiffs' action for malicious interference with insurance agency contracts. *Uzzell v. Integon Life Ins. Corp.*, 458.

COUNTIES

§ 2. Governmental Powers in General

Summary judgment was properly granted for plaintiff in an action by a regional planning and economic development commission to collect contributions due from a county. *Land-of-Sky Regional Council v. Co. of Henderson*, 85.

CRIMINAL LAW

§ 23. Guilty Plea

A plea agreement entered into between defendant and the U. S. Attorney that no additional charges would be brought against defendant did not entitle him to immunity in a driving while impaired case. *S. v. Midgett*, 387.

§ 26.5. Former Jeopardy; Same Transaction Violating Different Statutes

Defendant's right against double jeopardy was not violated by the imposition of sentences against defendant for offenses of trafficking by possession and trafficking by delivery based on the same transaction. *S. v. Thrift*, 199.

§ 29.1. Procedure for Raising and Determining Issue of Mental Capacity

The trial court did not err by denying defendant's motion for an independent psychiatric exam where defendant had received a psychiatric evaluation at Dix Hospital. *S. v. Bush*, 686.

§ 33.2. Evidence as to Motive

The trial court did not err in a prosecution for armed robbery by instructing on motive where there was evidence that defendant had attempted to borrow money prior to the crime. *S. v. Bush*, 686.

§ 34.1. Inadmissibility of Evidence of Defendant's Guilt of other Offenses to Show Defendant's Character or Disposition to Commit Offense

The trial court in a prosecution for felonious breaking or entering and larceny erred in allowing the prosecutor to question an accomplice who had entered into a plea bargain about other break-ins he had committed with either of the defendants. *S. v. McKoy*, 531.

The trial court in a robbery case erred in allowing the State to elicit testimony that defendant was involved in a shooting unrelated to the crime for which he was being tried. *S. v. Monroe*, 661.

§ 42.4. Identification of Object and Connection with Crime; Weapons

The trial court did not commit prejudicial error in a prosecution for armed robbery and assault by allowing the State to have a hatchet marked as an exhibit and displayed to the jury. *S. v. Bush*, 686.

§ 43. Photographs

The trial court did not err in a prosecution for possession with intent to manufacture and sell marijuana and cocaine by admitting photographs depicting defendant in close proximity to marijuana plants or holding or smoking marijuana

CRIMINAL LAW — Continued

§ 75.7. Confession; Requirement that Defendant Be Warned of Constitutional Rights; What Constitutes Custodial Interrogation

Defendant was subjected to custodial interrogation although officers never planned to arrest him that day and returned him to his home after he signed a confession, and defendant's oral confession made before the Miranda warnings were given to him was inadmissible. *S. v. Harvey*, 235.

§ 75.11. Confession; Waiver of Constitutional Rights; Sufficiency of Waiver

Where defendant's oral confession was inadmissible because defendant was subjected to custodial interrogation without being given the Miranda warnings, a written confession prepared by an officer and signed by defendant after he had been given the Miranda warnings was also inadmissible. *S. v. Harvey*, 235.

§ 76.4. Determination of Admissibility of Confession; Voir Dire Hearing; Evidence

The trial court has the discretion to deny summarily a motion to suppress inculpatory statements because the motion failed to set forth adequate legal grounds. *S. v. Harvey*, 235.

The trial court did not abuse its discretion in reopening the evidence on voir dire for the limited purpose of hearing testimony with respect to the nature of the rights stated by the investigating officer to defendant. *S. v. Stroud*, 599.

§ 76.5. Determination of Admissibility of Confession; Voir Dire Hearing; Findings Generally

The trial judge did not err in filing a written order suppressing defendant's in-custody statement after court had adjourned where the court had previously announced its ruling in open court. *S. v. Edwards*, 605.

§ 76.8. Confession; Voir Dire Hearing; Evidence Sufficient to Support Findings with Respect to Warning as to and Waiver of Constitutional Rights

The trial court could properly rule a confession inadmissible based on a negative finding as to the credibility and demeanor of the State's only witness at the suppression hearing. *S. v. Harvey*, 235.

§ 79. Declarations of Coconspirators

A coconspirator's statement immediately following delivery of cocaine that it was good stuff because he had had some earlier in the day occurred close enough in time to the criminal acts to be admissible. *S. v. Gary*, 29.

§ 79.1. Declarations of Coconspirators Subsequent to Commission of Crime

The trial court erred in admitting hearsay statements made by a coconspirator a week after the conspiracy had ended that he could get cocaine from defendant. *S. v. Gary*, 29.

Evidence that a non-testifying codefendant had been charged and tried for narcotics offenses violated the rule barring evidence of convictions of non-testifying codefendants even though evidence of the result of the trial was not introduced. *Ibid.*

§ 86.3. Credibility of Defendant; Prior Convictions

The trial court did not err in a prosecution for murder by permitting the prosecution to question defendant about the facts of a prior assault conviction where defendant had admitted the conviction on direct examination. *S. v. Rathbone*, 58.

CRIMINAL LAW — Continued

§ 88.3. Cross-examination as to Collateral Matters

In a prosecution of defendant for taking indecent liberties with his 15-year-old stepdaughter, the trial court erred in permitting the prosecutor to ask defendant questions concerning his sexual abuse of his 5-year-old daughter who had been ruled incompetent to testify. *S. v. Flannigan*, 629.

§ 89.10. Impeachment; Prior Convictions

The trial court did not err in failing to declare a mistrial when the prosecutor asked defendant numerous questions relating to the details of defendant's admitted prior convictions. *S. v. Harrington*, 39.

§ 91. Speedy Trial

A prison inmate was not entitled to have a felonious larceny charge pending against him dismissed for failure of the State to try him on the charge within six months of his request to the clerk of court for a speedy trial where the inmate failed to serve a copy of the request on the prosecutor as required by statute. *S. v. Hege*, 435.

§ 92.5. Severance

The trial court did not err in a prosecution for conspiracy to procure drugs for an inmate and procuring drugs for an inmate by denying defendant's motion to sever his trial from a codefendant's trial. *S. v. Seagroves*, 49.

§ 98.3. Removal and Custody of Defendant during Trial

Defendant was not prejudiced when one juror saw defendant being moved from the courtroom to the jail in handcuffs. *S. v. Boykin*, 572.

§ 99.1. Court's Expression of Opinion on the Evidence during Trial

The trial judge did not express an opinion on the case when he gave an instruction informing the jury of the elements of the crime and the elements of self-defense after counsel made their opening statements but before any evidence was presented. *S. v. Tabron*, 424.

§ 101. Conduct or Misconduct Affecting Jurors

The trial court did not abuse its discretion in denying defendant's motion for a mistrial based on conduct of defendant's husband who slammed his hand on the table and stated, "My wife ain't a liar" in reaction to a statement by the prosecutor regarding distortion of the truth. *S. v. Stroud*, 599.

§ 113.3. Charge on Subordinate Feature of Case

The trial court did not err in a prosecution for armed robbery and assault by denying defendant's request for an instruction on identification. *S. v. Bush*, 686.

§ 113.7. Charge as to Acting in Concert

The evidence in a prosecution for homicide was sufficient to support an instruction on "acting in concert." *S. v. Moxley*, 551.

§ 128.2. Particular Grounds for Mistrial

The trial court did not err by denying defendant's motions for mistrials where the court sustained defendant's objections and immediately instructed the jury to disregard the district attorney's questions and argument. *S. v. Johnson*, 68.

The trial court did not err in a prosecution for conspiracy to procure drugs for an inmate and procuring drugs for an inmate by denying defendant's motion for a

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

The trial court did not err by refusing defendant's request for a one and one-half hour continuance of the sentencing hearing where defendant offered no reason why the hearing should not proceed. *S. v. Bush*, 686.

The trial court did not err when sentencing defendant for armed robbery and assault by failing to find as a mitigating factor that defendant had a history of using drugs. *Ibid.*

The trial court did not err by finding as an aggravating factor that the offense was especially heinous, atrocious or cruel where defendant assaulted and robbed his mother with a hatchet. *Ibid.*

A trial court in a resentencing hearing may find an aggravating factor not found in the original sentencing hearing. *S. v. Daye*, 753.

On resentencing, the trial court must make a new determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation. *Ibid.*

The trial court did not err in a felonious breaking or entering and felonious larceny prosecution by failing to find as a non-statutory mitigating factor that the victim suffered only insubstantial loss. *S. v. Litchford*, 722.

§ 141.1. Sentence for Repeated Offenses; Manner of Determining whether Defendant Has Suffered Prior Convictions

There was no error in requiring defendant to stand trial as an habitual felon within twenty days of indictment. *S. v. Winstead*, 180.

§ 142.3. Particular Conditions of Probation Held Proper

A condition of probation for driving while impaired that defendant not go to any business or private club licensed for the sale or on premises consumption of alcoholic beverages between 8:00 p.m. and 6:00 a.m. was valid. *S. v. Harrington*, 39.

§ 142.4. Particular Conditions of Probation Held Improper

Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence, and there was no evidence to support a recommendation that defendant pay $5,000 restitution as a condition of work release. *S. v. Daye*, 753.

§ 143.10. Violation of Probation Condition as to Payments

The trial court's finding "from evidence presented" that defendant's failure to make payments required by a probation judgment was willful and without lawful excuse was sufficient to show that the trial court considered and evaluated defendant's evidence. *S. v. Jones*, 507.

§ 143.12. Sentence upon Revocation of Probation

Where the trial court found from the evidence presented that defendant's failure to make payments required by a probationary judgment was willful and without lawful excuse, the court was not required to consider alternate means of punishment other than imprisonment. *S. v. Jones*, 507.

§ 149.1. Appeal by State not Permitted

The State had no right to appeal from the trial court's order granting defendant's motion to dismiss made after the court had granted a mistrial because of a deadlocked jury. *S. v. Ausley*, 791.

CRIMINAL LAW — Continued

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General

The Court of Appeals reviewed defendant's assignments and arguments even though defendant failed to follow Rule 10 of the North Carolina Rules of App. Procedure. *S. v. Davis*, 804.

§ 162. Objections and Assignments of Error to Evidence

The trial court did not err in a murder prosecution by admitting testimony concerning defendant's assault on a friend of the victim. *S. v. Rathbone*, 58.

§ 163. Necessity for Objections to Charge

Where defendant failed to object to the instructions at trial, alleged erroneous instructions will be reviewed only for the limited purpose of determining whether "plain error" was committed. *S. v. Tabron*, 424.

§ 165. Exceptions and Assignments of Error to Jury Argument

Defendants could not complain of alleged errors in the prosecutor's final argument where neither defendant objected at trial to the argument. *S. v. Moxley*, 551.

DAMAGES

§ 1. Nominal Damages

Failure to submit the issue of negligent repairs to the jury when only nominal damages were available was not prejudicial error. *The Asheville School v. Ward Construction, Inc.*, 594.

§ 17.8. Punitive Damages; Injury to Real or Personal Property

The trial court did not err in an action for damages to a houseboat by refusing to instruct the jury on loss of use damages. *Martin v. Hare*, 358.

DECLARATORY JUDGMENT ACT

§ 4. Availability of Remedy in Particular Controversies

A controversy justiciable under the Declaratory Judgment Act was presented as to whether plaintiffs are bound by anti-competitive provisions in promissory notes received in the sale of a newspaper's assets. *Sharpe v. Park Newspapers of Lumberton*, 275.

DIVORCE AND ALIMONY

§ 8. Abandonment

The trial court did not err in an action for alimony by concluding that defendant had abandoned his wife where there was no dispute that defendant had left the marital home with no intention to return. There was no justification for defendant's departure, and the wife did not consent to the separation. *Patton v. Patton*, 247.

§ 16.8. Alimony; Findings as to Ability to Pay

The trial court did not err by not making a specific finding as to defendant's income in setting child support and alimony. *Patton v. Patton*, 247.

§ 19. Modification of Alimony Decree Generally

The trial court's order adding language to a consent judgment making the wife responsible for payments on the mortgage only while she resided in the house and

DIVORCE AND ALIMONY — Continued

providing that "net proceeds" rather than "proceeds" after sale of the house be divided equally did not amount to a correction of mere clerical errors but improperly granted plaintiff substantive relief. *Hinson v. Hinson*, 613.

§ 19.1. Jurisdiction to Modify Alimony Decree

North Carolina had statutory jurisdiction over plaintiff's motion to reduce or terminate his alimony obligations to a defendant who lived in New Jersey, but defendant did not have sufficient minimum contacts with North Carolina so that exercise of personal jurisdiction over her was consistent with due process. *Schofield v. Schofield*, 657.

§ 19.5. Effect of Consent Decrees on Alimony Orders

Provision of a consent judgment requiring the husband to pay the wife's medical expenses was not inconsistent with a provision stating that no claim for support was made and was properly entered by the court even though such issue was outside the pleadings in the original divorce action. *Davis v. Davis*, 464.

§ 22. Child Support Generally

In a Uniform Reciprocal Enforcement of Support Act action, the Attorney General is the attorney of record for petitioner obligee for purposes of appeal, but the better practice is for the appellant's brief to be served upon both the Attorney General and the district attorney. *Grimes v. Grimes*, 208.

§ 24.4. Enforcement of Child Support Orders

A finding that "defendant has had the ability to comply" is insufficient to support the conclusion that defendant had the present ability to comply with a civil contempt order requiring him to pay $1,000 of a child support arrearage. *Lee v. Lee*, 632.

§ 24.9. Findings in Child Support Orders

The trial court's findings were not sufficient in an action under the Uniform Reciprocal Enforcement of Support Act. *Grimes v. Grimes*, 208.

§ 27. Attorney's Fees Generally

The trial court did not err in an action for alimony, child support, equitable distribution, and attorney fees by awarding counsel fees to one of the wife's attorneys for services rendered in connection with the child support and alimony aspects of the hearing even though a counsel fee had been awarded to the wife at an earlier hearing; however, the award was not supported by proper factual findings. *Patton v. Patton*, 247.

§ 30. Equitable Distribution

The trial court in an action for equitable distribution did not err by finding that there was a disparity in the parties' incomes and concluding that an equal division of marital property would not be equitable where the wife's income consisted of Aid to Families with Dependent Children, food stamps, and child support paid by the husband. *Bradley v. Bradley*, 150.

The trial court's findings in an action for equitable distribution regarding plaintiff's health, capacity to work, and loss of weight were supported by plaintiff's testimony even though no expert medical testimony was presented. *Ibid.*

The trial court did not err in an action for equitable distribution in its valuation of defendant husband's business. *Patton v. Patton*, 247.

The trial court did not abuse its discretion by ordering an unequal distribution of marital property. *Ibid.*

DIVORCE AND ALIMONY — Continued

The trial court could properly consider depreciation in the value of chicken houses which constituted plaintiff's separate property in dividing the marital property, but the court's failure to find the value of the chicken houses following the marriage and the amount of money needed to repair them at the time of the parties' separation made it impossible for the court on appeal to determine whether the trial court erred in giving plaintiff a 15% credit in the division of marital property. *Johnson v. Johnson*, 787.

ELECTRICITY

§ 6. Repair of Wires

Plaintiff failed to show that his injuries were caused by defendant's negligence when a ½ inch bolt in a puller-tensioner supplied by defendant to plaintiff's employer broke while being used to install wire onto power poles and plaintiff was injured when he installed an inadequate replacement bolt which also broke. *Surrette v. Duke Power Co.*, 647.

EQUITY

§ 1.1. Nature of Equity and Maxims

The clean hands doctrine was not applicable in an action to impose a purchase money resulting trust though there was evidence that plaintiff and deceased defendant were cohabiting illicitly and had planned a deceptive scheme to secure financing. *Ray v. Norris*, 379.

ESTOPPEL

§ 4. Equitable Estoppel

A subcontractor's lender could not assert promissory estoppel as a ground for recovery under a modified agreement between the contractor and the subcontractor that checks due the subcontractor would be payable jointly to the subcontractor and the lender. *Lee v. Paragon Group Contractors*, 334.

§ 8. Sufficiency of Evidence

A jury question was presented as to whether plaintiff lessor's refusal of defendant lessees' checks estopped plaintiff from terminating a lease on the ground of non-payment of rent. *Homeland, Inc. v. Backer*, 477.

EVIDENCE

§ 11.5. Transactions with Decedent; Persons Disqualified by Statute

Testimony regarding statements plaintiff's deceased husband made in the witness's presence to a bank representative about a one hundred percent loan to build a house did not violate the Dead Man's Statute. *DeHart v. R/S Financial Corp.*, 93.

§ 32.2. Application of the Parol Evidence Rule

The parol evidence rule was not violated by testimony in an action for usury that the base amount of a loan was $5,600 at a six percent interest rate and that the actual interest rate for the face amount of the note was ten percent. *DeHart v. R/S Financial Corp.*, 93.

EVIDENCE — Continued

§ 33. Hearsay Evidence in General

Testimony by a witness regarding statements plaintiff's deceased husband made in his presence to a bank representative about a one hundred percent loan to build a house was not inadmissible hearsay. *DeHart v. R/S Financial Corp.*, 93.

§ 36. Hearsay; Admissions by Agents or Representatives

The Industrial Commission erred in a tort claim action by excluding answers to interrogatories which were not verified but which were signed by the Assistant Attorney General representing defendant. *Karp v. University of North Carolina*, 214.

§ 48.3. Failure to Object to Qualification of Expert

The trial court did not err in an action for damages to a boat being hauled overland by admitting the testimony of an expert in marine surveying on the question of whether the boat was properly hauled. *Martin v. Hare*, 358.

EXECUTION

§ 1. Property Subject to Execution

An installment land contract executed by the record owners to defendant and his present wife created a tenancy by the entirety so as to preclude a judgment creditor of one spouse from subjecting the property to execution and sale. *Foy v. Foy*, 188.

EXECUTORS AND ADMINISTRATORS

§ 37. Costs and Attorney's Fees; Right to Compensation

The trial judge did not err by awarding fees and expenses to a successor administrator from wrongful death proceeds. *In re Lessard*, 196.

FALSE IMPRISONMENT

§ 1. Nature and Essentials of Right of Action

A merchant who detained customers was not immune from civil liability under G.S. 14-72.1(c). *Ayscue v. Mullen*, 145.

§ 2.1. Sufficiency of Evidence

Motions for a directed verdict and judgment n.o.v. on claims of false imprisonment were properly denied as to both plaintiffs. *Ayscue v. Mullen*, 145.

§ 3. Damages

The trial court erred by denying defendants' motions for a directed verdict or judgment n.o.v. on the issue of punitive damages in an action by customers who had been detained by a merchant. *Ayscue v. Mullen*, 145.

FORGERY

§ 2.2. Sufficiency of Evidence

There was sufficient evidence of forging and uttering an endorsement on a check despite the fact that the State never introduced the check into evidence. *S. v. Nicholson*, 398.

FRAUD

§ 3. Material Misrepresentation of Past or Subsisting Fact

The trial court properly entered summary judgment for defendants in plaintiffs' claim based on fraud in inducing them to terminate old insurance agency contracts and enter into new contracts. *Uzzell v. Integon Life Ins. Corp.*, 458.

GRAND JURY

§ 3.3. Sufficiency of Evidence of Racial Discrimination

Evidence that every grand jury foreman in the county for the past thirty years has been white and that 47% of the county population is black did not require dismissal of the indictments against a black defendant on equal protection grounds. *S. v. Gary*, 29.

GUARANTY

§ 1. Generally

There was no merit to defendant's contention that the guaranty in question applied only to debts incurred during 1970 pursuant to a 1970 contract between plaintiff and the principal debtor or only to debts incurred prior to April 1981 when a new contract was entered between plaintiff and the principal debtor, that a change in credit terms and an increase in the amount of credit extended discharged him, or that he was entitled to an accounting upon request. *Amoco Oil Co. v. Griffin*, 716.

§ 2. Actions to Enforce Guaranty

The trial court did not err in failing to find that the guaranty in question was signed through mutual mistake of fact. *Amoco Oil Co. v. Griffin*, 716.

There was no merit to defendant's contention that an action on a continuing guaranty was barred by the statute of limitations or laches. *Ibid.*

HOMICIDE

§ 9. Self-Defense Generally

The trial court did not err in a prosecution for murder by denying defendant's motion to dismiss based on self-defense or defense of his wife. *S. v. Rathbone*, 58.

§ 15. Relevancy and Competency of Evidence in General

Evidence was properly admitted regarding the victim's physical appearance at the scene and in the hospital. *S. v. Moxley*, 551.

§ 21.4. Sufficiency of Evidence of Identity of Defendant

The evidence was insufficient to support defendant's conviction of second degree murder of a man whose body was found in a motel room. *S. v. Johnson*, 729.

§ 21.9. Sufficiency of Evidence of Manslaughter

The evidence in a homicide case was sufficient to go to the jury on the question of whether defendant was the aggressor or whether he used excessive force. *S. v. Moxley*, 551.

§ 28.3. Instructions on Self-Defense; Aggression or Provocation by Defendant

There was no error in a prosecution for murder where the trial court instructed the jury that defendant was not entitled to the benefit of self-defense if he was the aggressor or if he used excessive force. *S. v. Rathbone*, 58.

INSURANCE

INSURANCE — Continued

§ 147.1. Aviation Liability Insurance

Provisions of an aircraft liability policy created an ambiguity as to whether coverage was provided for a bank's claim against the insured for damage to negotiable instruments in a crash of the insured's airplane, and the ambiguity must be construed against the insurer. *Southeast Airmotive Corp. v. U. S. Fire Ins. Co.*, 418.

§ 150. Professional Liability Insurance

Damages caused by fraudulent investment activities of an accountant were not covered under the accountant's professional liability policy. *Mastrom, Inc. v. Continental Casualty Co.*, 483.

INTEREST

§ 2. Time and Computation

The trial court properly allowed interest on the amount of the jury award less the amount plaintiff had received in workers' compensation rather than on the entire amount of the jury award. *Absher v. Vannoy-Lankford Plumbing Co.*, 620.

The trial court properly awarded prejudgment interest to three plaintiffs who originally instituted their actions before amendment of G.S. 24-5 allowed prejudgment interest where plaintiffs took a voluntary dismissal and refiled their actions after the effective date of the amendment. *Harwood v. Harrelson Ford, Inc.*, 445.

Prejudgment interest is not authorized when only enforcing a statutory lien absent a contract between the parties. *Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 664.

JUDGMENTS

§ 2. Time and Place of Rendition

The trial judge did not err in filing a written order suppressing defendant's in-custody statement after court had adjourned where the court had previously announced its ruling in open court. *S. v. Edwards*, 605.

§ 6.1. Modification of Judgments for Clerical Errors

The trial court's order adding language to a consent judgment making the wife responsible for payments on the mortgage only while she resided in the house and providing that "net proceeds" rather than "proceeds" after sale of the house be divided equally did not amount to a correction of mere clerical errors but improperly granted plaintiff substantive relief. *Hinson v. Hinson*, 613.

§ 37.1. Res Judicata; Effect of New Conditions, Facts or Evidence

A prior declaratory judgment was not res judicata in an action seeking the equitable remedy of subrogation where the subsequent action is dependent upon facts unknown to plaintiffs and the court at the time of the prior judgment. *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders*, 108.

LABORERS' AND MATERIALMEN'S LIENS

§ 8.1. Enforcement of Lien Generally; Actions against Owner

The trial court properly apportioned the lien for plumbing work on an office condominium complex and did not enforce the blanket lien on the entire complex against the individual defendants' unit. *Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 664.

MASTER AND SERVANT — Continued

§ 49.1. Workers' Compensation; "Employees" within Meaning of the Act; Status of Particular Persons

The Industrial Commission did not err in an action for workers' compensation by the president of a family owned corporation by finding and concluding that plaintiff was acting as an employee at the time of his injury. *Sorrell v. Sorrell's Farms and Ranches, Inc.*, 415.

§ 55.1. Workers' Compensation; Necessity for and what Constitutes "Accident"

The fact that plaintiff was working with only one other man at a metal shearing machine when he suffered a back injury while lifting a sheet of metal did not make the crew "short-handed" and the work outside the normal routine. *Pittman v. Inco, Inc.*, 134.

Plaintiff's back injury while lifting a heavy sheet of metal did not occur as a matter of law outside the normal work routine because plaintiff's employer had been given a disability certificate from plaintiff's doctor stating that he could not lift heavy objects until he regained strength in an injured hand. *Ibid.*

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

Plaintiff's knee was not injured by accident when he sidestepped behind another employee and pivoted while attempting to get to a soda machine in a break area. *Swindell v. Davis Boat Works*, 393.

§ 55.4. Workers' Compensation; Meaning of Arising out of and in Course of Employment

Plaintiff was not injured by accident arising out of and in the course of his employment when he was overcome by fumes while cleaning a tote tank. *Parker v. Burlington Industries, Inc.*, 517.

§ 68. Workers' Compensation; Occupational Diseases

Plaintiff's claim to recover workers' compensation for chronic obstructive lung disease is remanded for redetermination upon appropriate findings of fact and conclusions of law. *Neal v. Leslie Fay, Inc.*, 117.

The Industrial Commission did not err by awarding plaintiff permanent partial disability for costochondritis. *Thomason v. Fiber Industries*, 159.

Plaintiff's claim to recover compensation for chronic obstructive pulmonary disease filed within two years after the date he was forced to stop work of any kind because of his occupational disease was timely filed without regard to when he was first informed of the nature and work-related cause of his disease. *Underwood v. Cone Mills Corp.*, 155.

Findings that plaintiff's lung disease was not caused, aggravated or accelerated by her exposure to cotton dust in her employment were insufficient to determine whether plaintiff's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the development of her disease. *McHargue v. Burlington Industries*, 324.

The evidence was insufficient to support a finding that plaintiff textile worker is disabled from chronic obstructive lung disease. *Hendrix v. Linn-Corriher Corp.*, 373.

The evidence was sufficient to support the Industrial Commission's finding and conclusion that plaintiff's exposure to respirable cotton dust while employed with defendant significantly aggravated the severity of his chronic obstructive pulmonary disease. *Calloway v. Shuford Mills*, 702.

MASTER AND SERVANT — Continued

The Industrial Commission did not err by concluding that because of a chronic pulmonary disease plaintiff was permanently partially disabled. *Ibid.*

The Industrial Commission erred in denying compensation to plaintiff employee on the ground that noise in his ears was reduced below 90db by the provision and use of protective devices. *Clark v. Burlington Industries, Inc.*, 695.

If plaintiff employee could show any augmentation of his occupational hearing loss resulting from his employment with defendant after the date of the statute allowing compensation for occupational hearing loss related to long-term exposure to harmful noise, then defendant could properly be held liable for the entire disability. *Ibid.*

§ 69. Workers' Compensation; Amount of Recovery Generally

The Industrial Commission erred by awarding permanent total disability under G.S. 97-29 where all of plaintiff's injuries were scheduled in G.S. 97-31(12). *Whitley v. Columbia Lumber Mfg. Co.*, 217.

A chronic obstructive lung disease case was remanded for further consideration of whether plaintiff was entitled to compensation for permanent and total disability under G.S. 97-29. *Webb v. Pauline Knitting Industries*, 184.

An Industrial Commission award of compensation was remanded for further findings on the issue of wages earned after plaintiff was disabled. *Calloway v. Shuford Mills*, 702.

§ 72. Workers' Compensation; Partial Disability

The Industrial Commission erred in computing the compensation that is due plaintiff because of her partial disability from costochondritis. *Thomason v. Fiber Industries*, 159.

§ 73.1. Workers' Compensation; Loss of Vision or Eye

An employee who has received compensation for disability resulting from loss of vision to an eye may not also recover compensation for serious facial disfigurement when there has been no enucleation. *Griffin v. Red & White Supermarket*, 617.

§ 75. Workers' Compensation; Medical Expenses

The Industrial Commission did not err by ordering defendants to pay plaintiff's medical expenses beyond the cutoff date of an approved compromise agreement where defendants breached their duty of good faith and fair dealing by acting to delay a treatment until after that date. *Gallimore v. Daniels Construction Co.*, 747.

§ 77.1. Workers' Compensation; Modification of Award; Change of Conditions

Plaintiff was not entitled to additional compensation for a back injury based on a change of condition where the evidence showed that the intensifying of plaintiff's physical problems is due to scar tissue from an operation performed prior to the original award. *Sawyer v. Ferebee & Son, Inc.*, 212.

§ 93.2. Workers' Compensation; Proceedings before Commission; Admissibility of Evidence

There was no prejudicial error where the Industrial Commission allowed plaintiff to testify that the Duke University Compensation Office had told him that he would not be admitted to the hospital without insurance authorization where defendants failed to object to similar testimony. *Gallimore v. Daniels Construction Co.*, 747.

MASTER AND SERVANT — Continued

§ 93.3. Workers' Compensation; Proceedings before Commission; Expert Evidence

A nurse's testimony provided the minimum evidence necessary to make an employer's pulmonary function test results competent evidence. *McHargue v. Burlington Industries*, 324.

§ 94.1. Workers' Compensation; Proceedings before Commission; Sufficiency of Findings of Fact

Findings that plaintiff employee experienced pain in her back and leg when she exerted an unusual amount of pressure during a particular task and had to seek medical attention were insufficient to support a conclusion that plaintiff sustained an injury by accident arising out of and in the course of her employment. *Jackson v. Fayetteville Area Sys. of Transp.*, 412.

§ 94.3. Workers' Compensation; Rehearing by Commission

The Industrial Commission properly ruled that plaintiff was excusably misled by the Commission's erroneous notice of appeal time and properly denied defendants' motion to dismiss plaintiff's appeal to the Full Commission because plaintiff failed to give notice of appeal within fifteen days from the date of notification of the deputy commissioner's opinion and award. *Crawford v. McLaurin Trucking Co.*, 219.

The Industrial Commission erred by not weighing the evidence and by reversing the decision of the Deputy Commissioner and awarding plaintiff additional benefits under the mistaken impression that the law required a finding for plaintiff if there was any competent evidence to support such a finding. *Cauble v. The Macke Co.*, 793.

§ 99. Workers' Compensation; Attorney's Fees

A workers' compensation case was remanded where the language in the Commission's order was so ambiguous as to preclude review of whether the Commission believed it lacked authority to award attorney fees where both the insurer and claimant appealed. *Harwell v. Groves Thread*, 437.

MORTGAGES AND DEEDS OF TRUST

§ 11. Registration

The trial court did not err by dismissing a claim under a title insurance policy where plaintiffs would have been in the same position even if the title was as it was insured to be. *Schuman v. Investors Title Ins. Co. and Schuman v. Beemer*, 783.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses

Possession of a controlled substance with intent to manufacture is a separate and distinct offense from possession of such substance with intent to transfer. *S. v. Johnson*, 68.

A misdemeanor of maintaining a motor vehicle with knowledge that it is resorted to by persons for the use, keeping or selling of marijuana exists under G.S. 90-108(a)(7). *S. v. Bright*, 239.

NARCOTICS — Continued

§ 2. Indictment

Indictment alleging trafficking in a compound obtained from "cocoa" leaves rather than from "coca" leaves was not so defective as to deprive the trial court of jurisdiction. *S. v. Thrift*, 199.

§ 3.1. Competency and Relevancy of Evidence

An SBI agent was properly permitted to testify as to his working definition of marijuana. *S. v. Grainger*, 123.

§ 3.3. Opinion Testimony

The opinion of an S.B.I. lab analyst that mass spectra of residues found in defendant's pool hall indicated the presence of cocaine was not inadmissible because the tests were performed by someone else. *S. v. Gary*, 29.

§ 4. Sufficiency of Evidence

The State's evidence presented a jury question as to the existence of a conspiracy to sell and deliver cocaine where the jury could logically infer that defendant knew that the purchaser was not buying cocaine for his own use. *S. v. Gary*, 29.

The State presented sufficient evidence of the weight of marijuana plants to support submission of an issue as to defendant's guilt of trafficking by possession of 2,000 pounds or more but less than 10,000 pounds of marijuana. *S. v. Grainger*, 123.

The trial court did not err by denying defendant's motions to dismiss a prosecution for possession of marijuana with intent to sell and deliver. *S. v. Damon*, 421.

§ 4.1. Cases where Evidence Was Insufficient

The State's circumstantial evidence was insufficient to support conviction of defendant for trafficking in excess of 10,000 pounds of marijuana found by police in a tractor-trailer and a rental truck. *S. v. Diaz*, 488.

§ 4.2. Sufficiency of Evidence in Cases Involving Sale to Undercover Agent

Defendant's motion to dismiss the charge of possession of LSD with intent to sell or deliver was properly denied. *S. v. Pulliam*, 129.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The jury was not improperly permitted to infer that defendant had constructive possession of marijuana solely because the marijuana was found growing on a farm which defendant controlled where there was other evidence tending to show defendant's constructive possession. *S. v. Grainger*, 123.

The trial court did not err by denying defendant's motions to dismiss charges of possession of cocaine with intent to sell and possession of marijuana with intent to manufacture and sell. *S. v. Johnson*, 68.

There was sufficient evidence of constructive delivery to support defendant's conviction of trafficking by delivery of cocaine. *S. v. Thrift*, 199.

§ 4.5. Instructions Generally

The trial court did not err in a prosecution for possession of cocaine with intent to sell and possession of marijuana with intent to manufacture and sell by refusing to instruct the jury that they must find beyond a reasonable doubt that the manufacturing was not for personal use. *S. v. Johnson*, 68.

There was no plain error in the jury instructions in a prosecution for conspiracy to provide drugs to an inmate and procuring drugs for an inmate. *S. v. Seagroves*, 49.

NARCOTICS — Continued

§ 5. Verdict

A verdict of guilty of sale or delivery of LSD was inherently ambiguous and fatally defective where the evidence was sufficient to go to the jury on delivery but there was insufficient evidence of the sale. *S. v. Pulliam*, 129.

NEGLIGENCE

§ 2. Negligence Arising from Performance of Contract

A subcontractor's lender could not recover against the contractor for negligence in the performance of a contract modification between the contractor and the subcontractor to make checks due the subcontractor payable jointly to the subcontractor and the lender. *Lee v. Paragon Group Contractors*, 334.

§ 6.1. Application of Res Ipsa Loquitur

Plaintiff's evidence was sufficient for the jury under the doctrine of res ipsa loquitur in an action to recover for damages suffered when the camper top came off defendant's truck and struck plaintiff's vehicle. *Sharp v. Wyse*, 171.

§ 20. Limitation of Actions

The six-year statute of repose of G.S. 1-50(6) barred plaintiff's action instituted in 1984 against the manufacturer and dealer of a vehicle initially purchased by another in 1974 to recover for injuries sustained in 1983 although plaintiff did not purchase the vehicle until 1980. *Davidson v. Volkswagenwerk, A.G.*, 193.

§ 30.2. Insufficiency of Evidence of Proximate Cause

Plaintiff failed to show that his injuries were caused by defendant's negligence when a 1/2 inch bolt in a puller-tensioner supplied by defendant to plaintiff's employer broke while being used to install wire onto power poles and plaintiff was injured when he installed an inadequate replacement bolt which also broke. *Surrette v. Duke Power Co.*, 647.

§ 35.1. Particular Cases where Evidence Discloses Contributory Negligence as Matter of Law

Plaintiff was contributorily negligent as a matter of law in continuing to operate a piece of machinery with knowledge that the mechanism connecting the motor to a reel required a case-hardened 1/2 inch bolt, that the 1/2 inch bolt had sheared, causing him to fall, and that the 1/2 inch bolt had been replaced by a weaker 3/8 inch carriage bolt. *Surrette v. Duke Power Co.*, 647.

§ 57.6. Sufficiency of Evidence in Actions by Invitees; Foreign Matter on Floor

Summary judgment was improperly entered in favor of defendant in plaintiff customer's action to recover for injuries received when she slipped and fell in human excrement on the floor of defendant's grocery store. *Warren v. Rosso and Mastracco, Inc.*, 163.

PARENT AND CHILD

§ 4.1. Right of Parent to Maintain Action for Alienation of Affection of Child

Summary judgment on plaintiff's claim for damages for the alienation of the affections of her son was proper because no action for alienating the affections of a child will be supported by the parent-child relationship absent seduction or abduction. *Morris v. Bruney*, 668.

PERJURY

§ 1. Nature and Essentials of Offense of Perjury

A civil action in tort will not lie for perjury or subornation of perjury. *Hawkins v. Webster*, 589.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 17.2. Malpractice; Sufficiency of Evidence; Diagnosis

Summary judgment for defendant was proper in an action in which plaintiffs alleged that defendants' negligent diagnosis of twins resulted in physical pain and suffering, mental anguish and emotional distress, and expended sums for duplicate clothing and other items. *Woodell v. Pinehurst Surgical Clinic, P.A.*, 230.

PRIVACY

§ 1. Generally

The trial court did not err by dismissing plaintiff's claim for invasion of privacy based on public disclosure of private facts. *Trought v. Richardson*, 758.

PROCESS

§ 9.1. Personal Service on Nonresident Individuals in Another State; Minimum Contacts Test

North Carolina had statutory jurisdiction over plaintiff's motion to reduce or terminate his alimony obligations to a defendant who lived in New Jersey, but defendant did not have sufficient minimum contacts with North Carolina so that exercise of personal jurisdiction over her was consistent with due process. *Schofield v. Schofield*, 657.

§ 19. Actions for Abuse of Process

Allegations that defendants filed answers containing falsehoods are insufficient to support an action for abuse of process. *Hawkins v. Webster*, 589.

RAPE AND ALLIED OFFENSES

§ 4. Relevancy of Evidence

The trial court did not err in a prosecution for attempted second degree sexual offense by excluding testimony concerning the amount of rent the prosecutrix paid for her apartment. *S. v. Coen*, 778.

§ 5. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of taking indecent liberties with and attempted first degree rape of his 3½-year-old daughter. *S. v. Gregory*, 565.

§ 19. Taking Indecent Liberties with Child

Any error in admitting two-year-old gonorrhea test results which indicated that defendant and the victim had gonorrhea at the same time was not prejudicial. *S. v. Gregory*, 565.

A physician's testimony concerning statements made to him by a 3½-year-old sexual offense victim, including statements identifying defendant as the perpetrator, was admissible under the medical diagnosis or treatment exception to the hearsay rule. *Ibid.*

RAPE AND ALLIED OFFENSES — Continued

Testimony by the grandmother of a sexually abused 3½-year-old victim concerning statements made by the victim was admissible under the medical diagnosis and treatment exception to the hearsay rule. *Ibid.*

REGISTER OF DEEDS

§ 1. Generally

The trial court did not err by granting defendant's 12(b)(6) motion for dismissal in an action against the register of deeds for late indexing. *Badger v. Benfield,* 427.

ROBBERY

§ 4.3. Armed Robbery where Evidence Held Sufficient

Where defendant committed a robbery by use of a box cutter which constituted a deadly weapon per se, there is a mandatory presumption that the victim's life was in fact endangered or threatened. *S. v. Wiggins,* 405.

Defendant's motion to dismiss an armed robbery case for failure to show that a knife used in the robbery was a dangerous weapon was properly overruled. *S. v. Smallwood,* 365.

The trial court did not err by denying defendant's motion to dismiss an armed robbery charge for insufficient evidence. *S. v. Bush,* 686.

§ 4.5. Cases Involving Aiders and Abettors in which Evidence Was Sufficient

Evidence that defendant drove the getaway car was sufficient to support his conviction of armed robbery. *S. v. Monroe,* 661.

§ 4.7. Cases where Evidence Was Insufficient

The evidence was insufficient to support defendant's conviction of robbery of his mother. *S. v. Hollingsworth,* 578.

§ 5. Instructions

There was no merit to the State's contention that, because defendant presented alibi evidence, the only choice was between armed robbery and not guilty. *S. v. Smallwood,* 365.

§ 5.2. Instructions Relating to Armed Robbery

The trial court did not err by instructing the jury that the box cutter used in a robbery was a deadly weapon per se despite the absence of a verbal description of the weapon. *S. v. Wiggins,* 405.

§ 5.4. Instructions on Lesser Included Offenses

The trial court in an armed robbery case did not err in failing to instruct on common law robbery. *S. v. Wiggins,* 405.

The trial court in an armed robbery case erred in refusing to submit common law robbery to the jury where the knife was never produced and there was some evidence that defendant had a knife but was holding it down by his side rather than at the victim's throat. *S. v. Smallwood,* 365.

RULES OF CIVIL PROCEDURE

§ 15. Amended Pleadings

The trial court did not abuse its discretion by refusing to allow defendant to amend its answer and deny an earlier admission in an action for damages to a boat being hauled overland. *Martin v. Hare,* 358.

RULES OF CIVIL PROCEDURE — Continued

§ 15.1. Discretion of Court to Grant Amendment of Pleadings

The trial court did not err in denying plaintiffs' motion to amend their complaint to add an additional cause of action. *Pressman v. UNC-Charlotte*, 296.

§ 41.1. Voluntary Dismissal

The trial court properly awarded prejudgment interest to three plaintiffs who originally instituted their actions before amendment of G.S. 24-5 allowed prejudgment interest where plaintiffs took a voluntary dismissal and refiled their actions after the effective date of the amendment. *Harwood v. Harrelson Ford, Inc.*, 445.

§ 56.5. Findings of Fact in Summary Judgment Orders

Findings of fact in a summary judgment order are ill advised. *Amoco Oil Co. v. Griffin*, 716.

§ 59. New Trials

A discretionary new trial order is not reviewable on appeal in the absence of manifest abuse of discretion, and the trial judge is not required to make specific findings as to the factors causing him to order a new trial. *Edge v. Metropolitan Life Ins. Co.*, 624.

The ten-day time limit to give notice of appeal was not tolled by defendants' motion to amend judgment where defendants thereafter withdrew their motion to amend and there was never a judicial determination of the motion. *Landin Ltd. v. Sharon Luggage Ltd.*, 558.

SEARCHES AND SEIZURES

§ 1. Generally

An ex parte order directing the officials of a company to make available its records pertaining to transactions with two other corporations and the City of Charlotte was not an administrative search warrant. *In re Computer Technology Corp.*, 402.

STATUTES

§ 2.4. Constitutional Prohibition against Enactment of Local or Special Acts Relating to Designated Subjects

A 1983 session law directing the State to acquire public pedestrian beach access in the vicinity of Bogue Inlet and closing a right of way to non-emergency vehicular traffic violated a prohibition in the North Carolina Constitution against local acts discontinuing highways, streets or alleys. *Town of Emerald Isle v. State of N. C.*, 736.

§ 4.2. Statute Constitutional in Part and Unconstitutional in Part

The trial court erred by holding that unconstitutional parts of Ch. 539 of 1983 North Carolina Session Laws could be severed from the remainder of the Chapter. *Town of Emerald Isle v. State of N. C.*, 736.

SUBROGATION

§ 2. Volunteers

Plaintiffs' payment of an amount to satisfy defendant contractor's bank construction loan and to discharge liens filed by subcontractors which exceeded the

TROVER AND CONVERSION — Continued

§ 4. Measure of Damages

The evidence supported a jury verdict awarding defendant $1,000 for plaintiff's conversion of two of defendant's cows. *Yeargin v. Spurr*, 243.

TRUSTS

§ 15. Actions to Establish Resulting Trusts

The clean hands doctrine was not applicable in an action to impose a purchase money resulting trust though there was evidence that plaintiff and deceased defendant were cohabiting illicitly and had planned a deceptive scheme to secure financing. *Ray v. Norris*, 379.

§ 19. Actions to Establish Trusts; Sufficiency of Evidence

The evidence was sufficient to be submitted to the jury in an action to impose a purchase money resulting trust on a house and lot purchased by plaintiff's girl friend, who is now deceased. *Ray v. Norris*, 379.

§ 20. Actions to Establish Trusts; Instructions

Defendants were not entitled to an instruction on pro tanto resulting trust. *Ray v. Norris*, 379.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Evidence from which the jury could find that the seller of a retail fabric business represented to the buyers that she owned certain patterns, racks and cabinets which in fact belonged to various pattern companies was sufficient to create a jury question as to deceptive acts in the sale of the business. *Chastain v. Wall*, 350.

In an action to recover for an unfair or deceptive trade practice committed by defendant in the sale of her business, plaintiffs are not required to show fraud or misrepresentation but must show conduct which had the capacity or tendency to deceive and mislead. *Ibid.*

The trial court's error in submitting an issue as to whether defendant's conduct was in commerce or affected commerce was harmless error. *Ibid.*

Plaintiff's evidence that he was required to buy his gasoline from defendant and that defendant set plaintiff's retail prices was sufficient to establish per se violations of G.S. 75-5(b)(2) and (b)(7). *Baynard v. Service Distributing Co.*, 796.

UNIFORM COMMERCIAL CODE

§ 1. Generally

The U.C.C. rather than the M.V.A. controls in determining whether the purchaser of an automobile or a finance company which has an inventory security agreement with the dealer will bear the loss caused by the dealer's failure to pay the finance company money received from the purchaser. *N. C. National Bank v. Robinson*, 1.

§ 8. Statute of Frauds

The U.C.C. statute of frauds applied to an oral agreement for the sale of peanuts involving a value in excess of $500. *Varnell v. Henry M. Milgrom, Inc.*, 451.

UNIFORM COMMERCIAL CODE — Continued

Where plaintiff alleged that he entered into a written contract with defendant whereby defendant agreed to buy all of his "quota peanuts" for $640 per ton, and the parties then orally modified their contract so that defendant agreed to buy all of plaintiff's peanuts for $600 per ton, there was no merit to plaintiff's contention that defendant waived its right to assert the Statute of Frauds by operation of G.S. 25-2-209(4). *Ibid.*

§ 17. Title to Goods with Regard to Third Persons

An automobile purchaser may be a "buyer in the ordinary course of business" as that term is used in the U.C.C. even though the certificate of title has not yet been reassigned. *N. C. National Bank v. Robinson*, 1.

Where a used automobile was held in inventory and displayed for sale by a dealer with no warning that defendant finance company had a security interest in it under an inventory security agreement, and the dealer failed to pay the finance company for the vehicle when it was sold, the purchasers took free of any security interest defendant finance company may have had. *Ibid.*

VENDOR AND PURCHASER

§ 6.1. Liability of Vendor of New Structure

Plaintiffs' complaint was sufficient to state a claim for fraudulent concealment of material defects in a house sold to plaintiffs by defendant. *Carver v. Roberts*, 511.

WATERS AND WATERCOURSES

§ 3.2. Pollution

The State of Tennessee was an "aggrieved person" who could seek judicial review of a consent special order issued by the Environmental Management Commission to a corporation allowing it to discharge effluents into the Pigeon River. *State of Tennessee v. Environmental Management Comm.*, 763.

A consent special order issued by the Environmental Management Commission to a corporation allowing it to discharge effluents into the Pigeon River was a "contested case" within the meaning of G.S. 150A-43. *Ibid.*

§ 7. Marsh and Tidelands

The trial court did not err in reversing a decision of the Marine Fisheries Corporation to grant a shellfish cultivation lease in Core Sound on the issue of whether there was sufficient evidence to determine that the area did not contain a natural shellfish bed. *In re Protest of Mason*, 16.

The trial court erred in its reasoning when reversing a Marine Fisheries Commission decision to issue a shellfish cultivation lease by concluding that the lease constituted a taking of riparian rights without compensation. *Ibid.*

WEAPONS AND FIREARMS

§ 2. Carrying or Possessing Weapons

In the statute prohibiting possession of a handgun by a felon, the exception applying to a person in his own home does not encompass common areas of an apartment house. *S. v. McNeill*, 514.

WITNESSES

§ 10. Attendance

The trial court did not abuse its discretion and did not violate defendant's right to compulsory process by denying defendant's motion for assistance in getting a witness into court. *S. v. Coen*, 778.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina