NORTH CAROLINA COURT OF APPEALS REPORTS

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JOHNNY JOSEPH HEAD

No. 8522SC761

(Filed 4 February 1986)

1. Homicide § 1; Criminal Law § 32— second degree murder—body not found—proof of corpus delicti sufficient

The trial court did not err in a prosecution for second degree murder by denying defendant's motion to dismiss for insufficient evidence where the State met its burden of establishing the *corpus delicti*, despite the lack of a body, in that there was no apparent motive for the victim to disappear; there was much evidence tending to show strong motives for her to continue enjoying the life she was leading; there was nothing missing from her home such as clothing or a suitcase; all of the clothing she had been wearing when last seen was found except a sweater or blouse; the last transactions on her joint bank account with her husband were a credit card payment in excess of $800 and a deposit in excess of $1,800; the victim was shown to be a happy person, in good physical and mental condition; she was described as very conscientious and hardworking; she had had several real estate closings planned for that week and she had made plans to get back in touch with clients; she had made tentative plans to host an open house later that month; although the victim and her husband had separated in the past, they had reconciled and there was no evidence of continuing acrimony or ill feelings in the relationship; the victim had never previously disappeared or left home for any length of time; a police survey of thirteen hospitals and mental health centers failed to turn up any patients matching the victim's name or description; and there was no evidence that she was alive at the time of trial, nineteen months after her disappearance.

2. Homicide §1; Criminal Law § 32— second degree murder—body not found—evidence of criminal agency sufficient

There was sufficient evidence in a prosecution for second degree murder to allow the reasonable inference that the cause of the victim's death was a criminal agency where no body or other physical remains were found indicat-

ing suicide or natural causes; had the victim died by accident, the presence of most of her clothing would admit of no explanation; circular pieces of duct tape found in the same general area as the clothes fit together where they had been cut once to form ankle-size loops for binding; pieces of hosiery material and fibers from the victim's shoes and polyester slacks were found on the duct tape; the slacks and underwear were cut and torn or cut further to lay the fabric back totally; a hair microscopically consistent with that of the victim was found on a nylon rope; hairs matching the victim's on the slacks and one of her shoes were crushed and had tissue adhering to the roots, indicating forcible removal; and the victim had been scheduled to appraise the house of a man who had given her a false name and false telephone number.

3. Homicide § 21.4— second degree murder—evidence that defendant was the criminal agent responsible for death—sufficient

The evidence was sufficient in a prosecution for second degree murder to show that the criminal agent who caused the victim's death was defendant where fingerprint evidence linked defendant to a trash bag and its contents; hair strands linked duct tape, rope, shoes, slacks, and other items to the victim; fiber evidence linked both defendant and the victim to the trash bag's contents and clothing found in the woods and showed convincingly that the victim had been in defendant's home; in her notes and to other people, the victim had made at least four references to "McCorkle" or "Larry McCorkle" in connection with an appraisal of a house or directions which led to defendant's house; defendant had previously been heard to represent himself as McCorkle; defendant did not appear at work on the day the victim disappeared; three long distance calls were made from defendant's residence to the victim's office that day; items found to match similar objects in defendant's residence included a trash bag, duct tape, a sexually oriented pinup from a magazine, strapping tape on the pinup, and bath cloths; a motive could be inferred from the evidence of duct tape bindings, panties and slacks that were cut or torn open to expose the genital area, and the presence of several sexually-oriented magazines in the trash bag; and inconsistencies in the State's evidence regarding the date on a sheet containing appraisal information about defendant's residence and the location of the property the victim was going to appraise the day she disappeared was explained at trial.

4. Criminal Law § 73.1— admission of hearsay—telephone conversation—harmless error

There was no prejudicial error in a prosecution for second degree murder where the court allowed a detective to testify that she had called thirteen hospitals in North Carolina regarding anyone matching the description of the missing victim and was advised that they had not treated the victim. There is no reasonable possibility that the result of the trial could have been different if the answer had been struck because the detective had already testified that she had checked thirteen hospitals and the fact that defendant was being tried for murder and that the victim was still missing gave rise to the clear inference that the victim was not located during the detective's search. N.C.G.S. 15A-1943 (1983), N.C.G.S. 8C-1, Rules 902 and 901(c).

5. Criminal Law § 38— second degree murder of realtor—testimony from another realtor that defendant's house eerie—no error

The trial court did not err in a second degree murder prosecution by refusing to strike the testimony of a realtor who had gotten a call from a "Mr. E. J. Head" who wanted his property appraised; the realtor had gone to defendant's house, arriving about ten minutes early; a dog on the porch was the only sign of life; the windows were closed and the drapes pulled; she had not knocked, but had left a card saying she would call later; two male voices answered a later call to "Mr. Head" at defendant's residence; the first voice identified the second as the father and denied having called the realtor to appraise the house; and the realtor testified on redirect that she had not liked the looks of the house because it was unknown and she felt that she was being watched. The testimony was relevant to show by its parallels to the experience of the murder victim identity and common plan or scheme, defendant did not renew his objection to strike after a voir dire on the testimony, the question was not objected to, and objections were sustained and motions to strike granted concerning other statements about the witness's feelings of bad vibes and eeriness, thus denigrating the witness's feelings in the eyes of the jury.

6. Criminal Law § 101.2— proximity of jury room to courtroom—motion to examine jury to determine whether voir dire testimony heard—denied—no error

The trial court did not err in a prosecution for second degree murder by failing to examine the jurors to see whether they could hear *voir dire* testimony from three women who testified that they had previously been the victims of assaultive behavior by defendant. Although defense counsel made the motion when he realized the proximity of the jury room to the courtroom and asserted that the district attorney had said there was a problem with the jury room and that such problem was known at the bar, defense counsel did not produce affidavits from the district attorney or any member of the bar and did not conduct tests himself.

APPEAL by defendant from *Seay, Judge.* Judgment entered 5 March 1985 in IREDELL County Superior Court. Heard in the Court of Appeals 10 December 1985.

Defendant was convicted of the second-degree murder of Dianne Thomas Gabriel. The State's evidence tends to show the following facts and circumstances. Dianne Gabriel was a licensed real estate agent for Century 21 Hecht Realty in Davidson. She was at home at Huntington Woods, a subdivision in Mooresville, with her husband Donald and daughter Donna on the morning of Monday, 18 July 1983. Ms. Gabriel was neatly dressed in blue slacks, red canvas shoes and a white blouse or sweater with colored stripes. Donna left the house about 11:30 a.m., shortly after which Ms. Gabriel left, in a hurry to get to the real estate office

and excited about several closings that week. Donald Gabriel left the house after 4:00 p.m. on a business trip to Columbia, South Carolina. Ms. Gabriel arrived at her office shortly before 12:00 p.m., remaining there for an hour or an hour and a half. She then left, indicating to the secretary that she expected a call from a Mr. McCorkle. She ate lunch at the Pier Restaurant on Highway 150, located approximately twenty-five minutes walk from defendant's residence, and returned to the office around 3:30 p.m., when she received phone calls. That afternoon she requested both Gary Rhyne, a fellow agent, and Bob Hecht, her employer, to accompany her to a house appraisal scheduled for 8:00 p.m. that evening. Hecht remembered the location as "Penicillin Point" and Rhyne remembered it as being at the "north end" of Lake Norman. Neither agent was available to accompany Ms. Gabriel that evening.

Troy and Teresa Helton met with Dianne Gabriel at about 5:15 p.m. to see some houses in Woodland Heights. When Ms. Helton had set up the meeting time earlier in the day, Ms. Gabriel had mentioned that she had a 7:30 appointment to meet someone at the Pier Restaurant. At the meeting with the Heltons, Ms. Gabriel appeared in good spirits. She asked the Heltons if they knew the man she was to meet that evening, but did not seem nervous or upset. Ms. Gabriel's gold-colored Buick, a Century 21 placard on the side, was seen parked at her home shortly after 7:00 that evening. She was subsequently seen driving away from Huntington Woods.

When Donald Gabriel returned home about 10:00 p.m. on Wednesday, he learned that his wife was missing. He began a search of his residence "to see if anything had happened in the house." He found nothing missing from the bedroom or closets but he found a note in the kitchen garbage can. The note read, in Ms. Gabriel's handwriting:

> House Highway 150, Paradise Peninsula, Hogan Road, three-bedroom house, vaulted ceiling, partial basement, Larry McCorkle, 664-2365. Hogan Road to second house on left, green house with green truck.

Mr. Gabriel gave this note to Detective Sergeant Cecil Cook of the Iredell County Sheriff's Department. It was later determined that the instructions on the note led to defendant's home.

Detective Cook had seen Ms. Gabriel's Buick parked at the Pier Restaurant at 9:00 or 9:30 p.m. on 18 July while he was patrolling the area. On 20 July, the Buick was identified as belonging to Ms. Gabriel and Detective Cook conducted a search of the car. No fingerprints were obtained. Ms. Gabriel's attache case and realtor signs were in the trunk, but no keys were found.

On 26 July 1983, Mr. Kenneth Hagler, a volunteer searcher for Ms. Gabriel, found a plastic trash bag near a drainage ditch by the road that led to what Mr. Hagler remembered as "Pinnacle Point," identified by Detective Sergeant Harold Miller of Iredell County, who recovered the bag, as Greenbay Road off Highway 150 West. Greenbay Road connects Paradise Peninsula Road to Hogan Road, where defendant's residence is located. Found within the trash bag were six sexually-oriented magazines, loose pages from other such magazines, pieces of gray duct tape bound together "in a circular-type position" and cut through once, a partially used roll of duct tape, braided nylon rope, bath cloths, a towel, two packages of plastic eating utensils and a ball-point pen. Approximately one hundred volunteers twice searched the area from the Pier Restaurant past the Paradise Peninsula Road turn-off through tangled undergrowth and then through the woods west to the lake, but nothing more was found.

State Bureau of Investigation (SBI) Special Agent Ricky Navarro lifted seven latent fingerprints of value from the trash bag, a plastic bag within the trash bag and the magazine pages. He was able to identify the prints as defendant's.

In early February 1984 Michael Canipe was walking in the snow in the wooded area between the McCrary Creek Access Area and Paradise Peninsula Road. This was the same general area that had been searched in July 1983. Canipe found a pocketbook, a red canvas shoe and a pair of blue slacks. Further searching by police personnel on 12 February uncovered a keycase with keys, a notepad containing some papers, a pair of women's panties and a second red canvas shoe. The pocketbook contained over a dozen separate items of identification of either Dianne or Donald Gabriel, including a checkbook on their joint account. The slacks, shoes and keycase were identified by Donald Gabriel as those belonging to his wife. The keycase contained keys that fit the gold Buick and unlocked the front door of the Gabriel residence.

The notepad contained directions to defendant's house and the beginnings of an appraisal of that house, the word fragment "firep" being the last entry. It was dated "7/19/83."

SBI Special Agent Scott Worsham, a forensic hair examiner, obtained hair samples from the Gabriel residence bathtub drain and a hairbrush belonging to Dianne Gabriel. He also obtained hair samples from defendant and defendant's residence. He compared these samples to hairs removed from the trash bag and its contents: hairs from the trash bag and the roll of duct tape were microscopically consistent with hairs from the Gabriels' bathtub drain; a hair from the length of nylon rope and hairs from the bath cloths were consistent with hair from Dianne Gabriel's hairbrush; two white dog hairs from the duct tape were consistent with dog hairs obtained from a couch in defendant's residence.

Analysis by Worsham also revealed that human hairs from the slacks and red shoe found at the McCrary Creek Access Area were microscopically consistent with hair from the Gabriels' bathtub drain. The hair from the shoe was crushed and the hairs from the slacks had tissue adhering at the root, an indication that these (head) hairs had been removed by force. White dog hairs from the slacks were consistent with dog hairs found at defendant's residence and on the duct tape from the trash bag.

SBI Special Agent John Wayne Bendure, an expert in fiber identification and analysis and a forensic chemist, conducted a search of defendant's residence on 2 May 1984 and obtained many fiber samples for comparison. After analysis of evidence taken from the trash bag, the McCrary Creek Access Area and defendant's residence, Agent Bendure determined that the bath cloths found in the trash bag were consistent in color, composition and manufacturing detail with bath cloths taken from defendant's residence. The duct tape in the trash bag was consistent in color, manufacture and manufacturer with duct tape found in defendant's residence. Some fragments of hosiery material had adhered to the pieces of duct tape from the trash bag. The tape appeared to be cut from two loops approximately four layers thick. The pieces of duct tape also yielded two types of blue polyester fiber, red rayon fibers, rust-colored trilobal nylon carpet fiber and orange polyester fiber. The two different types of blue polyester fiber were consistent with the two types of fiber used

to weave the material for the blue slacks found at McCrary Creek. The red rayon fiber on the duct tape was consistent with that used in the red canvas shoes. The carpet fiber was consistent with carpet found in defendant's bedroom. The orange polyester fiber was consistent with a "trace fabric" or "environmental contaminant" taken from couches in defendant's basement. Five different fibers found on the towel and bath cloths were consistent with fiber taken from defendant's couch. Orange polypropylene fiber found on the partial roll of duct tape and the bath cloths from the trash bag was consistent with that found on defendant's basement couch and a footstool in defendant's bedroom. Nylon fibers found on the basement couch were consistent with fibers taken from the nylon rope found in the trash bag.

The slacks found at McCrary Creek were cut on the outside of the pants leg crease on either side, then either cut or torn the rest of the way to the waistband. The panties were cut or torn in a similar fashion, so that the fabric was "totally laid open." There was a small quantity of adhesive in the hem area of the slacks leg. The color and viscosity of this adhesive and its elemental makeup were consistent with adhesive found on the duct tape. Blue polyester fibers on the underwear were consistent with the fibers of the blue slacks.

In his 2 May 1984 search of defendant's residence, Agent Bendure also found a mass of blue polyester fiber caught in a crack in the veneer at the base of defendant's bedroom door. This mass of fiber not only matched the fibers which made up Dianne Gabriel's slacks under the microscope, but it also matched the slacks in dye composition, a test Bendure was able to perform due to the amount of fiber found. In his opinion, the fibers had come from the same dye lot.

In further investigation carried out by Agent Bendure, he found that the trash bag was of the same size and manufacturer's markings as trash bags found in defendant's residence. Bendure also found sexually-oriented magazines in defendant's home, including the cover to a November 1979 *Playboy*. The centerfold to a November 1979 issue of *Playboy* was found in the trash bag. Strapping tape on the corners of the magazine pages found in the trash bag was consistent in thickness, composition, dimensional detail, number of filaments, diameter and color and effective in-

dex of filaments with strapping tape found at defendant's residence.

Federal Bureau of Investigation Special Agent Ronald Duncan, an expert in forensic chemical analysis, testified that the ink in the pen found in the trash bag was chemically identical to the ink on the notepad appraisal sheet found in the McCrary Creek Access Area.

Dianne Gabriel had made references to a client named McCorkle when speaking to her secretary, on the note found in the Gabriel kitchen trash and on a notebook in her office. Her desk appointment calendar listed an 8:00 p.m. appointment for 18 July with McCorkle. A car salesman testified that defendant had once represented himself to the salesman as "Mr. McCorkle."

Defendant presented no evidence.

Further evidence will be discussed as the opinion requires.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Joan H. Byers and Associate Attorney John H. Watters, for the State.

Walker, Palmer & Miller, P.A., by James E. Walker and H. Monroe Whitesides, Jr., for defendant.

WELLS, Judge.

I.

In his first assignment of error, defendant contends that the trial court erred in denying defendant's motion to dismiss for insufficient evidence. The evidentiary principles governing motions to dismiss are set out at length in *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Briefly summarized, they are that the evidence must be considered in the light most favorable to the State, with the benefit of all permissible favorable inferences. If the trial judge finds substantial evidence, regardless of weight, of each essential element of the crime, and that defendant committed it, the motion should be denied.

"Substantial evidence" may be defined as "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 . . . ." *Id.* The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. *Id.* Though all the evidence against defendant be circumstantial, that fact alone should not bar submission of the case to the jury. The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). If the evidence presented is circumstantial, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

Second degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). In homicide cases, as in all criminal cases, the State must show that a crime was committed and that defendant committed it. *State v. Earnhardt, supra.* The evidence that a crime was committed is often referred to as the *corpus delicti*, meaning literally "the body of the transgression charged." *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971). The death, the felonious cause of death and the identification of an accused as the person who caused the death can all be shown by circumstances from which these facts might reasonably be inferred. *See State v. Edwards*, 224 N.C. 577, 31 S.E. 2d 762 (1944). If the evidence is only circumstantial, it should be "so strong and cogent that there can be no doubt of the death." *State v. Dawson, supra.*

Dianne Gabriel's body was never found; therefore, the *corpus delicti* in this case must be shown by two logical steps. First, Dianne Gabriel must be shown to be dead; second, her death must be shown to be a result of a criminal agency.

A.

[1] Defendant contends that despite the evidence brought out at trial, the State has not met its burden of establishing *corpus delicti.* To support this assertion, defendant cites Lord Chief Justice Hale who in turn cites Lord Coke for a case in which a

man was executed for the murder of his niece, who had disappeared. The niece had only run away and later returned to claim her property. Defendant also cites a case from 1661 in which a man was executed for killing a rent collector, who later turned up alive. In both these cases a strong reason for the "victims' " disappearances was suggested by the facts: The niece had run away to escape beatings by her uncle; the rent collector had absconded with the collected rents. There was no such apparent motive for Dianne Gabriel to disappear. To the contrary, there was much evidence tending to show strong motives on her part to continue enjoying the life she had been leading. Dianne Gabriel's life was not lived in the seventeenth and eighteenth centuries:

> In . . . Hale's day, a person might disappear beyond all possibility of communication by going overseas or by embarking in a ship. It would have been most dangerous to infer death merely from his disappearance. Worldwide communication and travel today are so facile that a jury may properly take into account the unlikelihood that an absent person, in view of his health, habits, disposition, and personal relationships would voluntarily flee, "go underground," and remain out of touch with family and friends. The unlikelihood of such a voluntary disappearance is circumstantial evidence entitled to weight equal to that of bloodstains and concealment of evidence.

Epperly v. Com., 224 Va. 214, 294 S.E. 2d 882 (1982). We concur in the force of this logic.

That Dianne Gabriel would voluntarily disappear is so unlikely as to remove any doubt of its occurrence. There was nothing missing from her home, such as clothing or a suitcase. All the clothing she had been wearing when last seen, except a sweater or blouse, was found at the McCrary Creek Access Area. The last transactions on the joint bank account with her husband were a credit card payment in excess of $800 and a deposit in excess of $1,800, both dated 18 July. No further transactions on that account were recorded by the bank. Ms. Gabriel was shown to be a happy person, in good physical and mental condition. Her work habits were described as "very conscientious." Her employer described her as "as hard-working . . . as anybody I ever had." She had several closings expected that week, she made plans to

get back in touch with the Heltons and she had made tentative plans, as written in her notebook, to host an "Open House" for both the Heltons and "McCorkle" for 24 July.

Though Donald and Dianne Gabriel had separated for six or seven months half a year before Ms. Gabriel's disappearance, they had since reconciled. There was no evidence of continuing acrimony or ill feelings in the relationship. During the separation, it was Donald Gabriel who left the home. Dianne Gabriel had never disappeared or left home for any length of time previous to 18 July 1983. A police survey of thirteen hospitals and mental health centers failed to turn up any patients matching Ms. Gabriel's name or description. Moreover, there was no evidence that she was alive at the time of trial, a full nineteen months after her disappearance.

The foregoing evidence was clearly sufficient to establish the death of Dianne Gabriel.

B.

[2] The State's evidence was sufficient to allow the reasonable inference that the cause of Ms. Gabriel's death was a criminal agency. There was no body or other physical remains found; this negates the inference that Dianne Gabriel died from suicide or natural causes. Had she died by accident, the presence of most of her clothing in the McCrary Creek Access Area would admit of no explanation.

Further evidence of criminal agency is found by Agent Bendure's testimony that the circular pieces of duct tape fit together where they had been cut once to form ankle-size loops for binding. That this exercise is logically consistent is shown by the presence on the duct tape of pieces of hosiery material and fibers from Ms. Gabriel's canvas shoes and polyester slacks. Both the slacks and the pair of underwear were cut and then torn or cut further to lay the fabric back totally. On the length of nylon rope was found a hair microscopically consistent with the hair of Dianne Gabriel. Hairs matching hers from the slacks and one of the shoes were crushed and had tissue adhering to the roots, indicating forcible removal. Ms. Gabriel was scheduled to appraise the house of a man who had given her a false name and false telephone number. This evidence was sufficient to allow the jury reasonably to infer that a criminal agency was the cause of Dianne Gabriel's death.

C.

[3] Finally, in order to get to the jury, the State had to show that the criminal agent who caused Ms. Gabriel's death was the defendant.

Fingerprint evidence linked defendant to the trash bag and its contents. Hair strands linked the duct tape, rope, shoes, slacks and other items to Dianne Gabriel. Fiber evidence linked both defendant and Ms. Gabriel to the trash bag's contents and the clothing found in the woods and showed convincingly that Ms. Gabriel had been in defendant's home.

The foregoing evidence was manifestly credible. Fingerprint evidence is a common and reliable tool for police investigation and will not be discussed here. The similarities in the hair samples were testified to by Special Agent Worsham, an expert in forensic hair examination and identification. Examination of hair includes the comparison of the many variables of color, thickness and shapes of scales on the cuticle, the outside of the hair shaft; the colors, shapes, sizes and distribution patterns of pigments in the cortex, the inner core of the hair shaft; and cellular shapes, sizes and patterns of the medulla, or central core of the hair shaft. In referring to the microscopic consistency of two or more hairs, Agent Worsham stated that he meant that the hairs had scales the same thickness, character and size; the pigments in the hair were of the same size, color and distribution pattern; and the medullary characteristics were the same shape and size. The only hair evidence for which this did not hold true was the dog hair, which could only be identified as being from any white dog.

The fiber evidence was also analyzed with a high degree of precision and accuracy. Special Agent Bendure, an expert in fiber identification and analysis, testified that variables examined in relation to the fibers included the amount of dye absorbed, the amount, particle size and distribution of delustriant (soil-hiding chemicals), the shape of the fiber (which could be round, star-shaped, triangular, multi-lobed, etc.), color, detail (such as striations on the fiber), light-polarizing characteristics and solubility characteristics. Agent Bendure testified that when he said one fiber was "consistent with" another, that meant that there were no inconsistencies in any of the details examined. In addition, the

mass of blue polyester fiber found in the crack in defendant's bedroom door veneer was sufficiently large to determine that the dye composition was the same as that of Dianne Gabriel's blue slacks found at the McCrary Creek Access Area. Bendure testified that "it is very difficult, if possible, to choose things at random and find a fabric that has the same dye composition as another piece of fabric."

There was other evidence to connect defendant with Ms. Gabriel's death. In her notes and to other people Ms. Gabriel made at least four references to "McCorkle" or "Larry McCorkle" in connection with an appraisal of a house or directions which led to defendant's house. Defendant had previously been heard to represent himself as McCorkle, a boyhood friend who had not seen defendant in a decade. Defendant did not show up for work on 18 July. Three long-distance calls were made from defendant's residence to Hecht Realty on that day.

Items found to match similar objects in defendant's residence included the trash bag, the duct tape, the sexually-oriented pinup from the 1979 *Playboy*, the strapping tape on the pinups and the bath cloths.

An opportunity for defendant to commit the crime has thus been established. Considering the evidence of the duct tape bindings, the panties and slacks that were cut or torn open to expose the genital area and the presence of several sexually-oriented magazines in the trash bag, it is not difficult or unreasonable to infer a motive on the part of the criminal agent.

Inconsistencies in the State's evidence were explained at trial. The sheet on which appraisal information about defendant's residence was written was dated "7/19/83." Bob Hecht of Hecht Realty testified that it was not unusual for one of his agents to put the next day's date on the appraisal form when performing an evening appraisal because it was usually the next night that an agent would return to the home with an estimated value to do what he called the "listing presentation." A second point of confusion was Mr. Hecht's insistence that Dianne Gabriel had told him that she was to do an appraisal that evening at Penicillin Point, a spot on the north end of Lake Norman and approximately four miles north of defendant's residence. Gary Rhyne also remembered Ms. Gabriel's appraisal to be scheduled for some-

where at the "north end" of the lake. One of the roads near defendant's house was called "Paradise Peninsula Road." Another witness referred to the area near defendant's residence as "Pinnacle Point." Lt. Guy Griffin of the Iredell County Sheriff's Department testified that when Hecht had first given a statement, he had said that Ms. Gabriel had gone to appraise a house at "Peninsula Point." Taken in the light most favorable to the State, this evidence shows simply a confusion of place names.

We hold that the foregoing evidence is so strong and cogent as to leave no doubt that Dianne Gabriel is dead. It was also sufficient to allow the reasonable inference that she died by criminal agency and that the criminal agent was the defendant. This case properly went to the jury.

II.

[4] In his second assignment of error, defendant contends that testimony as to the telephone investigation of Detective Sergeant Sarah O'Connor of Iredell County was hearsay and its admission constituted prejudicial error. Detective O'Connor testified that she had called thirteen hospitals in North Carolina in reference to anyone matching the description of Dianne Gabriel. The following exchange then occurred:

> Q: And what did you find out?
>
> MR. WALKER: Objection.
>
> COURT: Overruled.
>
> A: The mental hospitals advised they had no unidentified females fitting her description, and they, and also the other normal health hospitals, advised they had not treated a Dianne Gabriel. There was one exception being, just one minute please. A hospital in Charlotte—it will take me a minute to find it—they advised they had a black female, and she was nineteen years old.
>
> MR. WALKER: Objection and move to strike that.
>
> COURT: Overruled.

The prosecutor had previously asked the witness, "When you called these institutions, what did you ask them?" The trial court

sustained an objection to this question, but the question made it apparent that Detective O'Connor's investigation had been over the telephone. For this reason, the later question, "And what did you find out?" clearly called for hearsay testimony and a timely objection should have been sustained. N.C. Gen. Stat. § 8C-1, Rules 802 and 901(6) of the Rules of Evidence. Instead, Detective O'Connor was allowed to testify fully as to the results of the investigation. Defendant's tardy objection does not make it clear whether it applies to the whole statement or solely to the remarks about the "black female." Moreover, there is no reasonable possibility that the result of this trial would have been different had that answer been struck. Detective O'Connor had already testified that she had checked thirteen hospitals, by no stretch of the imagination a comprehensive list of where Ms. Gabriel might be found if, as defendant asserts, "it is still possible for Dianne Gabriel to walk into any police department or hospital in these United States." The evidence that O'Connor had checked these places, that Dianne Gabriel was still missing after nineteen months and that the prosecution for murder against the defendant was proceeding all gave rise to the clear implication that Ms. Gabriel was not located during O'Connor's investigation, no matter if the negative results of that investigation had been detailed or not. Further evidence of the death of Dianne Gabriel, as detailed in Part IA of this opinion, demonstrates that the outcome of the trial was not affected by this testimony. N.C. Gen. Stat. § 15A-1443 (1983). This assignment is overruled.

III.

[5] In his third assignment of error, defendant contends that the trial court committed prejudicial error by refusing to strike the testimony of real estate agent Nancy Ward. Ms. Ward was working for a realtor in Mooresville in late March or early April of 1983 when she received a call from a "Mr. E. J. Head" who wanted his property appraised. Ms. Ward related that she had gone to defendant's house, arriving there approximately ten minutes early for the 9:00 a.m. appointment that she had set up. A dog on the porch was the "only sign of life" she saw; the windows were closed and the drapes were pulled. She did not knock on the door, instead leaving her card on the porch railing with a note to Mr. Head that she would call him later.

In a call to defendant's residence later that day, two male voices, both answering to the name "Mr. Head," but the first identifying the second as the father, denied having called Ms. Ward to come appraise the house. The information was partially elaborated and clarified during cross-examination.

Defendant first contends that the whole of Ms. Ward's testimony should have been struck as irrelevant. We disagree. The testimony was to show, by its parallels to the experience of Dianne Gabriel, identity and common plan or scheme of defendant to lure female real estate agents to his house. N.C. Gen. Stat. § 8C-1, Rule 404(b) of the Rules of Evidence; *see, e.g., State v. Bartow*, 77 N.C. App. 103, 334 S.E. 2d 480 (1985).

Defendant also contends that it was error to allow Ms. Ward to testify on re-direct:

> Q: You indicated that you didn't like the looks of the house on cross-examination—why not?
>
> A: I guess it is a kind of an unknown. I felt like I was being watched.
>
> MR. WALKER: Objection.
>
> COURT: Sustained.
>
> MR. WALKER: Move to strike.
>
> COURT: The objection is sustained.

The prosecutor then moved for a *voir dire* on the testimony. After the *voir dire*, the trial court did not instruct the jurors to strike that testimony from their memory and defense attorney did not renew his motion to strike. Moreover, the question, which clearly called for a possibly inadmissible response, was not objected to.

Even considering the issue on its merits, we hold that no prejudice was caused by this statement. Defendant asserts that other inadmissible "feelings" of the witness had been stated, *e.g.*, her "bad vibes" and "eerie feelings," and that the cumulative effect of this was to prejudice defendant. When these other statements were made, however, objections were sustained and motions to strike, when presented, were granted. When the court withdraws incompetent evidence and instructs the jury not to

consider it, any prejudice is ordinarily cured. *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 104 S.Ct. 263, 78 L.Ed. 2d 247 (1983). The cumulative effect of the sustained objections to Ms. Ward's testimony would be to denigrate her "feelings" in the eyes of the jury. We hold that this statement created no prejudice and overrule this assignment of error.

IV.

In his fourth assignment of error, defendant contends that the prosecutor engaged in misconduct and improper argument that prejudiced the trial. Where appropriate, the trial court properly sustained objections to questionable behavior by the prosecutor and admonished the jury in a curative instruction, which cured any possible prejudice. *State v. Sanders*, 303 N.C. 608, 281 S.E. 2d 7, *cert. denied*, 454 U.S. 973, 102 S.Ct. 523, 70 L.Ed. 2d 392 (1981). In light of the whole record, the conduct of both the prosecutor and counsel for the defense reveal nothing more than zealous advocacy in a hotly contested case. Defendant has failed to show any prejudice resulting from the conduct of the prosecutor. This assignment is overruled.

[6] The State presented evidence on *voir dire* from three female witnesses who testified that they had been victims of previous assaultive behavior by the defendant. In his fifth and final assignment of error, defendant contends that the trial court erred in failing to conduct an examination of the jurors to determine whether they could hear that *voir dire* testimony. Defense counsel first made this motion when he realized the proximity of the jury room to the courtroom. The trial court refused to conduct any investigation unless there were "some evidence offered in the form of motions and so forth concerning impropriety."

> MR. WALKER: I bring this up partially because the District Attorney has said there is a problem about acoustics and that things can be heard in that room. I don't practice here regularly. If I had, I would have been making a motion that they not be in that room yesterday, and I wasn't aware there was a problem either; but, apparently, it is known at this Bar that there is a problem; and, when you consider the volume that went into the remarks yesterday by the witness and the two lawyers, myself included, then I think there was more than the usual opportunity for the Jury to have heard it.

COURT: Bring the Jury back.

In the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the courts are within the trial judge's discretion. *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985). The presiding judge is given large discretionary power as to the control of the trial. *Id.* This discretion extends to investigations of possible improprieties concerning the jury. *State v. Selph*, 33 N.C. App. 157, 234 S.E. 2d 453 (1977). Depending on the definite character of the allegations made, it may not be necessary for the trial court to conduct an investigation. *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363 (1962).

In the case below, defense counsel asserted that the district attorney had said there was a problem with the jury room and that such problem was "known at this Bar," but counsel failed to produce any affidavits from either the district attorney or another member of the Bar attesting to the truth of this allegation; neither did counsel conduct tests of the room himself. The trial court asked for evidence and none was forthcoming. The court stated its personal knowledge that the jury deliberation room had been in use for "twelve or fifteen years." "The circumstances must be such as not merely to put suspicion on the verdict because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely a matter of suspicion, it is purely a matter in the discretion of the presiding judge." *State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978). This assignment is overruled.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND THE PUBLIC STAFF OF THE NORTH CAROLINA UTILITIES COMMISSION v. MARTHA H. MACKIE, APPLICANT-APPELLANT

No. 8510UC69

(Filed 4 February 1986)

1. Utilities Commission § 19— water and sewer services—public utility

Appellant is providing water and sewer services "to or for the public" within the meaning of N.C.G.S. 62-3(23)a.2 and is subject to regulation by the Utilities Commission where, ever since she acquired property containing water distribution and sewage disposal facilities, she has provided such services to any resident of a house connected to her facilities who desired the services; she provides water to eighteen customers and sewage services to nineteen customers in an unincorporated village; and although appellant has solicited no customers and has not extended her facilities to any residences not previously served, she has provided service to new customers who moved into homes already connected to her facilities.

2. Utilities Commission § 19— water and sewer services—public convenience and necessity

The Utilities Commission did not err in concluding that appellant's operation of water and sewer systems served the public convenience and necessity where the evidence before the Commission indicated that a number of residences served by appellant's water and sewer system were situated on lots of insufficient size to support both a well and a septic system and the occupants of these residences thus have no alternative means of water supply and sewage disposal.

3. Utilities Commission § 19— water and sewer services—refusal to permit abandonment—insufficient findings

The facts found by the Utilities Commission were insufficient to support its conclusion that appellant's evidence did not establish her entitlement to abandon her operation of water and sewer systems on the ground that operation of the systems cannot produce sufficient revenues to meet the expenses thereof where the Commission failed to make findings as to the reasonable expenses of operation and the revenues which the systems might reasonably be expected to produce and failed to give consideration to appellant's evidence concerning the anticipated costs of necessary repairs to a water tank. N.C.G.S. 62-79(a); N.C.G.S. 62-118(a).

4. Utilities Commission § 1— utilities regulation—order to comply with laws

The Utilities Commission does not exceed its statutory authority by ordering one who is, in fact, operating as a public utility to comply with laws providing for utilities regulation. N.C.G.S. 62-30; N.C.G.S. 62-32(b); N.C.G.S. 62-118(b).

5. Utilities Commission § 2— water and sewer services—finding of public convenience and necessity—order to apply for certificate unnecessary

An order of the Utilities Commission requiring appellant to apply for a certificate of public convenience and necessity for the operation of water and sewer systems was redundant where the Commission has already found that appellant is operating a utility which serves the public convenience and necessity. If the Commission should conclude that appellant's application to abandon service should be denied, the Commission should proceed to establish the territory to be served by appellant, issue the certificate, establish the rates to be charged for the services, and, if necessary, exercise its statutory powers to compel compliance with its lawful orders.

6. Utilities Commission § 19— requiring continuation of public utility—no involuntary servitude

An order of the Utilities Commission requiring appellant to continue the operation of public water and sewer utilities would not violate constitutional prohibitions against involuntary servitude so long as appellant is justly compensated for the services she provides.

Judge WEBB dissenting.

APPEAL by applicant from order of North Carolina Utilities Commission entered 10 September 1984. Heard in the Court of Appeals 29 August 1985.

On 25 January 1984, Martha H. Mackie made application to the North Carolina Utilities Commission for authority to cease providing water service and sewage disposal service to residential customers in the unincorporated village of Falls of the Neuse in Wake County. In her application, Mrs. Mackie maintained that she was not operating a public utility and was not therefore, subject to the regulatory jurisdiction of the Commission. However, in the event that she was found by the Commission to be subject to its jurisdiction, Mrs. Mackie asserted that she should be permitted to discontinue service because the revenues derived from providing water and sewer services were insufficient, after meeting her costs of operation, maintenance and depreciation, to yield a fair return. The Commission scheduled a public hearing on the application for 10 April 1984. On 6 April 1984, upon motion of the Public Staff, the scope of the hearing was expanded "to also consider the issue of whether or not Martha H. Mackie is a public utility under the jurisdiction of the North Carolina Utilities Commission."

The evidence before the Commission tended to show that in the fall of 1982, George C. Mackie, Jr., applicant's husband, pur-

chased two tracts of land located in Falls of the Neuse from Scarsdale Investment Corporation for the sum of $45,000.00. Title to the tracts, consisting of 18.69 acres and 1.0 acres respectively, was taken in Mrs. Mackie's name as a gift to her from her husband for long-range investment purposes. When Mrs. Mackie acquired the property, there was located on the 18.69 acre tract a water distribution system consisting of a water pipeline from a spring located on property owned by the United States Government, a pumphouse containing a pump and concrete holding tank, and an elevated steel water storage tank connected to water lines running to residences in the village. A sewage disposal facility, consisting of a large sand pit, was located on the 1 acre tract, which is not contiguous to the larger tract. Sewage is emptied into the sand pit through a main located beneath the roadway.

The evidence showed that Falls of the Neuse was originally a mill village which grew around a textile mill operated by the Neuse Manufacturing Company. Neuse also owned most of the residences in the village, and provided a water system. Neuse went out of business, and the mill was intermittently operated by a succession of owners and receivers until after World War II, when Erwin Mills purchased the mill and some of the residences. In approximately 1949, Erwin Mills constructed the water and sewer systems which presently exist, and provided water and sewage disposal services to its own employees and tenants and also to other residents of the village. After Erwin Mills ceased operating the mill, the property was sold. Gradually, the residences were conveyed to individuals. The property upon which the water system and sewage disposal facility are located was conveyed to Henry Young and Lewis Walton and, later, to Scarsdale Investment Corporation. These owners continued to provide water and sewage disposal services to residents of the village.

When Mrs. Mackie acquired the property, Scarsdale Investment Corporation had been charging a monthly fee of $10.00 for water service and $5.00 for sewage disposal. Soon after she acquired the property, Mrs. Mackie increased the monthly charges to $15.00 for water service and $10.00 for sewage disposal. Five customers discontinued use of the systems after the rates were increased. At the time of the hearing, there were 17 users of both water and sewer services, 1 user of water service only, and 2 users of sewer service only.

The evidence does not disclose the total number of residences to which the water or sewer systems were capable of providing service, however, no additional residences have been connected to either system since Mrs. Mackie acquired it. The systems do not serve all of the residences in Falls of the Neuse Village; those residences which do not obtain water from Mrs. Mackie's tank are served by wells and those residences which do not use her sewage disposal system are served by septic tanks. Although no additional residences have been connected, new occupants have moved into residences already connected and have obtained water and sewer service from Mrs. Mackie.

Mrs. Mackie testified that she did not acquire the property for the purpose of operating a water or sewer utility and that she had made no effort to attract customers. She has continued to provide the same service as had been provided by her predecessors in title as a convenience to the present users. In her opinion, the presence of the water supply facility is a hindrance to the development of her property. George H. Mackie, Jr., testified that although he had been aware of the water and sewer facilities when he purchased the property, he had been advised that he could terminate the service. According to all of the evidence, the system had never been authorized or regulated by the Utilities Commission; its existence was unknown to the Commission until it received a complaint when Mrs. Mackie increased the monthly charges for service. Upon the complaint being made, Mrs. Mackie was contacted by Jerry Tweed, Director of the Water Division of the Public Staff of the Utilities Commission, who advised her that she should file either an application for a certificate of public necessity and convenience, in order to continue providing service, or an application to abandon service.

Mrs. Mackie also offered evidence as to her actual out-of-pocket expenses for operation of the system for the 14 month period from 1 January 1983 until 29 February 1984, exclusive of property taxes, depreciation, major repairs, bookkeeping and accounting expenses, or salary to her or her husband. Based upon these figures, she estimated that the annual cost of operation, including taxes and bookkeeping expenses but excluding major repairs, depreciation or salary to herself or her husband, will be approximately $4,600.00. Assuming that the number of present customers remains constant, total revenues for a one-year period

will be approximately $5,500.00. There was evidence tending to show that the water tank is in need of painting at an estimated cost of $5,000.00. No evidence of the original cost of the facilities was available, however, Mrs. Mackie offered evidence as to the present cost of replacement.

The Public Staff offered evidence tending to show that many of the residences served by the system were located on lots which were of insufficient size to support both a well and a septic tank. Therefore, many of Mrs. Mackie's customers would have no alternative source of water or sewer service if Mrs. Mackie was permitted to discontinue service.

After making findings of fact and conclusions of law, the Commission entered a Final Order (1) declaring that Mrs. Mackie was "a public utility providing water and sewer service in the village of Falls of the Neuse," (2) denying her application to discontinue the service, and (3) ordering her to submit an application for a certificate of public necessity and convenience. Mrs. Mackie appeals.

Vickie L. Moir, Staff Attorney, for Public Staff of the North Carolina Utilities Commission, intervenor-appellee.

I. Beverly Lake for applicant-appellant.

MARTIN, Judge.

I

The scope of judicial review of a decision of the Utilities Commission is delineated by G.S. 62-94. According to G.S. 62-94(b), this Court may reverse or modify a decision of the Utilities Commission only when

> [T]he substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

G.S. 62-94(b); *Utilities Commission v. Bird Oil Co.*, 302 N.C. 14, 273 S.E. 2d 232 (1981). Grounds for relief not specifically set forth in the notice of appeal may not be relied upon in the appellate courts. G.S. 62-94(c). However, even when specific grounds are set forth, the applicable scope of review may be determined only from an examination of the issues brought forward by the appealing party and the nature of the argument in support thereof. *Utilities Commission v. Bird Oil Co., supra.*

II

[1] The first issue presented by appellant is whether the Commission erred in concluding and decreeing that she is operating a public utility subject to regulation by the Utilities Commission. In the notice of appeal filed with the Commission, and in the assignments of error in the record on appeal, appellant referred to five of the six statutory criteria as grounds for relief. It is apparent, however, that the basis of her argument before this Court, as to this first issue, is her contention that the Commission erred in its application of the law to the facts found by it. Thus our review of the Commission's conclusion and decree that appellant is operating a public utility is properly conducted under G.S. 62-94(b)(4), whether the Commission's order was affected by errors of law.

In its findings of fact, the Commission summarized the history of the water service and sewage disposal facilities from their beginning until the subject property was acquired by Mrs. Mackie. It found that appellant's husband was aware, when he purchased the property, that the facilities were on the property and were in use. After appellant acquired the property, she continued to provide the services, maintained the equipment, employed men to operate the facilities, and charged fees to those using the services. Although it found that no new homes have been connected to the system since appellant acquired it, the Commission found that appellant had extended service to new residents of homes already connected. At the time of the hearing, appellant was selling water to eighteen customers and providing sewage disposal service to nineteen customers. Appellant has not

assigned error to the Commission's findings of any of the foregoing facts; they are supported by competent evidence and are conclusive on appeal. *Utilities Commission v. Intervenor Residents*, 305 N.C. 62, 286 S.E. 2d 770 (1982).

The term "public utility" is defined by G.S. 62-3(23). With respect to water and sewer utilities, the statute provides:

> G.S. 62-3(23)a. "Public utility" means a person, . . . owning or operating in this State equipment or facilities for:
>
> . . . .
>
> 2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers . . . .

Applying the definition to the facts found by the Commission, there is no question that appellant meets the statutory criteria of distributing water and providing sewage disposal service to more than ten residential customers for compensation. The basis of appellant's argument, however, is that since she has not offered to extend services to any residence other than those already connected to her system when she acquired it, she is not operating a public utility because she does not provide the services "to or for the public."

Although it excluded from the definition of "public utility" those water and sewer systems serving less than ten residential customers, the General Assembly did not attempt, in Chapter 62 of the General Statutes, to define the word "public" or establish any standardized test as to when a utility service is provided "to or for the public." Hence, our Supreme Court has twice been required to consider this question and to attempt a definition of the word "public" as used in the utilities law. In *Utilities Commission v. Carolina Telephone and Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966), the Court defined "public," as used in G.S. 62-3(23) as follows:

> One offers service to the "public" within the meaning of the statute when he holds himself out as willing to serve all

> who apply up to the capacity of his facilities. It is immaterial, in the connection, that his service is limited to a specified area and his facilities are limited in capacity.

Id. at 268, 148 S.E. 2d at 109. In *Utilities Commission v. Simpson*, 295 N.C. 519, 246 S.E. 2d 753 (1978), the Court rejected a definition of "public," that would have required a service to be offered to an indefinite class or to the community at large. Instead, the Court approved a more flexible interpretation of the term.

> [W]hether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of "public" to be thereafter universally applied. What is "public" in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances are (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry. The meaning of "public" must in the final analysis be such as will, in the context of the regulatory circumstances, . . . accomplish "the legislature's purpose and comport with the public policy." (Citation omitted.)

Id. at 524, 246 S.E. 2d at 756-57. The Court concluded that although a service may be offered only to a definable class, rather than to the public at large, it still may be considered an offering of service to the "public" within the meaning of the regulatory statutes.

We believe that appellant is providing water and sewage disposal service "to or for the public" under the holdings of both *Carolina Telephone and Telegraph Co.* and *Simpson.* Since her acquisition of the water distribution and sewage disposal facilities, appellant has provided services to any resident of a house connected thereto who desired the services. Although she has solicited no customers and has not extended her facilities to any residences not previously served, she has willingly provided service to new customers who moved into homes already connected to her facilities. In so doing, she has held herself out as willing to serve, indiscriminately, all who have applied, up to the capacity of

her facilities, within the holding of *Carolina Telephone and Telegraph Co., supra.*

By application of the "regulatory circumstances" interpretation of *Simpson, supra,* we reach the same result. By excluding from its definition of public utility those water systems serving fewer than ten customers, G.S. 62-3(23)a.2, the General Assembly manifested its clear intent that systems serving ten or more customers serve a sufficient segment of the public to create a public interest in their regulation to make certain that adequate service is provided at fair rates. G.S. 62-2. Evidence before the Commission indicated that more than half of all water systems regulated by the Commission serve a limited number of users in limited areas, such as a single residential development. The effect of non-regulation of these systems would expose their users to the risk of inadequate service and exorbitant rates, with no alternative sources of service.

We hold, therefore, that appellant is providing water and sewage disposal service "to or for the public" within the meaning of G.S. 62-3(23)a.2 and is subject to regulation by the Utilities Commission. That portion of the Commission's order so holding is affirmed.

III

[2] After concluding that appellant is operating a public utility, the Commission also concluded that her operation of the water and sewer systems served the public convenience and necessity. In her notice of appeal and exceptions filed with the Commission, appellant asserted that such conclusion was in excess of the statutory authority of the Commission and was arbitrary and capricious. She based her exception on the grounds that she was not operating a public utility system. In view of our affirmation of the Commission's decision that appellant is, in fact, operating a public utility, its determination that the public convenience and necessity were served thereby is clearly within its statutory authority. *See* G.S. 62-110, -118.

In her assignments of error contained in the record on appeal, appellant seeks to rely on an additional ground for relief, not stated in her notice of appeal, i.e., that the Commission's conclusion is not supported by any finding of fact which is supported

"by competent, material and substantial evidence in view of the entire record as submitted. . . ." G.S. 62-94(b)(5). Although G.S. 62-94(c) precludes her reliance on this ground, we have considered it in connection with our consideration of appellant's contention that the Commission's conclusion is arbitrary and capricious.

Evidence before the Commission indicates that a number of the residences served by the water and sewer systems are situated on quarter-acre lots, which are of insufficient size to support both a well and septic system. The occupants of these residences, who are currently among appellant's customers, have no alternative means of water supply or sewage disposal other than the service provided by appellant. This evidence clearly supports the Commission's finding of fact that: "The customers do not have wells; some customers do not own enough land to install a septic tank." Considering the recognized importance of an adequate and safe water supply and sanitary means of sewage disposal, the Commission's finding supports a conclusion not only that appellant's services constitute a convenience to that segment of the public who use them, but also that such services are necessary to the safety and health of the public.

The words "arbitrary" and "capricious" have similar meanings, generally referring to acts done without reason or in disregard of the facts. *In re Housing Authority of Salisbury*, 235 N.C. 463, 70 S.E. 2d 500 (1952). We find nothing arbitrary or capricious in the Commission's conclusion that appellant's water and sewer services serve the public convenience and necessity.

IV

[3] The next issue presented for our consideration concerns the denial of appellant's application for authority to abandon her public utility service. She seeks review of this portion of the Commission's order upon grounds that it is unsupported by competent evidence, is arbitrary and capricious, is in excess of the Commission's statutory authority and is in violation of constitutional provisions. We need reach none of these grounds for review because we find the order, as it addresses this issue, inadequate to permit appellate review.

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine

the controverted questions presented in the proceedings and shall include:

(1) Findings and conclusions and the reasons or bases therefor upon all material issues of fact, law, or discretion presented in the record, ...

N.C. Gen. Stat. § 62-79(a) (1982). This section requires the Commission to find all facts which are essential to a determination of the issues before it, in order that the reviewing court may have sufficient information to determine whether an adequate basis exists, in law and in fact, to support the Commission's resolution of the controverted issues. *Utilities Commission v. Conservation Council*, 312 N.C. 59, 320 S.E. 2d 679 (1984); *Utilities Commission v. Queen City Coach Co.*, 4 N.C. App. 116, 166 S.E. 2d 441 (1969).

Appellant based her application to discontinue service upon the following provision of G.S. 62-118(a): "Upon finding . . . that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power . . . to authorize by order any public utility to abandon or reduce such service." The power of the Commission to authorize an abandonment of service is, in large measure, discretionary. *Utilities Commission v. Southern Railway Co.*, 254 N.C. 73, 118 S.E. 2d 21 (1961). This is so because the Commission's decision must ultimately rest on a balancing of the public's interests and the financial ability of the utility to provide service. However, the Commission's power to require the utility to continue a service is not unlimited. To require a utility, particularly a small operation such as the one involved in the present case, to continue an unprofitable operation would violate constitutional guaranties against the taking of property without just compensation. *See* F. Welch, *Cases and Text on Public Utility Regulation* 226 (rev. ed. 1968). The burden is on the utility seeking authorization to abandon service to establish "that there is no reasonable probability of its being able to realize sufficient revenue by the rendition of such service, to meet its expenses." *Utilities Commission v. Haywood Electric Membership Corp.*, 260 N.C. 59, 131 S.E. 2d 865 (1963).

In the present case, as previously summarized, appellant presented substantial evidence as to her actual expenses of operation and projected future expenses of operation, as well as the

necessity of repairs to the water tank and the estimated cost thereof. Although no evidence of the original cost of the system or accumulated depreciation of original cost previously recovered was available to her, she presented evidence of her cost of acquisition of the entire property upon which the facilities are located and estimates of replacement costs of the facilities. The Commission based its denial of appellant's application to abandon service upon its Finding of Fact 11:

> 11. The financial evidence offered by applicant fails to show that there is no reasonable probability of her realizing sufficient revenues from the utility services to meet her utility expenses.

The Commission repeated virtually the same language in its third Conclusion of Law:

> 3. The Applicant has failed to show that there is no reasonable probability of her realizing sufficient revenue to meet the expenses of the operation of the public utility water and sewer systems. . . .

Though denominated a finding of fact by the Commission, the statement contained in Finding of Fact 11 is in reality a conclusion of law in that it applies principles of law, rather than a determination of facts from the appellant's evidence, to resolve the issue. In order to review this legal conclusion, we must determine whether facts otherwise found by the Commission are sufficient to support its legal determination that appellant's evidence did not establish her entitlement to abandon service. *See Jones v. Andy Griffith Products, Inc.*, 35 N.C. App. 170, 241 S.E. 2d 140, *disc. rev. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978).

The Public Staff argues that the Commission has complied with G.S. 62-79(a)(1) because the Hearing Examiner, in his Discussion of Evidence and Conclusions in the Recommended Order, stated the reasons for his rejection of appellant's financial evidence, and the Commission adopted the Recommended Order as its Final Order. It is true that the Hearing Examiner summarized appellant's contentions as to her operating costs, depreciation expense and fair return. He rejected her evidence of operating costs because he was "unable to reproduce the calculation" and because an item of capital equipment was erroneously included in ap-

pellant's schedule of expenses for "Repairs and Maintenance." He rejected her evidence of depreciation expense because he found it "exaggerated" and because he determined that it had been improperly calculated insofar as rate-making purposes are concerned. He rejected her evidence as to fair return because he found that her contention was based upon the full purchase price of all of the property, when only a part was used for utility purposes. The Hearing Examiner's discussion of the evidence, however, does not sufficiently resolve material issues of fact to permit a determination of the controversy.

The ultimate issue for resolution is whether the operation of the system can produce sufficient revenues to meet the expenses of operation. G.S. 62-118(a). To resolve the issue, there must necessarily be findings of fact as to the reasonable expenses of operation and the revenues which the system may be reasonably expected to produce. Neither the Hearing Examiner nor the Commission made findings as to either of these material facts. Moreover, there is no indication from the findings made, or from the Hearing Examiner's Discussion of Evidence and Conclusions, that the Commission gave any consideration to appellant's evidence concerning the anticipated costs of necessary repairs to the water tank. Thus, we hold that the Commission failed to find sufficient facts to enable this Court to determine the correctness of the Commission's ruling on the controverted issue. Its failure to do so necessitates that we remand this issue for further proceedings.

In connection with our decision to remand this issue to the Commission, we note that appellant has attempted to bring to our attention, in her brief, evidence which was not before the Commission and which, according to appellant, became known to her only after the Commission acted in this matter. We have not considered this evidence, nor has the appellant attempted to proceed in accordance with G.S. 62-93 in order to present this evidence to the Commission pending appeal. Upon remand, the decision as to whether to permit the taking of additional evidence will be that of the Commission.

V

Appellant also asserts that the Commission's order that she apply for a certificate of public convenience and necessity to operate the water and sewer systems is in excess of the Commis-

sion's statutory authority and in violation of constitutional provisions. While this issue may or may not arise after remand, depending upon the Commission's findings, we choose to address it.

N.C. Gen. Stat. § 62-110 (1982) (amended 1984) provides in pertinent part:

> No public utility shall hereafter begin the . . . operation of any public utility plant or system or require ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such . . . acquisition, or operation . . . .

Appellant argues that although the foregoing statute creates a condition precedent upon the right of a person to enter the utility business, the Commission exceeds its statutory authority by requiring a person who has failed to comply with the statute to apply for and accept a certificate of public convenience and necessity. According to her argument, the Commission may do no more than order her to cease and desist from operating the water and sewer systems in violation of the statute, an order with which she would willingly comply.

[4] Chapter 62 of the North Carolina General Statutes confers upon the Utilities Commission broad powers to regulate public utilities and to compel their operation in accordance with the policy of the State, as declared in G.S. 62-2. *Utilities Commission v. Robert Morgan, Att'y Gen.*, 277 N.C. 255, 177 S.E. 2d 405 (1970), *aff'd on rehearing*, 278 N.C. 235, 179 S.E. 2d 419 (1971). The status of an entity as a public utility, entitled to the rights conferred by the statutes and subject to the jurisdiction of the Commission, does not depend upon whether it has secured a certificate of public convenience and necessity, pursuant to G.S. 62-110, but is determined instead according to whether it is, in fact, operating a business defined by the Legislature as a public utility. *Utilities Commission v. Carolina Telephone and Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966). If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission notwithstanding the fact that it has failed to comply with G.S. 62-110 before beginning its operation.

G.S. 62-30 vests the Utilities Commission with "general power and authority to supervise and control the public utilities . . . as may be necessary to carry out the laws providing for their regulation, and all such other powers . . . as may be necessary or incident to the proper discharge of its duties. G.S. 62-32(b) specifically vests the Commission "with all power necessary to *require and compel* any public utility to provide and furnish . . . reasonable service of the kind it undertakes to furnish . . . ." (Emphasis added.) G.S. 62-118(b) authorizes the Commission, specifically with respect to abandonment of water and sewer utility service without the Commission's consent, to seek injunctive relief from the superior court to compel the continued operation of such water and sewer utility services. Thus, we hold that the Commission does not exceed its statutory authority by ordering one who is, in fact, operating as a public utility to comply with laws providing for utilities regulation.

[5] However, we find redundant the Commission's order that appellant apply for a certificate of public convenience and necessity. The effect of such a certificate is to grant a utility an exclusive right to sell its service within the territory allotted to it, based upon a finding that such service would be a convenience to, and fill a need of, the public. The Commission has already made such a finding. Should the Commission again conclude, upon remand, that appellant's application to abandon service should be denied, no purpose is served by requiring appellant to apply for a certificate, the issuance of which is dependent upon a finding which the Commission has already made. Instead, the Commission should proceed to establish the territory to be served by appellant, issue the certificate (franchise), establish the rates to be charged for the services, and, if necessary, exercise its statutory powers and authority to compel compliance with its lawful orders.

[6] Neither do we agree that an order of the Commission, based upon proper findings and conclusions, requiring appellant to continue operation of her utilities would violate constitutional prohibitions against involuntary servitude. Appellant voluntarily put her land and equipment to a public use and collected compensation for the services which she provided. Having done so, the Commission may require that she continue to use it in the service to which she voluntarily dedicated it so long as she is justly compensated for such service.

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good.

Munn v. Illinois, 94 U.S. 113, 126, 24 L.Ed. 77 (1877).

VI

In summary, we affirm that portion of the Commission's Final Order holding that appellant owns and operates public utility water and sewer systems and, as such is subject to the jurisdiction of the Commission. We also affirm that portion of the Commission's Final Order holding that the public convenience and necessity are served by her operation of those systems. For the reasons previously stated, however, we vacate that portion of the Final Order denying appellant's application for authority to abandon service and remand this case to the Utilities Commission to make necessary findings upon which it may properly resolve the issue.

Affirmed in part, vacated in part, and

Remanded.

Judge BECTON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not believe Martha H. Mackie offers water and sewerage services to all who apply up to the capacity of her facilities. For this reason I would hold she does not operate a public utility.

STATE OF NORTH CAROLINA v. JOE LYNN CAIN

No. 8519SC191

(Filed 4 February 1986)

1. **Searches and Seizures § 23— assault—search pursuant to warrant—evidence sufficient for probable cause**

Defendant's motion to suppress evidence seized pursuant to a search warrant was properly denied where the information contained in the affidavit was sufficient to support the magistrate's determination of probable cause and the findings of the trial court in denying the motion to suppress were supported by plenary competent evidence.

2. **Criminal Law § 66.13— assault—showup in police car—not impermissibly suggestive—counsel not required**

The trial court did not err in a prosecution for assault and discharge of a firearm into an occupied vehicle by denying defendant's motion to suppress identification testimony obtained from a witness at the scene who later identified defendant in the back of a patrol car. Defendant was not entitled to have counsel present when he was taken into custody as a suspect and shown to the witness because a formal charge had not been levied, and the pretrial identification procedure was not so impermissibly suggestive or conducive to misidentification as to violate defendant's right to due process where the witness observed a man outside a trailer for five to ten seconds from a distance of 15-20 feet; it was 9:00 p.m. and dark outside but the area was illuminated by the lights of an industrial plant on the other side of the highway; a deputy testified that there was enough light left in the parking lot area to read two license plates out the side window of his patrol car from 50 feet away without any additional artificial lighting; the witness testified that light from inside the trailer lit up the outside a little when the door was open; the witness identified defendant as the man he saw with no doubt in his mind; the witness was interviewed less than an hour after the shooting; a deputy observed a man in the trailer who fit the witness's description; that man, defendant, was detained in a patrol car while the witness was brought to the scene; officers bringing the witness to the scene did not suggest to the witness that he ought to pick out the man in the patrol car as the man he saw outside the trailer; an officer asked the witness if he "minded looking at an individual and see if he could identify him"; and the witness looked at defendant for 10-15 seconds, identified defendant, and said there was no doubt in his mind.

3. **Assault and Battery § 14.3— assault—firing into car—evidence sufficient**

There was sufficient evidence to go to the jury and to convict defendant of assault with a deadly weapon with intent to kill inflicting serious injury where there was substantial evidence from which the jury could reasonably infer that the defendant shot at the victim, an occupant of a car, with a deadly weapon; the evidence that the victim was seriously injured by one of the shots was positive and uncontradicted; and intent to kill could be inferred from defendant's use of a .357 magnum revolver, fired numerous times.

4. Weapons and Firearms § 3— discharging firearm into occupied automobile—evidence sufficient

There was sufficient evidence from which the jury could reasonably infer that defendant had, without legal justification or excuse, fired a .357 magnum revolver at an occupied Plymouth automobile with two of the bullets entering the vehicle, and with the knowledge that the vehicle was then occupied by one or more persons or with reasonable grounds to believe the vehicle might be so occupied. N.C.G.S. 14-34.1.

5. Criminal Law § 87.1— assault—leading question—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for assault and discharging a firearm into an occupied automobile by allowing the State to ask a witness if there were any dissimilarities between defendant and the person he had seen by a trailer just before the shooting. The question did tend to lead the witness, but defendant did not demonstrate that the court abused its discretion in allowing the question and the answer.

6. Assault and Battery § 16.1— lesser included offenses not submitted—no error

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and for discharging a firearm into an occupied automobile by not instructing the jury on the lesser included offenses of assault with a deadly weapon with intent to kill and assault with a deadly weapon. There was no contradiction in the evidence of the infliction of serious injury or that a deadly weapon was used; the defendant was either guilty of shooting into the car and wounding the girl or he was not guilty.

7. Criminal Law § 138— two mitigating factors—no aggravating factors—presumptive sentence—no abuse of discretion

The trial court did not abuse its discretion when sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury and for discharging a firearm into an occupied vehicle by imposing the presumptive sentence for each offense even after finding two factors in mitigation and none in aggravation. The question of whether and to what extent to reduce the sentence below the presumptive term upon a finding of one or more mitigating factors and no aggravating factors is within the court's discretion. N.C.G.S. 15A-1340.4, N.C.G.S. 15A-1444(a1).

APPEAL by defendant from *Mills, Judge*. Judgments entered 15 June 1984 in Superior Court, CABARRUS County. Heard in the Court of Appeals 25 September 1985.

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

Koontz, Hawkins & Nixon by Timothy M. Hawkins for defendant appellant.

COZORT, Judge.

Defendant was tried upon proper indictments issued 18 July 1983, charging him with (1) assault with a deadly weapon with intent to kill inflicting serious injury, G.S. 14-32(a), and (2) discharging a firearm into an occupied vehicle, G.S. 14-34.1. Defendant was convicted on both counts. The State's case was based on circumstantial evidence. On appeal, defendant raises six assignments of error, with the most important issues being (1) the trial court's denial of defendant's motion to suppress evidence seized pursuant to a search warrant; (2) the trial court's denial of defendant's motion to suppress a witness's identification of the defendant; (3) the sufficiency of the evidence to go to the jury; and (4) the trial court's imposing the presumptive sentence on each charge after finding two factors in mitigation and no factor in aggravation. We find no error. The facts follow:

During the early evening hours on 30 March 1983, seven people in their late teens or early twenties gathered in Charlotte and decided to drive north on Highway N.C. 49 to the Rocky River bridge in Cabarrus County. They took two cars, with Mike Jones and John Buckley riding together in one car; and David Ross, Hugh Gilbert, Timothy Furr, Lori Coates and Kim Richardson riding in the second, a 1976 four-door Plymouth Volare owned by Ross's mother and driven by Ross on this evening. They bought beer in Charlotte and proceeded up Highway 49. They drove across the Rocky River bridge to the north side of the river and pulled off on the left-hand side of the road in the parking area of what appeared to be an abandoned gas station. Ross pulled in about three feet to the left of a dump truck parked there, and the car containing Jones and Buckley pulled in and parked to the left of Ross's car. At about 8:30 p.m., all seven walked down to the river to a train trestle where they drank beer and talked. They stayed down at the river for about 20 to 30 minutes. Furr and Ms. Richardson went back to the car 5 or 10 minutes before the others.

After everyone had returned to the cars, Furr and Gilbert got out of Ross's car to use the bathroom. Furr went to the back of the dump truck and began urinating, while Gilbert went to the front of the dump truck, which was facing a small trailer parked at the site. Gilbert was facing the door to the trailer. While he

was urinating, a light came on in the trailer, and then the door swung open. A man stepped out and stood 15-20 feet from Gilbert. Gilbert looked at the man for 5-10 seconds. The man was smoking a cigarette. The right side of his face was illuminated by the light shining out the trailer door. At trial, Gilbert identified defendant as the man he saw walk out the trailer door. Gilbert spoke to the man, who went back in the trailer without responding. Gilbert finished urinating and returned to Ross's car. Gilbert and Furr got in the back seat with Ms. Richardson, with Ms. Richardson sitting on the right, Furr in the middle, and Gilbert on the left. Ms. Coates sat in the front seat with Ross. Gilbert told the others he had seen a man out there. Ross was getting the car ignition key out of his wallet when shots started ringing out. The shots were fired about a minute after Gilbert saw the man at the trailer. According to Gilbert, the shots came from the other side of the truck, towards the trailer. There were four or five shots, some of which hit in front of the car. Furr saw dirt flying up in front of the car, visible in the car's headlights. Ross cranked the car and began backing out. As he was backing out, Ross heard more shots and Ms. Coates looked back and saw "a figure on the ground like a cast or a shadow," moving out from behind the truck. She could not make out what it was. Both cars backed out of the parking area and proceeded to go back south on Highway 49 towards Charlotte, with the Ross automobile in the rear. They waited for a van to pass before pulling completely out on the highway.

As the Ross vehicle was going over the Rocky River bridge, more shots came from behind the car from the area where they had been parked. Just before that series of shots, Gilbert looked out the back window and saw a man walk fast from the trailer to the road. He could not tell who it was. He testified he did not notice any dissimilarities between the defendant when he saw him by the trailer and the figure he saw walk to the road. One of the shots came through the back window behind Gilbert, making a hole in the glass. A second bullet hit the rear window behind Ms. Richardson. Ms. Richardson fell into Furr's lap with a wound to her head. Ross drove to a volunteer fire department a couple of miles away. Ms. Richardson was pulled from the car by firemen. Ross observed a gunshot wound to her head.

Cabarrus County Deputy Sheriff C. D. Eggers received a radio dispatch to go to the Harrisburg Volunteer Fire Depart-

ment at 9:19 p.m. on 30 March 1983. After questioning the occupants of the Plymouth, Sergeant Eggers drove north on Highway 49, stopping at the abandoned store building location north of the Rocky River bridge. He observed a camping trailer, an old store building, a pickup truck, a van and a dump truck. There was enough light coming from the Mineral Research Plant across the highway for Sergeant Eggers to read license plates on the vehicles there from 50 feet away without using additional artificial lighting. There was a light on inside the trailer. Sergeant Eggers drove about .1 mile north, turned around, and drove back to within 250 feet of the old store, where he parked his patrol car and began observing the area of the trailer and the store. After about 10 or 15 minutes, a white male came out of the trailer, looked south down Highway 49, then went back inside. He came back out of the trailer, got in the pickup and started north on Highway 49. Sergeant Eggers stopped the pickup .1 mile away at a pull-off that went into the Mineral Research Plant. The defendant was operating the truck. He got out of the truck, was advised of his rights by Sergeant Eggers, and orally waived his rights. In response to a question from Sergeant Eggers about whether there was anyone else at the trailer, the defendant stated, "No, God damn it, there ain't nobody down there, lives down there but me. If you don't believe it, you can go look."

While the defendant was being detained at the Mineral Research Plant, Gilbert was taken to the plant. Gilbert viewed the defendant in the back seat of an officer's car and identified him as the man he saw come out of the trailer.

The defendant was questioned further by Deputy Sheriff R. W. Beaver. He told Deputy Beaver that he was alone in his residence in bed asleep at approximately 9:00 p.m. that night. He told Deputy Beaver that he had fired his Ruger .357 magnum pistol five times while target practicing earlier that day.

The van and the dump truck seen at the trailer were later found to be registered to Joe Lynn Cain, Senior.

Deputy Bobby Bonds searched Ross's car the next morning. He found one lead fragment in the rear deck near the radio speakers. In the front seat he found a deformed copper bullet jacket. Deputy Bonds obtained a search warrant and searched the trailer located near the Rocky River bridge at about 4:30 a.m. on 31

March 1983. He found a Ruger .357 magnum revolver in a holster with six cartridges, a .38 caliber revolver containing five cartridges, a .38 caliber Derringer, 10 spent .357 cartridge cases, and a styrofoam container holding 31, .357 magnum jacketed hollow point cartridges. State Bureau of Investigations Special Agent Robert Cerwin, an expert in firearms examination, identification and classification, testified that it was his opinion that the jacketed bullet found in the front seat of the Plymouth automobile was fired from the Ruger .357 magnum revolver found at the trailer. Dr. Jerry Greenhoot, an expert medical witness specializing in neurosurgery, treated Ms. Richardson. He found a bullet entrance wound in the left temporal region. The bullet traveled through the brain leaving small metallic fragments in the vital structures of the brain along the way. The bullet could not be removed. Ms. Richardson suffered irreparable and permanent brain damage, leaving her unresponsive and completely helpless, never to be a normal person again.

The defendant presented no evidence.

[1] Defendant's first assignment of error is based on the trial court's denial of his motion to suppress evidence seized pursuant to a search warrant issued at 4:00 a.m. on 31 March 1983, about seven hours after Ms. Richardson was shot. Defendant contends specifically that the information in the supporting affidavit is insufficient to establish probable cause for the issuance of a search warrant. He further contends that the findings of fact and conclusions of law of the trial court in its order denying defendant's motion to suppress evidence are not supported by the information and evidence contained in the affidavit of the search warrant.

The application in question reads as follows:

> I, B. R. Bonds, Crime Scene Officer, Cabarrus County Sheriff's Department being duly sworn, request that the court issue a warrant to search the person, place, vehicle, and other items described in this application and to find and seize the property and person described in this application. There is probable cause to believe that firearms; to wit; handguns or rifles; ammunition for such weapons, and spent casings Constitutes evidence of a crime and the identity of a crime and the identity of a person participating in a crime, Assault with Deadly Weapon with Intent to Kill, Inflicting Seroius

[*sic*] Bodily Injury, and is located (x) in the following premises a "Volunteer" brand travel trailer, white with brown woodgrain mid-stripe, located at Rt. 2 Box 890, N.C. 49, Harrisburg, N.C., located north of the Rocky River bridge.

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: At approximately 9:19 p.m., March 30, 1983, the Communication's Center of the Cabarrus County Sheriff's Department, received a radio transmission from the Harrisburg Volunteer Fire Department, Station Number One, N.C. 49 Harrisburg, requesting the Harrisburg Rescue Unit in reference to "someone shot." Cabarrus County Sheriff's Department officers, Sgt. C.D. Eggers, Plt. Tony McQuire and Plt. David Blackwelder were dispatched to the scene.

At 9:26 p.m., Sgt. Eggers arrived at the parking lot of the Norris Food Mart which is located north of the Harrisburg Fire Department, Sgt. Eggers observed a brown, four door 1976 Plymouth Valore, [*sic*] N.C. registration WCN 173 parked in the parking lot of the Norris Food Mart. The rear window of the vehicle had been shattered with two large holes in the rear window. Sgt. Eggers observed a white xxxxx female being removed from the back seat of the vehicle by emergency medical personnel of the Harrisburg Rescue Unit. Sgt. Eggers observed that the female, identified as Kim Richardson, age 15, had received a gunshot wound to the left side of the head.

Sgt. Eggers was advised by a passenger of the vehicle who was identified as Hugh Gilbert, white, male, 20, that the vehicle had stopped off N.C. 49 at Rocky River near the camper. Stated that the occupants had walked down a short distance to the river bridge.

Upon return to the vehicle, Hugh Gilbert and another passenger urinated outside the vehicle. While urinating, Gilbert observed a white male come out of the camper. Gilbert stated that he spoke to the man who just stood there and did not say anything.

Gilbert stated that as he started to get into the car, he heard loud shot like noises in rapid succession.

> The operator of the vehicle, identified as David Scott Ross, white, male, age 16, stated that as he started to pull off from the roadside and travel south on N.C. 49, he heard glass break. At that time, he stated the vehicle was headed in the general direction away from the trailer. After he heard the glass break, he heard Kim scream and noticed that the rear window of the car had been shot out. Ross stated that he drove to the fire station for help.
>
> Sgt. Eggers stated that he left the Norris Food Mart and drove to a camper type travel trailer located on N.C. 49 north of the Rocky River bridge. Sgt. Eggers described the trailer as a white camper trailer with a brown mid stripe. Stated that the same was a single axle trailer.
>
> At 9:45 p.m., Sgt. Eggers observed a Chevrolet pick up [*sic*] truck leave the travel trailer and proceed north on N.C. 49. Sgt. Eggers stopped the vehicle less than one half mile north of the trailer. Sgt. Eggers observed the operator of the truck to be Joe Lynn Cain, W/M.
>
> Sgt. Eggers advised Mr. Cain of his Miranda Rights; Joe Cain orally waived his Miranda Rights and agreed to answer questions. Mr. Cain stated to Sgt. Eggers that he lived alone at the white travel camper trailer located at Rocky River on N.C. 49. Mr. Cain further stated to Sgt. Eggers that he was the only one at the trailer and stated "if you don't believe me, you can go down there and look."

Upon reviewing the application, we find the information contained therein sufficient to support the magistrate's determination of probable cause to search the trailer. As the court found in *State v. McDonald*, 312 N.C. 264, 321 S.E. 2d 849 (1984),

> the affidavit upon which the search warrant was issued "supplie[d] reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense [would] reveal the presence upon the described premises of the objects sought and that they [would] aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971).

Id. at 273, 321 S.E. 2d at 854.

We further find the trial court's order denying the motion to suppress was proper. Facts found by the trial court are conclusive if supported by competent evidence. *State v. Barfield*, 298 N.C. 306, 339, 259 S.E. 2d 510, 535 (1979). We have reviewed the findings of the trial court and find them to be supported by plenary competent evidence. This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in denying his motion to suppress identification testimony of Hugh Gilbert. Gilbert testified that he saw a white male come out of the trailer 15-20 feet in front of him. While continuing to urinate, he observed the man's face for 5-10 seconds. A few minutes later, after the shooting, Gilbert described the man he saw at the trailer to an officer questioning him at the Harrisburg Volunteer Fire Department. Less than an hour later, the defendant was in custody and was being detained in another officer's car. Gilbert was taken to that location where he identified the defendant, who was sitting in the patrol car, as the man he saw at the trailer. Gilbert also identified the defendant at trial as the man he saw at the trailer. Defendant filed a motion to suppress the identification of him in the patrol car by Gilbert, and to prevent Gilbert from identifying defendant at trial. After conducting a *voir dire*, the trial court allowed the identification evidence at the patrol car and the identification of defendant at trial. On appeal the defendant argues that the trial court erred, contending (1) the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification, (2) the defendant was not advised of his right to have counsel present at a lineup or show-up, (3) the unnecessarily suggestive identification procedure requires the exclusion of later identifications of defendant, and (4) the trial court's findings of fact at the *voir dire* were not supported by the evidence, and the findings of fact do not support the conclusion of law and the denial of defendant's motion.

We first address the issue of no counsel being present at the show-up. Defendant was not entitled to have counsel present when he was taken into custody as a suspect and shown to Gilbert.

> The right to counsel attaches upon the initiation of formal prosecution. Prosecution does not begin until a formal charge

> has been levied against a suspect by a judicial officer, whether by a finding of probable cause, or by arraignment, indictment, information or preliminary hearing. Custodial arrest of a mere *suspect* does not constitute the initiation of "adversary judicial proceedings" and is not sufficient to draw the State and the prisoner into such an antagonistic relationship as to require the assistance of counsel from that moment forward. [Citations omitted.]

State v. Matthews, 295 N.C. 265, 284-85, 245 S.E. 2d 727, 739 (1978) (emphasis in original).

Next, we consider whether the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. We note initially that "the showing of a suspect to a witness while the suspect is in a patrol car beside a policeman is not in and of itself impermissibly suggestive. (Citation omitted.)" *State v. McLain*, 64 N.C. App. 571, 573, 307 S.E. 2d 769, 770 (1983). The test to be used is as follows:

> [T]he test is whether the totality of circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice. [Citation omitted.]
>
> We have held that even if the pretrial procedure is suggestive, that suggestiveness rises to an impermissible level only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification. The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. [Citation omitted.]

State v. Grimes, 309 N.C. 606, 609-10, 308 S.E. 2d 293, 294-95 (1983).

After a review of these factors as they apply in this case, we find no error in the trial court's conclusion that the pretrial iden-

tification procedure was not so impermissibly suggestive or conducive to misidentification as to violate the defendant's right to due process. Gilbert testified that he observed the man outside the trailer for 5-10 seconds from a distance of 15-20 feet. It was approximately 9:00 p.m. and thus dark outside; however, the area was illuminated by the lights of an industrial plant on the other side of Highway 49. Deputy Eggers testified there was enough light in that parking lot area to read a license plate out the side window of his patrol car from 50 feet away without any additional artificial lighting. Also, Gilbert testified the light from inside the trailer lit up the outside a little when the door was open. At trial, Gilbert described the man he saw at the trailer as

> in his late forties, early fifties. He looked six foot, a little bit over. Looked from a hundred and fifty to hundred and eighty pounds. Had a day, day or two old beard, looked like he hadn't shaved in a couple of days. Had a ball cap on with a patch, a white one . . . . [His hair] was grayish black, short, cut short, and looked like it was salt and pepper color, gray and black.

He identified the defendant as the man he saw, having no doubt in his mind. Deputy Sheriff Eric Baggarly interviewed Gilbert at the Harrisburg Volunteer Fire Department less than an hour after the shooting. Deputy Baggarly testified that Gilbert gave the following description to him: "a white male—white male in his late forties or fifties with light whiskers, gray hair, and a hat partially covered his head." A few minutes after he arrived at the fire department, Deputy Eggers drove to the scene of the trailer. From a distance of 200-250 feet away, he observed a white male wearing a cap come out of the trailer twice, getting in the pickup truck the second time and driving away. Deputy Eggers stopped the truck, and found the defendant to be the operator. He described him as wearing a "cap with a patch on it," and Eggers said, "He appeared to have a heavy beard, I mean, just a day or two beard." The defendant was detained in a patrol car at the Mineral Research Plant while Gilbert was brought there. On the ride from the fire department to the Mineral Research Plant, the officers did not suggest to Gilbert that he ought to pick out the man in the patrol car as being the man he saw outside the trailer. Officer Baggarly asked Gilbert if he "minded looking at an individual and see if he could identify him." Gilbert walked up to

the car, looked in the car at the individual there for 10-15 seconds and said, "That's him." Officer Baggarly asked Gilbert if he was sure. Gilbert replied, "Yes, sir, that is definitely the man. No doubt in my mind that is him."

We hold the trial court committed no error in admitting the evidence of Gilbert's pretrial identification of the defendant and his identification of the defendant at trial. We have reviewed the findings of the trial court on this issue and find them to be supported by plenary competent evidence. This assignment of error is overruled.

[3] Next, we consider defendant's assignment of error contending the State's evidence was insufficient as a matter of law to go to the jury and to convict the defendant. We disagree. In *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981), our Supreme Court stated the standard for review:

> The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is "evidence [which tends] to prove the fact [or facts] 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." *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930). If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). (Brackets in original.)
>
> [I]n order to survive a motion for nonsuit there must be substantial evidence of all material elements of the offense. It is against this standard that defendant's claim of insufficient evidence must be judged.

Id. at 504-5, 279 S.E. 2d at 838. Defendant was charged and convicted with assault with a deadly weapon with intent to kill inflicting serious injury, in violation of G.S. 14-32(a). The essential elements of the crime are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. *State v. Meadows*, 272 N.C. 327, 331, 158 S.E. 2d 638, 640

(1968). We hold there was substantial evidence from which the jury could reasonably infer that the defendant shot at Kim Richardson, one of the occupants of the Plymouth automobile, with a deadly weapon, a Ruger .357 magnum revolver. The evidence that Ms. Richardson was seriously injured by one of the shots is positive and uncontradicted. The requisite "intent to kill" can be reasonably inferred by the defendant's use of a .357 magnum revolver, fired numerous times. *See State v. Musselwhite*, 59 N.C. App. 477, 480, 297 S.E. 2d 181, 184 (1982).

[4] Defendant was also charged and convicted of discharging a firearm into an occupied vehicle, a violation of G.S. 14-34.1. A person is guilty of this offense if he intentionally, without legal justification or excuse, discharges a firearm into an occupied vehicle with knowledge that the vehicle is then occupied by one or more persons or when he has reasonable grounds to believe that the vehicle might be occupied by one or more persons. *See State v. Hicks*, 60 N.C. App. 718, 720, 300 S.E. 2d 33, 35 (1983). We hold there was sufficient evidence from which the jury could reasonably infer that defendant, without legal justification or excuse, fired the .357 revolver at the occupied Plymouth automobile, with two of the bullets entering the vehicle, with the knowledge that the vehicle was then occupied by one or more persons or with reasonable grounds to believe the vehicle might be so occupied.

[5] We next consider defendant's assignment of error that the trial court erred by allowing the State to ask a leading question to witness Hugh Gilbert. The relevant portion of the transcript is reprinted verbatim:

> Q. Could you tell who that figure was moving out toward the road, that person? Could you tell who that was?
>
> A. I couldn't tell who it was, but it was a man.
>
> Q. Did you notice any dissimilarities between—
>
> MR. HAWKINS:—OBJECTION.
>
> THE COURT:—OVERRULED. Go ahead.
>
> Q. Did you notice any dissimilarities between Joe Cain when you saw him out there by the trailer and the figure you saw in the road?

MR. HAWKINS:—OBJECTION.

THE COURT:—OVERRULED.

A. No.

MR. HAWKINS:—MOVE TO STRIKE.

THE COURT:—Motion DENIED.

[Exception 11]

A leading question is one which "suggests the desired answer from a friendly witness on direct examination and is answerable by yes or no." *State v. Holsclaw*, 42 N.C. App. 696, 701, 257 S.E. 2d 650, 653 (1979). "However, it is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal." *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974). The question at issue here did tend to lead the State's witness. The defendant, however, has not demonstrated that the trial court abused its discretion in allowing the question and answer. We overrule the assignment of error.

[6] The defendant's fifth assignment of error alleges the trial court erred by not instructing the jury on the lesser included offenses of (1) assault with a deadly weapon with intent to kill, and (2) assault with a deadly weapon. The defendant contends that every element was disputed and that all lesser included offenses should have been submitted. The trial court submitted the following possible verdicts: (1) guilty of assault with a deadly weapon with intent to kill inflicting serious injury, or (2) guilty of assault with a deadly weapon inflicting serious injury, or (3) not guilty.

> The trial judge must submit and instruct the jury on a lesser-included offense when, and only when, there is evidence from which the jury can find that a defendant committed the lesser-included offense. Conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense.

State v. Summitt, 301 N.C. 591, 596, 273 S.E. 2d 425, 427, *cert. denied*, 451 U.S. 970, 68 L.Ed. 2d 349, 101 S.Ct. 2048 (1981).

There was no contradiction in the evidence of the infliction of serious injury to Ms. Richardson. Likewise, there was no contradiction in the evidence that a deadly weapon was used. The defendant was either guilty of shooting into the car and wounding the girl, or he was not guilty. This assignment of error is without merit.

[7] The defendant in his last assignment of error contends the trial court erred by entering the presumptive sentence for each offense after having found two factors in mitigation and none in aggravation. As mitigating factors, the trial court found "[t]he defendant has no record of criminal convictions," and "[t]he defendant has been a person of good character or has had a good reputation in the community in which he lives." The defendant argues that the mitigating factors must of necessity outweigh the aggravating and that "both the intent of the Presumptive Sentencing Act and . . . fundamental fairness should require that less than the presumptive sentence should have been entered in each case . . . ." The State counters that the sentence below was within the court's discretion and should not be disturbed and argues further that defendant has no right to appeal under G.S. 15A-1444(a1) because his sentence did not exceed the presumptive term set by G.S. 15A-1340.4.

The State's argument as to G.S. 15A-1444(a1) is well taken. That statute provides:

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article. Otherwise, he is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

"The [Fair Sentencing] Act does not allow appeal of a presumptive sentence as of right." *State v. Dickey*, 71 N.C. App. 225, 321

S.E. 2d 492 (1984). In our discretion, however, we elect to treat the purported appeal of the sentences below as a petition for certiorari and allow the petition.

Our research has revealed no cases discussing the issue of whether the trial court must impose a sentence below the presumptive if it finds mitigating factors and no aggravating factors. G.S. 15A-1340.4 provides, in pertinent part:

> (a) . . . 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 . . . .
>
> * * * *
>
> (b) If the judge imposes a prison term for a felony that differs from the presumptive term . . . the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, he must find that the factors in aggravation outweigh the factors in mitigation, and if he imposes a prison term that is less than the presumptive term, he must find that the factors in mitigation outweigh the factors in aggravation. However, a judge need not make any findings regarding aggravating and mitigating factors . . . if he imposes the presumptive term . . . .

The quoted language sets forth the method by which the trial court *may* give a sentence above or below the presumptive sentence. It does not require the court to impose a sentence above the presumptive if aggravating factors outweigh mitigating factors, or a sentence below the presumptive if mitigating factors outweigh aggravating factors. In *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983), our Supreme Court held that "[u]pon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion." *Id.* at 380, 298 S.E. 2d at 680. We find that the same rule of discretion should also apply when the trial court finds one or more mitigating factors and no aggravating factors and has thus by implica-

tion found that the mitigating factors outweigh the aggravating factors. We hold that upon a finding of one or more mitigating factors and no aggravating factors, the question of whether to reduce the sentence below the presumptive term, and if so, to what extent, is within the trial court's discretion. No abuse of that discretion has been shown here.

No error.

Judges WHICHARD and EAGLES concur.

PINEHURST, INC. AND PINEHURST RECEIVABLES ASSOCIATES, INC. v. O'LEARY BROTHERS REALTY, INC., TIMOTHY W. O'LEARY, AND DENNIS O'LEARY

No. 8420SC1234

(Filed 4 February 1986)

1. **Unfair Competition § 1— unfair trade practice—evidence sufficient to support findings**

The evidence supported findings by the trial court in an unfair trade practice action that both defendants participated in sending letters concerning an improper sewage situation on lots purchased from plaintiffs, that defendants had no specific knowledge of the matters asserted in the letters, and that the defects in the sewage system were minor and technical.

2. **Libel and Slander § 3— statements subject to interpretation as true—no libel per se**

Where the trial court concluded that statements in a letter could be interpreted as true, the court could not find the letter to be libelous *per se*.

3. **Unfair Competition § 1— letters as unfair trade practice**

The trial court did not err in concluding that defendants engaged in unfair or deceptive trade practices affecting commerce in violation of N.C.G.S. § 75-1.1 by writing letters to 180 persons who had purchased lots from plaintiffs informing them of a possible "improper sewage situation" on their lots which might violate the sales contract and HUD requirements and offering to represent the lots owners if they wished to attempt to obtain a refund of the purchase price from plaintiffs.

4. **Unfair Competition § 1— unfair trade practice—punitive damages not allowed**

Punitive damages may not be awarded in an unfair or deceptive trade practice case brought under N.C.G.S. Ch. 75.

5. Unfair Competition § 1— unfair trade practice—nominal damages—award of attorney fees

The trial court did not err in awarding attorney fees to plaintiff in an unfair or deceptive trade practice case based on a letter sent by defendants to purchasers of lots from plaintiffs where the court found that defendants' wrongful conduct caused a disruption of plaintiffs' business and injury to their business reputation, that plaintiffs sustained actual damages of $1.00 or more, and that defendants unwarrantedly refused to remedy the conduct which was the basis for the suit.

6. Rules of Civil Procedure § 65— foreclosure injunction—voluntary dismissal without prejudice—injunction wrongfully obtained—award of damages

Defendants' voluntary dismissal without prejudice of their counterclaim under which they obtained an order enjoining foreclosure was equivalent to a determination that the injunction was wrongfully obtained, and the trial court properly dissolved the foreclosure and required defendants to pay interest on the mortgage debt for the ten months the sale was stayed. N.C.G.S. § 1A-1, Rule 65.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by defendants from *Rousseau, Judge.* Judgment entered 28 June 1984 in Superior Court, MOORE County. Heard in the Court of Appeals 17 May 1985.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by J. Robert Elster, G. Gray Wilson and Jeffrey C. Howard, for plaintiff appellees.

Barringer, Allen & Pinnix, by Noel L. Allen and Miriam J. Baer, and Thigpen & Evans, by John B. Evans, for defendant appellants.

BECTON, Judge.

Each of the parties is engaged in selling or developing real estate in Moore County, particularly in the Pinehurst resort area. In December 1976 Timothy and Dennis O'Leary, the individual defendants who jointly own O'Leary Brothers Realty, Inc., bought a forty-acre tract of land which adjoins a tract of residential lots that plaintiff Pinehurst, Inc. (Pinehurst) was then selling.

The forty-acre tract was secured by the O'Learys' note and deed of trust, and that note and deed of trust, along with the other assets of O'Leary Brothers Realty, Inc., were later conveyed to Pinehurst. The residential lots, known as Unit 8A, and

the O'Learys' forty-acre tract were served by the same sewage pumping station.

Before undertaking to sell the Unit 8A lots in interstate commerce, as required by the Interstate Land Sales Act, 15 U.S.C. Secs. 1701-20 (1982), Pinehurst certified to the United States Department of Housing and Urban Development (HUD) that the sewage services were adequate. By February 1983, the pumping station was serving twenty-seven residences, eight of which were situated in Unit 8A, fourteen on adjacent land owned by Pinehurst, and five on the O'Learys' adjoining tract. During the preceding two years the O'Learys and Pinehurst had been negotiating about upgrading the sewer system and about Pinehurst's alleged obligation under the agreement made by Pinehurst's predecessor to provide memberships in Pinehurst Country Club to purchasers from the O'Learys. In February 1983, however, the negotiations reached an impasse, and the O'Learys stopped paying on their promissory note. Defendant Pinehurst Receivables Associates, Inc., a holding company that manages Pinehurst's lot sales contracts, declared the note to be in default and, on 15 April 1983, instituted foreclosure proceedings which were approved first by the Clerk of Superior Court and then by the Superior Court judge. No stay was sought in that proceeding, and an appeal from the order of sale was not perfected.

Meanwhile, the O'Learys acquired the names and addresses of the approximately 180 persons that had bought lots in Unit 8A from Pinehurst and on 15 March 1983 mailed to each of them the following letter:

> Dear Pinehurst Property Owner:
>
> We are informed that an improper sewage situation may exist where you own your lot in Unit 8A in Pinehurst, which could be in violation of the terms of your purchase contract with Pinehurst, Inc., or the conditions of the HUD registration covering the unit.
>
> Under circumstances similar to this, Pinehurst, Inc. has been required to refund the full purchase price, plus interest, taxes, and country club initiation fees.
>
> We would like to offer you our services to act as your agent to pursue this matter if you are interested in disposing of

your lot. We charge a commission of ten percent (10%) of the original purchase price of the lot only—but no charge on the return of any other payments that may have been incurred by you.

Obviously, we cannot guarantee you that our agency would result in the return to you of any money you may have previously paid to Pinehurst, Inc. or any of its successors. Nothing herein contained should be construed by you as a promise from us of any financial return to you; we merely offer our services to you, should you so desire.

If this is of a sincere interest to you, please complete the enclosed agreement and return it to us.

Thank you very much for your consideration of this matter, and we look forward to your positive response.

Sincerely,

O'LEARY BROTHERS REALTY, INC.

In response to the invitation made in the letter, approximately thirty Unit 8A lot owners engaged O'Leary Brothers Realty, Inc. to negotiate their supposed claims against the plaintiffs. The North Carolina State Bar, learning of this development, instituted proceedings against the O'Learys for unauthorized practice of law, but the proceedings were stopped several months later when the O'Learys agreed to stop handling the claims.

On 23 May 1983 this action for libel, tortious interference with contract, barratry, and unfair and deceptive trade practices was instituted against the defendants. All four claims were based on defendants encouraging persons that had contracted with plaintiffs to rescind the contracts and demand a refund of the payments made. By their answer, defendants admitted sending the letter but alleged in defense that the statements in the letter were true. Defendants also asserted counterclaims alleging: (1) plaintiffs breached the terms of the December 1976 land purchase agreement; (2) the foreclosure proceeding was improperly initiated after defendants had tendered full payment; and (3) the action against them constituted an unfair trade practice. In addition to actual and treble damages, defendants requested that the foreclosure proceedings be stayed. One day before filing their

answer and counterclaims, defendants sued plaintiffs in federal court for allegedly violating federal antitrust laws. Consequently, defendants moved that the state court stay this action until the federal action was resolved. The motion was denied, as were some other pretrial motions later referred to, but the court did enjoin the foreclosure sale upon the defendants giving bond therefor.

Following a trial without a jury, Judge Rousseau entered judgment for the plaintiffs on the unfair trade practices claim, but dismissed their other claims. Before ending the evidence, defendants took a voluntary dismissal without prejudice on their counterclaims. The judgment was based on findings of fact that included the following:

> 27. At the time defendants sent the letter of March 15, 1983, they had no specific knowledge concerning the assertions contained in the letter.
>
> 28. The sewage system in Unit 8A was fully in place and operational at the time of the March 15, 1983 letter. No public health hazard ever existed, nor was there any threat of contamination of surface waters in the area. After publication of the letter of March 15, 1983, and after institution of the present action, the North Carolina Department of Natural Resources did determine that the pump in Unit 8A, although adequate to handle the existing sewage needs, required a duplex rather than the single pump (of same specifications and size) in place, and was therefore in technical violation of the original permit issued in 1976. Prior to that time, Pinehurst Inc. had already ordered replacement equipment for the pump, and upon installation of this replacement equipment pursuant to a new permit the matter was resolved, without enforcement action, penalty or levy of fine by the state. The problems with the lift station had been minor problems. The cost of bringing the lift station into compliance with the permit was approximately $1,200. . . .
>
> 29. At the time the March 15, 1983 letter was issued by defendants the lift station which existed of [sic] defendants' property contained the same or similar type of pump which was in existence in Unit 8A of plaintiff's property, to the knowledge of all parties.

30. Prior to the letter of March 15, 1983 defendants Timothy O'Leary and Dennis O'Leary had been in negotiations with plaintiff for a period of over two years with regard to the construction of a joint sewer project to carry waste from their respective properties to the county waste water system, which joint project, had it come to fruition, would have replaced or done away with the heretofore described lift stations on each of their properties. The negotiations continued until February 1983, at which time plaintiffs declined to negotiate further on any of several pending issues between the parties until the individual defendant Timothy O'Leary cured a default on the note then owing by him to plaintiffs.

31. Prior to the issuance of the March 15, 1983 letter defendants did not contact any state or federal agencies or plaintiffs to correct any deficiencies which might have existed in the pump and lift station of Unit 8A, but rather wrote directly to the lot owners in Unit 8A as heretofore described.

. . . .

33. Plaintiff sustained actual damages of $1.00 or more in counsel fees expended in an effort to stop and restrain further publication of the letter of March 15, 1983 or further activities by defendants with regard to the letter. Plaintiffs also sustained disruption of their normal business activities, loss of administrative time, and injury to their business reputations, but did not offer evidence of specific monetary damages with regard to those items.

Based on these and other findings, the court concluded that although the letter contained no false statements, it was nevertheless unfair, deceptive, and maliciously published for an improper purpose in violation of N.C. Gen. Stat. § 75-1.1 (1985) and gave recovery to plaintiffs as follows:

1. Plaintiffs shall have and recover of defendants, jointly and severally, the sum of $1.00 in actual damages and the sum of $18,000 in punitive damages. Since the award of actual damages and punitive damages exceeds an award of treble the actual damages, the actual damages will not be trebled even though the court has found a violation of G.S. 75-1.1.

2. Plaintiffs shall have and recover of defendants, jointly and severally, the sum of $15,000 pursuant to G.S. 75-16.1 for attorneys' fees, in that defendants willfully engaged in unfair methods of competition and unfair and deceptive trade practices, and refused without warrant to pay plaintiffs' claims or to remedy the conduct which was the basis of this suit.

I

Defendants' first four assignments of error, concerning the denial of their pretrial motions (a) for summary judgment on the barratry claim, (b) to stay this action pending the resolution of a similar case in the federal court, (c) to extend the time for and implement discovery in certain respects, and (d) to allow defendants to amend their counterclaim and bring in additional parties, need not detain us. The first question is moot because the barratry claim was later dismissed and is not before us. All the other motions were addressed to the sound discretion of the trial judge and no abuse is indicated. The federal lawsuit that defendants wanted to try first was begun by them two months after this case was filed; defendants' motion to extend the discovery period was made after the time for completing discovery had passed and after the trial of this case had been continued once at their request; and defendants' motions to amend their counterclaim and add additional parties were not made until just twelve days before the trial was scheduled to begin.

II

[1] By three more assignments of error defendants contend that certain of the court's findings of fact—that defendant Dennis O'Leary participated in the sending of the 15 March 1983 letter, that defendants "had no specific knowledge" of the matters asserted in that letter, and that the defects in the sewage system were minor and technical—are unsupported by evidence. These contentions have no merit, and we overrule them.

Although Timothy O'Leary drafted the letter and attended to its reproduction and distribution, Dennis O'Leary, an officer and half owner of the corporation, testified that he saw the letter before it was sent, "concurred with the information in it," and discussed it with Timothy, and that the purpose of the letter was to obtain listings from property owners in Unit 8A. This evidence

is support enough for the court's determination that Dennis O'Leary participated in sending the letter and was jointly and severally liable therefor.

The finding that defendants had no "specific" knowledge concerning the assertions made in the letter is supported by the letter itself, which indicates that they merely had received information from others suggesting that Pinehurst *might* be in violation of the sales contract and the HUD requirements. The finding is also supported by Dennis O'Leary's testimony that he had not reviewed the HUD requirements, did not know whether anyone else had, had not seen the purchase contracts, and did not know which provisions Pinehurst allegedly had violated. However, as discussed later, even if this finding was unsupported, it would not affect the court's conclusion that defendants acted unfairly and deceptively in violation of G.S. Sec. 75-1.1.

Further, the court's characterization of the sewage facility defects as "minor" and "technical" was supported by the testimony of an employee of the Division of Environmental Resources of the North Carolina Department of Natural Resources and Community Development to the effect that the pump station was easily and quickly brought into compliance with regulations, that no enforcement or disciplinary action was required, and that no adverse impact resulted from the failure to comply earlier.

III

[2] The defendants' next contention, that the court erred in concluding as a matter of law that the letter was libelous *per se*, is correct, though of no benefit to them. Falsity is an essential element of libel, and the court, having concluded that the statements in the letter could be interpreted as true, could not find them to be libelous *per se*. Indeed, we doubt that the court intended to say that they were, as it dismissed the libel claim. In all events, this error is immaterial because the unfair or deceptive trade practice claim discussed below does not depend upon the letter being false.

IV

[3] The next question defendants raise is whether the court's conclusion that they engaged in unfair methods of competition

and in unfair or deceptive acts or practices in violation of G.S. Sec. 75-1.1 was erroneous. An unfair or deceptive trade practice was not defined by the General Assembly, probably because it is difficult to define safely and satisfactorily. *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). But courts have the capacity and authority to recognize an unfair or deceptive trade practice when they see one. *See, e.g., Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). And we believe the court ruled correctly in deeming that defendants' conduct in this case constituted an unfair method of competing in business and an unfair or deceptive trade practice. In our opinion, the conclusions—that defendants acted unfairly and for an improper purpose; that the statements in the letter were deceptive and maliciously made; and that the wrongful conduct affected commerce—all followed from the facts found and were entirely justified.

Defendants' arguments that, because the statements in the letter were true, they could not have deceived anyone and that, in any event, they had no effect on the marketplace are rejected. Proof of actual deception is not necessary; it is enough that the statements had the capacity to deceive. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981); *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). A statement can have the capacity to deceive without being false, and that the letter in question had the capacity to deceive is obvious. Although there were no grounds for making claims against the plaintiffs, about thirty recipients of the letter accepted defendants' offer to negotiate their claims against plaintiffs, and several other recipients telephoned Pinehurst in alarm about the matter.

As to the unfairness of defendants' actions, we note that unfair competition is that which a court of equity would consider unfair. Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C. L. Rev. 207, 217 (1982) (citing *Charcoal Steak House of Charlotte, Inc. v. Staley*, 263 N.C. 199, 139 S.E. 2d 185 (1964)). Recently, our Supreme Court said:

> The concept of "unfairness" is broader than and includes the concept of "deception." . . . A practice is unfair when it offends established public policy as well as when the practice

> is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . .
>
> * * *
>
> An act or practice is deceptive under Section 5 if it has the capacity or tendency to deceive. . . . Proof of actual deception is unnecessary. . . . Though words and sentences may be framed so that they are literally true, they may still be deceptive. . . . In determining whether a representation is deceptive, its effect on the average consumer is considered.

Johnson, 300 N.C. at 263, 265-66, 266 S.E. 2d at 621, 622 (citations omitted). Thus, what is unfair in one case might not be in another, and each case rests upon its own circumstances. The circumstances that prompted the trial court in this case to conclude that defendants' acts were unfair included the following:

> 3. The conduct of the individual defendants and the corporate defendants in sending the letter of March 15, 1983 to the lot owners in Unit 8A, and the other conduct in connection with the letter, was unfair for the reasons, among others, that at the time plaintiffs and defendants were working together on a joint sewer system to solve their joint problems; the problem which existed with the pump and the lift station in Unit 8A was a minor problem; defendants did not then report the problem to state or federal officials, or to plaintiffs, but rather wrote to the 180 lot owners in Unit 8A; and defendants' motive in sending the letter was not for a proper purpose but rather an attempt to obtain an unfair business advantage over a competitor and prospective business associate.

That defendants' conduct may not have been actionable at common law, as they argue, is beside the point. While the common law provides some guidance in unfair competition cases, the Unfair Trade Practices Act was enacted in part because common law remedies had often proved ineffective. *Marshall.*

As to the impact of defendants' conduct on the marketplace, defendants argue that because only nominal damages resulted therefrom, the court's conclusion is not supported by the facts.

We disagree. Impact on the marketplace is not to be equated with the damages legally recoverable. Impact on the marketplace speaks more to the effect unethical practices have on business activity than to value of the damage done. *See generally,* Comment, *The Trouble with Trebles: What Violates G.S. Sec. 75-1.1?* 5 Campbell L. Rev. 119 (1982). Although the proven monetary value of the damages was low, defendants' letter affected at least 180 real estate buyers, thirty to the extent of asserting a claim against Pinehurst and many others enough to telephone plaintiffs in alarm about their purchase and investment. Acts that diminish public confidence in a business transaction and enterprise may have an impact on the marketplace, as business stability depends on public confidence. Defendants' acts obviously caused a significant segment of the public to lose confidence in their contracts with plaintiffs and in plaintiffs as reliable real estate developers. That the diminished confidence in plaintiffs' business reliability may have been of short duration, due to plaintiffs' alacrity in alleviating the minor problems that existed, does not erase the baleful impact that defendants' actions had.

V

[4] Defendants next contend that the court erred in awarding punitive damages, and they stress that this is an unfair or deceptive trade practice case brought under Chapter 75, which mandates the trebling of actual damages, N.C. Gen. Stat. Sec. 75-16 (1985), but does not mention punitive damages. Plaintiffs' response is that nothing in Chapter 75 or pertinent case law prohibits the awarding of punitive damages in appropriate cases; that the defendants' wilful and malicious violation of the chapter justifies punishment; and that trebling the $1.00 actual damage verdict would not serve that purpose.

North Carolina General Statute Sec. 75-16 establishes a private cause of action for any person injured by another's violation of G.S. Sec. 75-1.1. And damages assessed pursuant to G.S. Sec. 75-1.1 are trebled automatically. *Marshall v. Miller,* 302 N.C. 539, 547, 276 S.E. 2d 397, 402 (1981). In holding that bad faith is not an element of an unfair or deceptive trade practice, the *Marshall* Court discussed at length the broad legislative purpose in enacting Chapter 75. It rejected both the comparison between Chapter 75 and the portion of Federal Trade Commission Act

codified at 15 U.S.C. Sec. 45(a)(1), which confers no private cause of action on injured parties, and the conclusion in *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), *aff'd*, 649 F. 2d 985 (4th Cir. 1981), that G.S. Sec. 75-1.1 is completely punitive in nature. We quote from *Marshall*:

> But it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. It is, in effect, a hybrid. . . .
>
> As it is a hybrid statute, providing a remedy for an entirely statutory cause of action, analogies to other rules of common law governing the imposition of punitive damages should not control. More significantly, whereas common law actions grounded in tort or contract *allow* both actual and multiple damages, G.S. 75-16 provides in effect that any actual damages assessed *shall* be trebled by the trial court if a violation of G.S. 75-1.1 is found. Many of our sister states provide that the awarding of exemplary or treble damages shall be proper only upon a finding of intentional wrongdoing. . . .
>
> Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown.

302 N.C. at 546-47, 276 S.E. 2d at 402 (citations omitted) (emphasis in original).

The *Marshall* Court suggests that the legislature's intent in enacting Chapter 75 was to supplement and broaden traditional common law actions and to provide a more easily recoverable remedy. *See* Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75-1.1?* 62 N.C. L. Rev. 1139, 1147 (1984).

Because an award of treble damages under Chapter 75 is bottomed upon "private enforcement" and "punitive measure" considerations, we believe an additional award of punitive damages would necessarily be duplicative, to the extent that the treble damage award consists of a punitive element. *Id.* And we have

not taken lightly plaintiffs' appealing argument that an additional punitive remedy is needed for intentional egregious conduct. The argument, considering the facts of this case, may impel legislative action to cover situations in which compensatory damages, even when trebled, results in a token award. In this case, our job is not to legislate, but to interpret Chapter 75 as it is written. Although we might say it differently, the following observation noted in 62 N.C. L. Rev. at 1147-48 (footnotes omitted) summarizes our response to plaintiffs' argument:

> First, the legislature contemplated intentional conduct in connection with a violation of section 75-1.1. Under North Carolina General Statutes section 75-16.1, a plaintiff injured by a violation of section 75-1.1 may recover attorneys' fees upon a showing that the defendant acted "willfully." Section 75-16.1 also was intended to encourage private enforcement. Although the award of attorneys' fees is not a punitive provision, it does enable the plaintiff to recover an increased award for intentional wrongdoing. Had the legislature intended punitive damages to be available in connection with violations of section 75-1.1, they would have provided such a remedy for intentional wrongdoing.
>
> Second, in cases involving intentional wrongdoing in which treble damages are minimal, the plaintiff may pursue a common-law cause of action and seek punitive damages. Since a plaintiff may pursue the common-law and the statutory causes of action in the same suit, if punitive damages are warranted and are awarded by the jury, he may elect such a remedy in lieu of the statutory treble damages.
>
> One final ground for the mutual exclusivity of punitive and treble damages exists. Punitive damages should not be used to supplement a statutory scheme in which treble damages have been provided explicitly and no provision has been made for additional damages. . . .
>
> Because section 75-1.1 is in "derogation of the common law" causes of action for unfair or deceptive trade practices and section 75-16 imposes a penalty, strict construction is in order. Absent explicit legislative inclusion, punitive damages should be excluded from the statutory scheme.

VI

[5] Defendants' contention that attorneys' fees are not authorized and were improperly awarded is rejected. The time devoted to the case and the value of the attorneys' services are not contested. North Carolina General Statute Section 75-16.1 (1985) provides in part as follows:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, at 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:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit.

Defendants argue that there is no evidence either of actual damage or of an unwarranted refusal to pay the claim. We disagree. Even though plaintiffs offered no proof as to the monetary value of their damages, the evidence shows and the court found that defendants' wrongful conduct caused a disruption of their business, loss of administrative time, and injury to their business reputation and that they had "sustained actual damages of $1.00 or more." And, albeit not labeled a finding, the court ruled that defendants "refused without warrant to pay plaintiffs' claim or to remedy the conduct which was the basis for the suit." This ruling, which we regard as a finding, is amply supported by the evidence, as the basis for the suit was the unfair and deceptive letter which defendants never retracted and still contend was an acceptable business practice.

VII

[6] In entering judgment, the court also dissolved the foreclosure injunction, required defendants to pay interest on the mortgage debt for the ten months that the sale was stayed, and left defendants' security bond in effect until the foreclosure is completed. These rulings are the basis for defendants' ninth assign-

ment of error, which we consider last for the sake of convenience, since it only peripherally relates to the trial. Although Rule 65, N.C. Rules of Civil Procedure authorizes the judge to award damages upon the dissolution of an injunction or restraining order, defendants contend the award is improper because the counterclaim under which the restraining order was obtained was voluntarily dismissed without prejudice, and it thus has not been judicially established that the injunction was improperly obtained. While usually it is error to award damages for obtaining a temporary injunction without first determining that the injunction was improperly issued, *The M. Blatt Co. v. Southwell*, 259 N.C. 468, 130 S.E. 2d 859 (1963), no such determination was necessary here. The injunction was granted in this case, as the record shows and the court found, because there was probable cause to believe that defendants might be able to establish their right to the injunction upon trying the issues raised by their counterclaim. Yet, after the case was tried almost to a conclusion, defendants voluntarily dismissed their counterclaim. Though done "without prejudice," this dismissal can only be construed as an acknowledgement by the defendants that they could not establish their entitlement to the restraining order, and for the purposes of this case is equivalent to a determination that the injunction was wrongfully obtained in the first place. *Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 311 S.E. 2d 1 (1984). Because the only purpose for obtaining the injunction was to have their rights fully adjudicated upon the trial of this case, defendants may not prevent the issue from being tried and then be heard to maintain that the judgment is erroneous because that issue has not been determined.

The award of punitive damages is vacated. The decision of the trial court is in all other respects affirmed.

Vacated in part and affirmed in part.

Judge PHILLIPS concurs in part and dissents in part.

Judge EAGLES concurs.

Judge PHILLIPS concurring in part and dissenting in part.

I concur with everything said in the majority opinion except the ruling setting aside the award of punitive damages. That

defendants' conduct violated the state's public policy enunciated in Chapter 75 has been established; it has also been established that the violation was committed in a manner that would warrant the award of punitive damages if the offense violated a common law rule instead of statutory policy. The Legislature clearly intended to encourage victims of unfair or deceptive practices to help enforce the statutory policy by suing violators of it; and that malicious violators of the Act be punished by the civil courts. And it also intended, it seems to me, that where trebling the damages will not promote these statutory purposes that punitive damages suitable to the wrongful and unethical character of the offense be assessed in accord with existing law. Under the aggravated circumstances of this case, which are not unique since deceitful and unfair conduct is not confined to transactions involving large sums, limiting plaintiffs' recovery and the sanctions against defendants to $3.00 makes a mockery of our Fair Trade Practices Act, as it permits a malicious violation of statutory policy to go unpunished and denies fair compensation to victims who have aided the State in enforcing its policy. And in my opinion the law requires no such holding. The common law doctrine of punitive damages has not been repealed; it is available for use by our courts in appropriate cases; this is an appropriate case for its use; and referring the question back to the General Assembly is in effect a failure to function as the General Assembly manifestly expects us to, since their task is to set policy, not decide details which arise in the trial of cases, and ours is to enforce and implement the policy adopted. I would affirm the award of punitive damages by the trial judge. I would also hold that punitive damages may be awarded where a violation of G.S. 75-1.1 is malicious, wilful and for an improper purpose and where trebling the actual damages suffered would neither punish the wrongdoer nor encourage victims to enforce the statutory policy.

IRVIN FRANK HILL v. HANES CORPORATION AND AETNA LIFE AND CASUALTY INSURANCE COMPANY

No. 8510IC233

(Filed 4 February 1986)

1. **Master and Servant § 94.4— workers' compensation—Rule 60 motion denied—events previously discoverable or occurring after final award**

The Industrial Commission did not err by denying defendant's motions under N.C.G.S. 1A-1, Rule 60(b)(2) and (6), based on affidavits from private investigators that plaintiff had engaged in activities inconsistent with total disability, where some of the activities were discoverable by due diligence long before plaintiff's claim was heard and the other activities occurred several months after the Commission's final award. The proper procedure to end, diminish, or increase a compensation award previously issued is a motion under N.C.G.S. 97-47.

2. **Master and Servant § 66— workers' compensation—prior award for scheduled injury—subsequent award of temporary total disability for depression—no error**

The Industrial Commission did not err by awarding plaintiff total disability compensation for depression where it had previously made a scheduled award under N.C.G.S. 97-31(15) (1979) for permanent partial disability. Although an employee is entitled to compensation exclusively under N.C.G.S. 97-31 when all of the employee's injuries are included in the schedule in N.C.G.S. 97-31, plaintiff's mental condition was unscheduled and N.C.G.S. 97-31 does not provide the exclusive remedy.

3. **Master and Servant § 77.1— workers' compensation—prior award—Industrial Commission Form 28B not filed—subsequent additional award—no error**

The Industrial Commission did not err by making a subsequent award for mental depression in a back injury case without evidence supporting an implied finding of changed conditions because defendant had not filed Industrial Commission Form 28B, a closing receipt, with the Commission. Until that form is filed and approved by the Commission, the Commission may continue to receive evidence and modify or add to a preliminary compensation award.

4. **Master and Servant § 66— workers' compensation—compensation for depression—finding of maximum improvement on a prior date—no error**

The Industrial Commission did not err by awarding plaintiff temporary total disability for the period beginning 8 November 1982 after finding that plaintiff reached maximum medical improvement on 1 November 1980 where the temporary total disability was the result of depression, it was clear that the Commission separated plaintiff's condition into physical and psychological components, and the Commission specifically found that on 1 November 1980 plaintiff had reached maximum physical improvement.

5. **Master and Servant § 66— workers' compensation—total disability—depression—evidence sufficient**

The evidence was sufficient to support the Industrial Commission's finding that plaintiff is totally disabled due to depression where a psychiatrist testified that persistent weakness and pain in plaintiff's legs and back had brought about symptoms of depression including difficulty in sleep patterns, trouble in concentration, accentuation of the pain already being experienced, psychomotor slowing, and constriction of interest in general in plaintiff's usual way of going about life, which had been seriously altered in so much as he was unable to function in an employment situation.

6. **Master and Servant § 69— workers' compensation—compensation for depression—no credit for prior award for scheduled injury**

In a workers' compensation case in which the Industrial Commission awarded plaintiff temporary total disability for depression after previously awarding compensation for permanent partial disability of both legs under N.C.G.S. 97-31, defendants were not entitled to a credit for compensation awarded under N.C.G.S. 97-31 where the award for temporary total disability began approximately six months after the final payment on the scheduled award, no overlapping benefits were ever awarded or paid, and the disability for which defendants had previously compensated plaintiff was separate and distinct from the disability based on stress induced depression.

Judge PARKER concurs in the result.

Chief Judge HEDRICK dissenting.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission entered 23 October 1984. Heard in the Court of Appeals 14 October 1985.

William Z. Wood, Jr., for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for defendant appellants.

BECTON, Judge.

I

This case presents an appeal from an opinion and award of the North Carolina Industrial Commission (Commission). On 12 March 1979, plaintiff Irvin Frank Hill was injured in the course of his employment with defendant Hanes Corporation. In a written agreement reached among the parties on 18 April 1979, and in a supplemental agreement dated 18 December 1979, the defendants agreed to compensate Hill for temporary total disability for "necessary weeks." Both agreements were filed with the Commis-

sion. Thereafter, apparently because the parties were unable to agree on the extent of Hill's disability, the case was heard before a Deputy Commissioner. The Deputy Commissioner found and concluded that Hill was entitled to compensation: for temporary total disability under N.C. Gen. Stat. Sec. 97-29 (Cum. Supp. 1983) (recompiled 1985) from 27 March 1979 to 11 April 1979, and from 10 July 1979 to 1 November 1980; for twenty percent permanent partial disability of each leg under N.C. Gen. Stat. Sec. 97-31 (15) (Cum. Supp. 1983) (recompiled 1985) for a period of eighty weeks commencing 1 November 1980; and for temporary total disability caused by stress-induced depression resulting from his injury from 8 November 1982 for so long as he remains disabled, pursuant to G.S. Sec. 97-29. The Commission affirmed.

Defendants Hanes Corporation and Aetna Life and Casualty Insurance Company appeal, contending that: (1) their motion for a rehearing should be granted; (2) the Commission erred in awarding Hill temporary total disability for the period commencing 8 November 1982; and (3) the Commission failed to allow defendants credit for the compensation paid under G.S. Sec. 97-31(15) in connection with the award of temporary total disability for the period commencing 8 November 1982. For the reasons stated below, the motion for rehearing is denied, without prejudice to the defendants' right to petition the Commission for a hearing based on a "change in condition" under N.C. Gen. Stat. Sec. 97-47 (1979), and the opinion and award entered by the Commission is affirmed.

II

Plaintiff Hill was employed as a machine fixer by defendant employer Hanes Corporation. His job involved using small hand tools to perform simple repairs on machines. In 1979, Hill was fifty years old and had worked for Hanes for twenty-four years. On 12 March 1979, Hill slipped, fell, and struck his back on the corner of a machine. He apparently continued working until 29 March 1979, when he came under the care of Dr. Gunn, a specialist in preventive and occupational medicine and the medical director for Hanes. Hill returned to work on 11 April 1979, continued working until 9 July 1979, and has not returned to work since. Hill again came under Dr. Gunn's care in August 1979 with complaints of back pain, numbness, and burning and weakness in both legs. Dr.

Gunn continued to see Hill through 1981. He worked with Hill to find a job Hill was capable of performing, but these efforts were unsuccessful.

Hill was referred to Dr. Jackson, a neurologist, who examined him on 9 October 1979. At that time, Hill was still experiencing weakness and decreased sensation in both legs as well as decreased sensation across the middle of his back. He was unable to do a deep knee bend, had no reflexes in his legs, and had abnormal reflexes in his feet. A myelogram taken two days later revealed "almost complete obstruction" at the mid-back level. Dr. Jackson testified that Hill reached maximum medical improvement in November 1980 and that as of 20 August 1981, the last time he saw Hill, Hill was unable to work at anything that required him to be on his feet or to sit for any period of time. Dr. Jackson referred Hill to Dr. de la Torre, a neurosurgeon, who operated on Hill in his spinal cord area. The operation revealed arachnoiditis, a thickening of the membranes that surround the spinal cord. Both Dr. de la Torre and Dr. Jackson testified that the arachnoiditis was probably caused by Hill's 12 March 1979 injury. Dr. de la Torre testified that, despite the surgery, Hill showed minimal improvement in the months following surgery and that between August 1980 and March 1981, Hill's physical condition had stabilized. Dr. de la Torre rated Hill at twenty percent disabilty in the usage of his legs.

Dr. de la Torre recommended a psychological evaluation of Hill, and on 8 November 1982, Hill came under the care of Dr. Branham, a psychiatrist, for the treatment of depression. Dr. Branham testified that, in his opinion, Hill's physical problems—the weakness and pain caused by his injury—resulted in depression. According to Dr. Branham, Hill's depression manifested itself in insomnia, difficulty in concentration, accentuation of pain, psychomotor slowing and constriction of interest (loss of interest in activities formerly found enjoyable).

III

[1] On 14 October 1985, defendants filed with this Court a motion pursuant to Rule 60(b)(2) and (6) of the North Carolina Rules

of Civil Procedure.[1] Three affidavits were filed in conjunction with this motion, one from one of defendants' attorneys, and two from private investigators hired to observe Hill. The investigators stated in their affidavits that between 8 March 1985 and 6 May 1985, they observed Hill engaging in activities such as carrying grocery bags, mowing the lawn with a tractor, working on his automobile, and cutting lumber with a "skill" saw. The investigators also suggested that Hill had been involved in other "physical activity" since 1977. The attorney's affidavit contained what she had been told by the investigators, essentially a repetition of their affidavits.

In order to support a motion under Rule 60(b)(2), new evidence must be presented that was not discoverable by due diligence in time to move for a new trial. No such evidence is offered in defendants' motion. First, the affidavits indicate that since 1977 Hill has engaged in "physical activities which are not consistent with the award of total disability." By defendants' own admissions, then, this evidence was discoverable by due diligence long before Hill's claim was ever heard. Second, the other activities, those allegedly observed between 8 March and 6 May 1985, occurred several months after the Commission's final award. The proper procedure to end, diminish or increase a compensation award previously issued is a motion to the Industrial Commission under N.C. Gen. Stat. Sec. 97-47 (1985). *See Owens v. Standard Mineral Co.*, 10 N.C. App. 84, 87, 177 S.E. 2d 775, 777 (1970) (The Industrial Commission has the discretion to consider newly discovered evidence in a hearing under G.S. Sec. 97-47), *cert. denied*, 277 N.C. 726, 178 S.E. 2d 831 (1971); *cf. Swift v. Smith & Co.*, 212 N.C. 608, 194 S.E. 2d 106 (1937) (On defendant employer's motion, Commission diminished award based on proven increase in claimant's earning power after initial award, and Supreme Court affirmed.). The Rule 60(b)(2) motion might have been successful had defendants offered newly discovered evidence of activities occurring before the Commission's award that were not previously discoverable by due diligence. There are no findings of fact necessary to determine the sufficiency of the Rule 60(b)(2) motion.

1. Although defendants styled their motion as "A Motion for Rehearing," it is in fact a Motion for Relief from Judgment or Order. The label, of course, has no bearing on the substance of the motion in this case.

With regard to defendants' motion under Rule 60(b)(6), we find nothing in the motion justifying relief from the Commission's award. With respect to the evidence of events allegedly occurring since 1977, this evidence should have been presented at the original hearing, and we decline to circumvent the "due diligence" requirement of Rule 60(b)(2) by indiscriminately entertaining any and all "newly discovered evidence" under Rule 60(b)(6). Were we to hold otherwise, Rule 60(b)(6) would become a vehicle for unsuccessful litigants to obtain automatic rehearings before the Commission without satisfying the requirements of G.S. Sec. 97-47. We decline to supplant the legislature's judgment on this issue. With respect to the evidence of activities allegedly observed after the Commission's award, we reiterate that the legislature determined that G.S. Sec. 97-47 would provide relief in these situations. The evidence is relevant only insofar as it indicates a change in claimant's wage-earning capacity; G.S. Sec. 97-47 is designed for this case. *Swygert v. Swygert,* 46 N.C. App. 173, 264 S.E. 2d 902 (1980) is inapposite to this case. It involved allegations, supported by affidavits, of mistake, inadvertence, surprise, excusable neglect and fraud, and there were "controverted questions of fact" for the trial court to resolve on remand. *Id.* at 181, 264 S.E. 2d at 907. The alleged events in the case at bar were either discoverable or are appropriate for G.S. Sec. 97-47 review. Therefore, there is no need for a hearing or findings of fact under defendants' Rule 60(b)(6) motion, and we see no reason to disturb the judgment of the Commission.

IV

The defendants' primary argument is that it was error for the Commission to award benefits for temporary total disability for the period beginning 8 November 1982. The following conclusion of law is at the heart of defendants' challenge:

> As a result of the injury by accident giving rise hereto, plaintiff has experienced stress induced depression which rendered him totally disabled from 11-8-82 up through and including 9-16-83 and he is entitled to compensation therefor at the rate of $156.79 per week for said period and thereafter for so long as he remains so disabled. G.S. 97-29.

In challenging this portion of the award, defendants make a number of related arguments, none of which, in our opinion, has merit. We address these challenges separately.

A

[2] Defendants contend that because the Commission made a scheduled award under N.C. Gen. Stat. Sec. 97-31(15) (1979) for permanent partial disability, it was precluded as a matter of law from subsequently awarding total disability compensation. It is true that when *all* of an employee's injuries are included in the schedule set out in G.S. 97-31, the employee's entitlement to compensation is exclusively under that section. *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 93-94, 249 S.E. 2d 397, 400-01 (1978). However, it has also been held that "if an employee receives an injury which is compensable and the injury causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity under G.S. 97-29." *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 146, 282 S.E. 2d 539, 540 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982). Hill's position is that, because his mental condition is an unscheduled, compensable injury, not "all" of his injuries are included within the schedule, and thus G.S. Sec. 97-31 does not provide the exclusive remedy in his case.

Hill's position has been adopted, and defendants' argument rejected, in a case of striking factual similarity. In *Davis v. Edgecomb Metals Co.*, 63 N.C. App. 48, 303 S.E. 2d 612 (1983), claimant received compensation for a leg injury sustained by accident in the course of his employment. The Commission found that claimant suffered from a "post-traumatic neurosis with a depressive reaction" as a result of the accident. It further found that claimant suffered a relapse in his recovery from the depression when he was told one leg would be permanently shorter than the other. Based on these findings, the Commission concluded that claimant was entitled to additional compensation for temporary total disability until he reached maximum improvement from his psychiatric condition. The employer argued on appeal that claimant's leg injury was a scheduled injury exclusively compensable under G.S. Sec. 97-31(15) and that it was error to award additional compensation for a disabling psychiatric condition resulting from claimant's inability to accept the permanency of his injury. This Court disagreed, noting that the law of this jurisdiction and others allows recovery for psychic, mental and emotional injuries which result from a compensable injury at the workplace, and affirmed the Commission. *Accord 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) (When scheduled injury results in unscheduled complications, compensation under G.S. Sec. 97-31 and G.S. Sec. 97-29 or -30 is proper.).

B

[3] Defendants also argue that the Commission was without authority to make the award in question because no evidence in the record supports an implied finding of a "change of condition." Under N.C. Gen. Stat. Sec. 97-47 (1979) (recompiled 1985), the Commission may modify compensation previously awarded only when there has been a "change in condition" of the claimant. *Baldwin v. Amazon Cotton Mills*, 253 N.C. 740, 117 S.E. 2d 718 (1961). However, the statute is inapplicable in cases in which there has been no previous final award. *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137, 181 S.E. 2d 588, 592 (1971). In such cases, jurisdiction remains in the Commission pending termination of the case by a final award. *Id.* We conclude that a final award had not been entered in this case prior to the hearing before the Deputy Commissioner.

Prior to the hearing before the Deputy Commissioner, the parties had filed with the Commission I.C. Forms 21 and 26, agreements for the payment of disability compensation to continue for "necessary" weeks. Both forms contained a notation at the bottom that "failure to file a report of compensation paid (I.C. Form 28B) within 16 days after last payment pursuant to this agreement" would subject defendants to a fine, pursuant to N.C. Gen. Stat. Sec. 97-15(f) (1985). There is no evidence that a copy of I.C. Form 28B was filed with the Commission. In *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E. 2d 27 (1960), as in the case at bar, the parties had initially filed a compensation agreement with the Commission, and they later sought a hearing. Although the claimant accepted and endorsed a check from the defendant that contained the notation "Final payment of temporary total disability," that did not constitute "final payment of the additional compensation to which she was entitled." 252 N.C. at 721, 115 S.E. 2d at 33. The Supreme Court continued:

> It is significant that claimant was not requested to sign a closing receipt, I.C. Form 27 [now Form 28B]. A closing receipt purports to be a final settlement and indicates that

> no further compensation will be paid unless request for hearing for change of condition is made within a year from date of the receipt. It states: "The use of this form is required under the provision of the Wormen's Compensation Act." . . . Rule XI(3) promulgated by the Commission pursuant to G.S. 97-80 provides that "no agreement for permanent disability nor any closing receipt will be approved until all medical reports in the case have been filed with the Commission." Claimant did not sign a closing receipt. Had she signed such receipt with the approval of the Commission it would have acquitted the employer.

Id. at 721-22, 115 S.E. 2d at 33 (citations omitted). A closing receipt, also called I.C. Form 28B, must still be filed with the Commission. N.C. Gen. Stat. Sec. 97-18(f) (1979) (recompiled 1985); Industrial Commission Rule X(5); *see Watkins; see also Willis v. J. M. Davis Industries, Inc.*, 280 N.C. 709, 186 S.E. 2d 913 (1972). Until it is filed with and approved by the Commission, the Commission may continue to receive evidence and modify or add to a preliminary compensation award. The parties in the case sub judice clearly were aware of the need to file I.C. Form 28B to notify the Commission.

We recognize that, for purposes of G.S. Sec. 97-47, the statutory one-year period for filing a claim for a change of condition begins at the time final payment is accepted, not when Form 28B is filed. *See Willis.* Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled "final" is or should be, in fact, the final payment. After this determination is made, the Commission accepts and approves a copy of Form 28B.

C

[4] Defendants next attack the award of temporary total disability for the period commencing 8 November 1982 on the ground that it is inconsistent with the Commission's finding that Hill reached maximum medical improvement on 1 November 1980. The Commission found:

> 5. As of 11-1-80, plaintiff's *physical condition* stabilized and by said date, he reached *maximum medical improvement physically.* His *physical condition* has remained essentially

unchanged since that date. As a result of the injury by accident, . . . he sustained 20% permanent partial disability of each leg. . . .

* * *

8. . . . As a result of the injury by accident . . . and the attendant residuals in his lower extremities and his inability to work, he experienced stress which at least by 11-8-82 resulted in depression and rendered him totally disabled.

(Emphasis added.) It is clear from these findings that the Commission separated Hill's medical condition into two components, physical and psychological. The Commission specifically found that on 1 November 1980, Hill had reached his maximum *physical* improvement. Thus, it was consistent for the Commission to go on to find that although Hill's physical condition did not change, he was subsequently disabled as a result of stress-induced depression.

D

[5] The defendants also allege the evidence does not support the Commission's finding that Hill is totally disabled due to stress-induced depression. The Commission found:

8. On 11-8-82, he came under the care of Dr. Branham, a psychiatrist, and has since then remained under his treatment, including antidepressant medications, for depression. As a result of the injury by accident giving rise hereto and the attendant residuals in his lower extremities and his inability to work, he experienced stress which at least by 11-8-82 resulted in depression and rendered him totally disabled. Although he has improved on treatment, he continues to experience sleep disturbance, difficulty in concentration, accentuation of pain, psychomotor slowing, sexual dysfunction, and constriction of interest by reason of said stress induced depression and he remained totally disabled thereby through 9-16-83 when last examined by Dr. Branham. The credible evidence of record fails to establish that said depression was of disabling severity prior to 11-8-82.

Dr. Branham, the psychiatrist, testified:

I saw Mr. Hill because of weakness in his legs, pain in his back, which had been present since an injury at work. Subse-

> quent to the injury, the weakness and the pain persisted which resulted in bringing about some symptoms of a disease which we call depression. These symptoms as I saw in Mr. Hill were represented by dysphoria or depression, difficulty in sleep pattern, trouble in concentration, accentuation of the pain already being experienced, psychomotor slowing, constriction of interest in general in his usual way of going about conducting his life which had been seriously altered in so much as *he was unable to function in an employment situation.*

(Emphasis added.) He further indicated that one cause of Hill's depression was the fear of future deterioration of his legs. According to Dr. Branham, Hill's depression was a result of a biochemical dysfunction of the nerve brain cells. He testified that stress caused by pain and weakness in Hill's legs triggered this dysfunction. The emphasized portion of the last sentence of the quoted testimony addresses the issue involving plaintiff's incapacity to earn wages due to depression.

Findings of fact of the Industrial Commission are binding on a reviewing court if supported by competent evidence and may be set aside on appeal only if there is no competent evidence to support them. *Carrington v. Housing Authority,* 54 N.C. App. 158, 282 S.E. 2d 541 (1981). In our opinion, the quoted evidence is sufficient to support Finding of Fact number 8, upon which the Commission's award of compensation for temporary total disability after 8 November 1982 is based.

V

[6] Finally, defendants argue that the Commission erred in awarding temporary total disability for the period commencing 8 November 1982 without affording them a credit for compensation paid in connection with the Commission's award of twenty percent permanent partial disability of both legs under G.S. Sec. 97-31. The pertinent part of the Commission's award is as follows:

> 1. Subject to counsel fee hereinafter allowed and *subject to any credit to which defendants are entitled by reason of compensation benefits already paid to him,* defendants shall pay compensation to plaintiff at the rate of $156.79 per week for the following periods: from 3-27-79 to 4-11-79; from 7-10-79

> to 11-1-80; from 11-1-80 for a period of 80 weeks [under G.S. Sec. 97-31]; and from 11-8-82 up through 9-16-83 and thereafter for so long as he remains totally disabled [under G.S. Sec. 97-29].

(Emphasis added.) The question, then, is not whether the Commission afforded defendants a credit, as it did, but whether this credit should operate so amounts paid under G.S. Sec. 97-31 must be deducted from benefits awarded under G.S. Sec. 97-29 commencing 8 November 1982. We answer this question in the negative.

Apparently, the question of availability of credit in these circumstances never has been squarely addressed by our courts. However, in *Davis v. Edgecomb Metals,* discussed in Part IV(A) as similar to the case at bar, this Court held it was not error to award "additional compensation for a disabling psychiatric condition" subsequent to a scheduled award of benefits under G.S. Sec. 97-31(15) for claimant's leg injury. 63 N.C. App. at 54, 303 S.E. 2d at 616. This implicitly supports Hill's contention that payments under a scheduled award of benefits should be treated as separate from any subsequent award for temporary total disability.

In *Moretz v. Richards & Associates,* 74 N.C. App. 72, 327 S.E. 2d 290, *disc. rev. allowed,* 314 N.C. 116, 332 S.E. 2d 482 (1985), this Court applied N.C. Gen. Stat. Sec. 97-42 (1979) (recompiled 1985) which provides, "[a]ny payments made by the employer to the injured employee during the period of his disability . . . which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation." In *Moretz,* defendant carrier paid temporary total disability benefits from 7 November 1975 through 25 October 1982 and, in June 1982, requested a hearing to determine whether the employee was entitled to continue receiving payments. The Commission found that the employee had a ninety percent permanent partial disability of the left leg and awarded 180 weeks of benefits under G.S. Sec. 97-31 to begin on 1 December 1977, the date of maximum medical recovery. This Court held that it was an abuse of discretion under G.S. Sec. 97-42 for the Commission to refuse to grant defendants a credit on the permanent partial disability award for payments made after 1 December 1977. The holding

was premised in part on the "strong public policy against double recovery." 74 N.C. App. at 76, 324 S.E. 2d at 294.

In contrast to *Moretz*, the instant case involves no double recovery; no overlapping benefits under G.S. Sec. 97-31 and G.S. Sec. 97-29 were ever awarded or paid. Rather, the temporary total disability payments were to begin approximately six months after the final payment on the scheduled award. The disability for which defendant Hanes previously compensated Hill, and for which Hanes seeks a credit, is separate and distinct from the disability based on stress-induced depression. We therefore hold that in the compensation awarded for temporary total disability commencing 8 November 1982, the defendants are not to be given credit for compensation previously awarded under G.S. Sec. 97-31(15).

The motion for rehearing is denied.

The opinion and award appealed from is affirmed.

Chief Judge HEDRICK dissents.

Judge PARKER concurs in the result.

Chief Judge HEDRICK dissenting.

In my opinion, the evidence in the record does not support the critical finding of fact that:

> 8. On 11-8-82, he came under the care of Dr. Branham, a psychiatrist, and has since then remained under his treatment, including anti-depressant medications, for depression. As a result of the injury by accident giving rise hereto and the attendant residuals in his lower extremities and his inability to work, he experienced stress which at least by 11-8-82 resulted in depression and rendered him totally disabled. Although he has improved on treatment, he continues to experience sleep disturbance, difficulty in concentration, accentuation of pain, psychomotor slowing, sexual dysfunction, and constriction of interest by reason of said stress induced depression and he remained totally disabled thereby through 9-16-83 when last examined by Dr. Bran-

ham. The credible evidence of record fails to establish that said depression was of disabling severity prior to 11-8-82.

The majority states that this finding of fact is supported by the following testimony of Dr. Branham:

> I saw Mr. Hill because of weakness in his legs, pain in his back, which had been present since an injury at work. Subsequent to the injury, the weakness and the pain persisted which resulted in bringing about some symptoms of a disease which we call depression. These symptoms as I saw in Mr. Hill were represented by dysphoria or depression, difficulty in sleep pattern, trouble in concentration, accentuation of the pain already being experienced, psychomotor slowing, constriction of interest in general in his usual way of going about conducting his life which had been seriously altered in so much as he was unable to function in an employment situation.

This testimony indicates that plaintiff was depressed because he was "unable to function in an employment situation." It is not evidence of disability due to depression. I, therefore, vote to reverse.

Furthermore, in my opinion, the majority has mishandled the Rule 60(b)(2) and (6) motion for "relief from judgment." This motion was properly filed in this Court. *Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (1980). With respect to hearing the Rule 60(b) motion in *Swygert*, Judge Frank Parker stated that "the determination of plaintiff's motion will require the resolution of controverted questions of fact which the trial court is in a far better position to pass upon than is this Court. . . ." *Id.* at 181, 264 S.E. 2d at 907 (1980). I know no reason why we should treat a Rule 60(b) motion filed in this Court in an appeal from the Industrial Commission differently than we treat any other Rule 60(b) motion.

The request in defendant's Rule 60(b) motion that we "decide the merits of the appeal filed by the defendants prior to remanding this case to the Industrial Commission for consideration of this motion" effectively withdrew the motion. Thus we need not take action on the motion.

Furthermore, a motion made under G.S. 97-47 is certainly not the same as a motion under Rule 60. A motion by defendant before the Industrial Commission pursuant to G.S. 97-47 would not afford the same relief as a motion filed pursuant to Rule 60(b)(2) and (6). When this case is finally determined on appeal, the defendant can file its Rule 60(b) motions with the Industrial Commission.

RARITAN RIVER STEEL COMPANY v. CHERRY, BEKAERT & HOLLAND, A GENERAL PARTNERSHIP; GARY J. WOLFE; S. DONALD BLANTON; HERMAN O. COLEMAN; C. CLINE COMER; W. DOUGLAS SERRISS; JOE R. NANTZ; CLARENCE EUGENE WILLIAMS, SR.; PRESTON CLARK; HOWARD J. KIES; HARRACE M. ROLNICK; PETER A. CAPRISE; JERRY P. FOX; ERIC C. PRESSLEY; R. TURNER RIVENBARK; WAYNE COMSTOCK; TONY W. WARFFORD; WIT BROWN; LOUIS EDDIE DUTTON; WILLIAM LANIER, JR.; DAVID WHALEY; T. ERNEST SIEVELKORN; JAMES LANEY; HAROLD B. HENDERSON; ALBRY SHAW; J. ARLEY ROWE, JR.; WILLIAM BLANKENSHIP; ROBERT HOLMAN; DON HOLLAND; ANTHONY G. CAMPAS; JOHN COMPTON; DONALD LEONARD; MICHAEL NEWHOUSE; CHARLES WEATHERSBY; WALLACE PERMENTER; CLYDE FUSSELL; WAYNE BUSEY; JERRY LLOYD; DAVID BOLTON; JOHN CORDELL; RALPH DAVIS; HARRY STOLTE, JR.; CHARLES BROWN; WAYNE GRIER; HARRY GRIGGS, JR.; RALPH HAROLD; FRANCES KOGER; KENNETH LITTON, JR.; CHARLES YOUNG; BOBBY BLACK; WILLIAM FLURRY; JACK MOODY; RUDOLPH OHME, JR.; E. A. THOMAS, JR.; RAYMOND WARCO; E. C. BLACKBURN; ANTHONY MORRIS; W. H. PETERSON; J. DOMINQUEZ; ROBERT HARTER; LLOYD BRAMMER; HENRY COLBRETH; PATRICK CALLEN; W. H. HUFF; JEFFREY McCLANATHAN; RICHARD ROBERTS; WILBURN ROBERTSON; GEORGE TORNWALL; AND ROBERT WHITE, PARTNERS

AND

SIDBEC-DOSCO, INC. v. CHERRY, BEKAERT & HOLLAND, A GENERAL PARTNERSHIP; GARY J. WOLFE; S. DONALD BLANTON; HERMAN O. COLEMAN; C. CLINE COMER; W. DOUGLAS SERRISS; JOE R. NANTZ; CLARENCE EUGENE WILLIAMS, SR.; PRESTON CLARK; HOWARD J. KIES; HARRACE M. ROLNICK; PETER A. CAPRISE; JERRY P. FOX; ERIC C. PRESSLEY; R. TURNER RIVENBARK; WAYNE COMSTOCK; TONY W. WARFFORD; WIT BROWN; LOUIS EDDIE DUTTON; WILLIAM LANIER, JR.; DAVID WHALEY; T. ERNEST SIEVELKORN; JAMES LANEY; HAROLD B. HENDERSON; ALBRY SHAW; J. ARLEY ROWE, JR.; WILLIAM BLANKENSHIP; ROBERT HOLMAN; DON HOLLAND; ANTHONY G. CAMPAS; JOHN COMPTON; DONALD LEONARD; MICHAEL NEWHOUSE; CHARLES WEATHERSBY; WALLACE PERMENTER;

CLYDE FUSSELL; WAYNE BUSEY; JERRY LLOYD; DAVID BOLTON; JOHN CORDELL; RALPH DAVIS; HARRY STOLTE, JR.; CHARLES BROWN; WAYNE GRIER; HARRY GRIGGS, JR.; RALPH HAROLD; FRANCES KOGER; KENNETH LITTON, JR.; CHARLES YOUNG; BOBBY BLACK; WILLIAM FLURRY; JACK MOODY; RUDOLPH OHME, JR.; E. A. THOMAS, JR.; RAYMOND WARCO; E. C. BLACKBURN; ANTHONY MORRIS; W. H. PETERSON; J. DOMINQUEZ; ROBERT HARTER; LLOYD BRAMMER; HENRY COLBRETH; PATRICK CALLEN; W. H. HUFF; JEFFRY McCLANATHAN; RICHARD ROBERTS; WILBURN ROBERTSON; GEORGE TORNWALL; AND ROBERT WHITE, PARTNERS

Nos. 8526SC811 and 8526SC812

(Filed 4 February 1986)

1. **Accountants § 1; Contracts § 14— third-party beneficiary—sufficiency of complaint**

Plaintiff Raritan's complaint stated a claim based on third-party beneficiary contract doctrine where it alleged the existence of "a valid and enforceable contract" by defendant certified public accountants to provide an audit for a corporation and that the contract was "entered into for the direct, and not incidental, benefit of plaintiff and other trade creditors." However, plaintiff Sidbec's complaint was insufficient to state a claim based on third-party beneficiary contract doctrine where it failed to allege that the contract between defendant certified public accountants and the corporation was valid and enforceable.

2. **Accountants § 1; Contracts § 15— third-party beneficiary—action for negligent performance of contract**

The law implies privity of contract for an intended third-party beneficiary of a contract for certified public accountants to perform an audit of a corporation, and the third-party beneficiary may bring an action in tort for negligent performance of the underlying contract by the accountants.

3. **Accountants § 1— action by third party against accountant—lack of privity not bar**

Lack of privity of contract is not a bar to an action by a third party against certified public accountants for negligent misrepresentation concerning the preparation of an audit opinion which the third party relied on to his or her detriment.

4. **Accountants § 1— liability of accountants to third parties—balancing test**

A balancing test containing several factors as set forth in *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P. 2d 16 (1958), is adopted by the Court of Appeals for determining the liability of professional accountants to third parties.

5. **Accountants § 1; Negligence § 2— action against accountants—negligent misrepresentation—sufficiency of complaint of third party**

Plaintiff Sidbec's complaint stated a claim against defendant certified public accountants based on negligent misrepresentation where it alleged that

defendants prepared audited financial statements for a corporation which showed that the corporation had a substantial positive net worth when it actually had a negative net worth; that the audit contract was entered into for the direct benefit of plaintiff and other creditors who defendants knew would rely upon such information; and that plaintiff has incurred damages as a result of its extension of credit to the corporation in reliance on the corporation's reported financial condition.

APPEAL by plaintiffs from *Burroughs, Judge.* Orders entered 9 May 1985 in Superior Court, MECKLENBURG County. Consolidated on appeal by order of this Court dated 1 August 1985. Heard in the Court of Appeals 6 December 1985.

Grier and Grier, by Joseph W. Grier, III, and Richard C. Belthoff, Jr., for plaintiff appellant Raritan River Steel Company.

Golding, Crews, Meekins, Gordon & Gray, by Rodney Dean, for plaintiff appellant Sidbec-Dosco, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings and Martha Jones Mason, for defendant appellees.

WHICHARD, Judge.

I.

Plaintiffs appeal from the granting of defendants' motions to dismiss the complaints for failure to state claims upon which relief can be granted. N.C. Gen. Stat. 1A-1, Rule 12(b)(6). The issue is whether the complaints state claims based on third-party beneficiary contract doctrine and the tort doctrine of negligent misrepresentation. More particularly, we must decide whether a third person not in privity of contract with a certified public accountant has a claim against that accountant for negligent misrepresentation which allegedly results in loss to the third person.

We hold that plaintiff Raritan River Steel Company (Raritan) has stated claims based on both third-party beneficiary contract doctrine and negligent misrepresentation. We hold that plaintiff Sidbec-Dosco, Inc. (Sidbec) has stated a claim based on negligent misrepresentation but has not stated a claim based on third-party beneficiary contract doctrine. In particular, we hold that the law implies privity of contract for an alleged intended

third-party beneficiary like Raritan and that such a plaintiff may bring an action in tort for negligent performance of the underlying contract. We also hold that under the facts alleged in Sidbec's complaint a third person not in privity of contract with a certified public accountant has a claim against that accountant for negligent misrepresentation.

Accordingly, we reverse the orders except for the portion dismissing Sidbec's third-party beneficiary claim, which we affirm.

II.

Raritan's complaint alleged, in pertinent part, that:

Intercontinental Metals Corporation (IMC) engaged defendant Cherry, Bekaert & Holland (Cherry), a general partnership of certified public accountants, pursuant to a valid and enforceable contract, to provide an audit of IMC for the years ending 30 September 1980 and 30 September 1981. The individual defendants are all general partners in Cherry. Cherry published its audit on or about 30 January 1982. Cherry was negligent in the preparation of this audit in that the published report showed IMC with a net worth of approximately $7,000,000, when, in actuality, IMC's net worth was substantially less. Dun & Bradstreet published a report on IMC which made specific reference to Cherry's audit.

Raritan regularly supplied raw steel to IMC on credit. Relying on information in the Dun & Bradstreet report, which was supplied by defendant Cherry, Raritan extended credit to IMC in excess of $2,247,844. IMC is in bankruptcy and cannot pay this debt in any substantial amount. Accordingly, as a direct and proximate result of defendants' negligence, Raritan, relying on Cherry's audit, extended credit to IMC and consequently suffered losses in excess of $10,000.

In Raritan's second claim it alleged that it is a third-party beneficiary to IMC's contract with Cherry and may therefore recover damages resulting from Cherry's breach.

Sidbec's complaint contains essentially the same allegations as Raritan's. Sidbec also extended credit to IMC based on the Cherry audit. Sidbec, however, did not specifically allege that it relied on the Dun & Bradstreet report for its information. Rather,

it simply alleged that it "has incurred . . . damages as a direct result of its extension of credit to IMC . . . in reliance on [IMC's] reported financial condition . . . ." Sidbec's damages resulted directly and proximately from Cherry's negligence in showing IMC with a net worth of approximately $7,000,000, when in actuality IMC's net worth was at least "a negative" $10,000,000.

Sidbec, like Raritan, alleged in its second claim that it is a third-party beneficiary of IMC's contract with Cherry.

III.

" '[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff[s] [are] entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 16-17, 290 S.E. 2d 732, 734, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982), *quoting Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166. *See also Brad Ragan, Inc. v. Callicut Enterprises, Inc.*, 73 N.C. App. 134, 135, 326 S.E. 2d 62, 63 (1985). " 'A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings,' " however. *Morrow*, 57 N.C. App. at 17, 290 S.E. 2d at 735. Specifically, plaintiffs must state enough to give the substantive elements of a legally recognized claim. *Id.*

> Under the "notice theory" of pleading contemplated by Rule 8(a)(1), detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Sutton, 277 N.C. at 104, 176 S.E. 2d at 167. " '[W]ell-pleaded material allegations of the complaint[s] are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.' " *Id.* at 98, 176 S.E. 2d at 163.

IV.

[1] For claims based on third-party beneficiary contract doctrine to withstand a Rule 12(b)(6) motion to dismiss, plaintiffs' allega-

tions must show: "(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." *Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-06, 263 S.E. 2d 313, 317, *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980); *see also Brad Ragan Inc.*, 73 N.C. App. at 138, 326 S.E. 2d at 65 (1985). Raritan alleges the existence of "a valid and enforceable contract" between defendants and IMC "entered into for the direct, and not incidental, benefit of plaintiff and other trade creditors." Since this includes all the allegations required by *Leasing Corp.*, the complaint adequately states a claim based on third-party beneficiary contract doctrine. The court thus erred in dismissing this portion of Raritan's complaint.

Sidbec alleges that defendant "pursuant to contracts, prepared audited financial statements for [IMC]." It then alleges that "[d]efendants' contract with IMC was entered into for the direct benefit of the [p]laintiff and other creditors . . . ." This complaint fails to allege that the contract(s) between defendants and IMC were valid and enforceable. Hence, it omits the second of the "essential allegations" and thus "leaves to conjecture that which must be stated." *Leasing Corp.*, 45 N.C. App. at 406, 263 S.E. 2d at 317; *see also Howell v. Fisher*, 49 N.C. App. 488, 493, 272 S.E. 2d 19, 23 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E. 2d 69 (1981).

Accordingly, we hold that Sidbec's complaint fails to state a claim based on third-party beneficiary contract doctrine. The court thus properly dismissed this portion of Sidbec's complaint. Upon remand Sidbec may move to vacate this portion of the Rule 12(b)(6) order and seek leave to amend its complaint to assert the essential allegation which it omitted. If it does, the trial court must then determine whether "justice . . . requires" allowing the motion and granting the leave. N.C. Gen. Stat. 1A-1, Rule 15(a).

V.

[2] We hold that both complaints adequately state a claim in tort for negligent misrepresentation. However, because Raritan has successfully alleged a claim based on third-party beneficiary contract doctrine, and Sidbec has not, different grounds exist for upholding each complaint.

As held above, Raritan has adequately alleged that it is a third-party beneficiary of defendants' contract with IMC. "[W]here a contract between two parties is entered into for the benefit of a third party, the latter may maintain an action . . . in tort if he has been injured as a result of its negligent performance." *Johnson v. Wall*, 38 N.C. App. 406, 410, 248 S.E. 2d 571, 573-74 (1978). The law implies privity of contract for intended third-party beneficiaries. *Id.* Thus, privity between Raritan and defendants is implied, and Raritan, as a third-party beneficiary, may bring an action in tort for injuries arising from defendants' negligent performance of their contract with IMC.

[3] Since Sidbec failed to state a claim based on third-party beneficiary doctrine, however, it must seek recovery in tort as a third person not in privity of contract with defendant. *See Leasing Corp.*, 45 N.C. App. at 406, 263 S.E. 2d at 317; *Howell*, 49 N.C. App. at 493-95, 272 S.E. 2d at 23-24. More specifically, the issue is whether a third person not in privity with a certified public accountant may bring a claim against that accountant for negligent misrepresentation concerning the preparation of an audit opinion which the third person allegedly relied on to his or her detriment.

A majority of jurisdictions have held that lack of privity bars a negligent misrepresentation action against an accountant. *See* Note, *Negligent Misrepresentation and the Certified Public Accountant: An Overview of Common Law Liability to Third Parties*, 18 Suffolk L. Rev. 431, 432 (1984). However, "the judicial trend is toward an abrogation of the privity requirement in favor of a more flexible and equitable standard." *Id.* Justice Cardozo's decision in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) first established the privity requirement. The Court there declined to impose on an accountant liability to a third party for negligent preparation of a balance sheet. It held that privity or a bond so close as to approach privity is necessary to impose liability on public accountants. 255 N.Y. at 182-83, 174 N.E. at 445-46. It warned:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on

> these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Id. at 179-80, 174 N.E. at 444.

This Court, however, has stated that "[t]he rationale of *Ultramares* is not . . . controlling where the damages to an identified third party are reasonably foreseeable by the defendant." *Howell*, 49 N.C. App. at 495, 272 S.E. 2d at 24. Following that reasoning, it held that plaintiff shareholders had a claim against defendant engineers for negligent misrepresentation concerning a soil report prepared by defendants for plaintiff shareholders' corporation, despite the absence of privity between plaintiffs and defendants. *Id.* at 495-98, 272 S.E. 2d at 24-26.

"It is well settled in North Carolina that privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party." *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E. 2d 588, 594 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E. 2d 391 (1985). In particular, under certain circumstances a third person not in privity of contract with an attorney may recover for negligence in the performance of the attorney's employment contract with his or her client. *See, e.g., Leasing Corp.*, 45 N.C. App. at 406-07, 263 S.E. 2d at 317-18. In *Leasing Corp.* the Court held that plaintiff, a lessor of equipment to defendant attorneys' client, adequately stated a claim against defendants for negligence concerning a title opinion letter issued by defendants to their client and relied on by plaintiff.

We find no compelling basis for distinguishing accountants from other professionals in this regard. Following *Leasing Corp.* and *Howell*, we thus hold that lack of privity of contract is not a bar to actions by third parties against certified public accountants for negligent misrepresentation.

Jurisdictions which have abandoned the privity requirement have adopted several standards for determining accountants' liability in tort. The most commonly applied alternative to the privity rule is that in the Restatement (Second) of Torts Sec. 552 (1977). *See Negligent Misrepresentation*, 18 Suffolk L. Rev. at 439-40. It provides that:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts Sec. 552 (1977).

This Court has followed the Restatement approach to negligent misrepresentation actions by third parties not in privity in suits against engineers (*Howell, supra; Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580, *disc. rev. denied*, 298 N.C. 295, 259 S.E. 2d 911 (1979)) and real estate appraisers (*Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981)). As construed in *Howell*, the Restatement restricts actions to a plaintiff or limited group of plaintiffs "to whom defendant intended the information to be supplied, who have suffered a loss in reliance upon the information in a transaction which defendant intended the information to influence." *Howell*, 49 N.C. App. at 497, 272 S.E. 2d at 25. Accordingly, in *Howell* plaintiffs established a claim for relief under this test by alleging "that defendants prepared the soil test reports with express knowledge that they would be used to induce plaintiffs to invest in the corporation and defendants' agent so advised plaintiffs upon the reliability of the soil reports." *Id.*

Another standard is a balancing test containing several factors. This standard originates with *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P. 2d 16 (1958). In *Biakanja* a will was denied probate because the notary public who prepared it negligently failed to

have it attested. Plaintiff, a beneficiary under the will, sought damages from the notary public. The Court held that third-party liability was a policy matter and applied the following six-factor balancing test:

> [t]he extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to [plaintiff], the degree of certainty that the plaintiff suffered injury, the [proximity] between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Id. at 650, 320 P. 2d at 19.

In *Aluma Kraft Manufacturing Co. v. Elmer Fox & Co.*, 493 S.W. 2d 378 (Mo. App. 1973), the court applied the *Biakanja* test to accountants. Plaintiff there, a buyer of stock of defendant accounting firms' client, sought damages for negligence in the performance of an audit it detrimentally relied on in the stock purchase. Applying the *Biakanja* test, the Court held that plaintiff had stated a claim sufficient to withstand defendants' motion to dismiss. *Id.* at 383.

This Court has acknowledged or applied the *Biakanja* test to find a third-party claim against architects. *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 268 S.E. 2d 12, *disc. rev. denied*, 301 N.C. 527, 273 S.E. 2d 454 (1980); *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 301-02 (1979). It has also applied this test to find a third-party claim against attorneys. *Ingle v. Allen*, 71 N.C. App. 20, 321 S.E. 2d 588 (1984); *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E. 2d 354, *disc. rev. denied*, 311 N.C. 758, 321 S.E. 2d 136 (1984); *Leasing Corp., supra.*

Two jurisdictions have adopted a standard negligence theory of recovery known as the reasonably foreseeable test. Under this theory, accountants owe a duty of care to all parties who are reasonably foreseeable recipients of financial statements for business purposes, provided the recipients rely on the statements pursuant to those business purposes. *Rosenblum v. Adler*, 93 N.J. 324, 352, 461 A. 2d 138, 153 (1983); *see also Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 386, 335 N.W. 2d 361, 366 (1983). In *Rosenblum* a corporate plaintiff acquired the stock of

defendant accounting firm's client. When the stock later proved worthless, plaintiff sued defendants alleging negligence and detrimental reliance. Applying the reasonably foreseeable test, the Court found defendants liable for negligent misrepresentation. 93 N.J. at 353-58, 461 A. 2d at 153-56.

The courts of this jurisdiction have not applied the reasonably foreseeable test to find liability to third parties in any negligent misrepresentation action. We also decline here to apply it to accountants. Especially in the field of accounting, "it [is] necessary to adopt a more restricted rule of liability [for pecuniary loss], because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it." Restatement (Second) of Torts 2d Sec. 552, comment a (1977).

We also do not adopt the Restatement test. The Restatement approach "is similar to the privity rule in that it draws an arbitrary limit on the class of potential plaintiffs." *Negligent Misrepresentation*, 18 Suffolk L. Rev. at 445. "While the *Restatement* position is easily applied, its arbitrary limitations create an undesirable inflexibility which denies injured third parties recovery simply because they do not fall within a specific class of persons." *Id.* at 445-46; *see also* Restatement (Second) of Torts Sec. 552, comment h, illustrations 5-7 (1977). In essence, liability hinges on the purpose of a particular audit. Besser, *Privity?—An Obsolete Approach to the Liability of Accountants to Third Parties*, 7 Seton Hall L. Rev. 507, 527 (1976). While the purpose of a particular audit may be relevant to foreseeability, it should not be exclusively determinative. *Id.*

[4] The *Biakanja* test, by contrast, avoids the necessity of an arbitrary, purpose-based determination of liability by allowing a court to weigh the purpose of the audit as one of several determinative factors. As noted, this Court has applied this test to find third-party liability for professionals in law and architecture. We now adopt it for determining professional accountants' liability to third parties as well.

[5] Taking the allegations in Sidbec's complaint "as admitted," *Sutton*, 277 N.C. at 98, 176 S.E. 2d at 163, and balancing the *Biakanja* factors, we hold that Sidbec has stated a claim against

defendants for negligent misrepresentation. Accordingly, the court erred in dismissing this portion of Sidbec's complaint.

The first consideration is the extent to which the transaction was intended to affect the plaintiff. In *Leasing Corp.* "[t]he furnishing of title opinion was done for the express purpose of inducing plaintiff to lease . . . equipment" from defendant attorneys' client. *Leasing Corp.*, 45 N.C. App. at 407, 263 S.E. 2d at 318. Sidbec's complaint, however, does not show that the furnishing of defendants' audit was for the express purpose of inducing plaintiff to extend credit to IMC. Sidbec merely alleges that "[d]efendant[s] knew that such financial statements would be used for . . . general representations by [IMC] of its financial condition, and that extensions of credit to IMC . . . would be based upon such statements." In *Aluma Kraft, supra*, the Court upheld a complaint which alleged that defendant "knew its opinion would be utilized by the plaintiff, knew a purchase of the stock was contemplated, knew the purchase price was to be computed based upon the audit, and knew the audit would be furnished to the purchasers [plaintiff]." 493 S.W. 2d at 383. That is not the case here. Sidbec's allegations do not show specifically that defendants were aware of Sidbec's intention to extend credit to IMC based on defendants' audit.

Sidbec also alleges, however, that "[d]efendant[s'] contract with IMC was entered into for the direct benefit of the [p]laintiff and other creditors who the [d]efendant[s] knew would be relying upon such information." This allegation arguably shows that defendants' audit "was directly intended to affect plaintiff." *Leasing Corp.*, 45 N.C. App. at 407, 263 S.E. 2d at 318. Balanced with the other *Biakanja* factors, this allegation prevents us from concluding "*to a certainty that plaintiff[s] [are] entitled to no relief under any state of facts.*" *Morrow*, 57 N.C. App. at 16-17, 290 S.E. 2d at 734. We thus hold that entry of the Rule 12(b)(6) order was improper.

In *Leasing Corp.* the Court found that "[i]t was foreseeable that failure to discover and to disclose prior recorded liens would result in an impairment of the plaintiff's security position in the pledged collateral." *Leasing Corp.*, 45 N.C. App. at 407, 263 S.E. 2d at 318. Likewise, it was foreseeable here that failure to discover and disclose that IMC had a substantial negative rather

than positive net worth would harm creditors such as Sidbec who extended credit relying on defendants' audit. Taking the complaint as true, it is reasonably certain that Sidbec has suffered injury, since the complaint alleges that Sidbec "has incurred substantial expenses and damages as a direct result of its extentions of credit to IMC . . . ." *See Jenkins*, 69 N.C. App. at 143-44, 316 S.E. 2d at 357. No allegations suggest that there were any intervening circumstances between defendants' allegedly negligent conduct and Sidbec's loss. *Id.* Under these circumstances defendants owed a duty to Sidbec to use reasonable care in the performance of its contract or contracts with IMC.

At the evidentiary stage, Sidbec will have the burden of supporting its allegations. At the pleading stage, however, pursuant to the authorities discussed above, the allegations are at least minimally sufficient to state a claim for relief.

In No. 8526SC811 (Raritan), reversed.

In No. 8526SC812 (Sidbec), affirmed in part, reversed in part.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. THOMAS M. HOOPER

No. 8529SC692

(Filed 4 February 1986)

1. **Searches and Seizures § 15— standing to object to search—insufficient showing**

Defendant had no standing to object to the search of a truck he was driving when arrested and a duffel bag found therein where the truck was owned by a corporation and defendant presented no evidence showing any legitimate property interest in the truck, the duffel bag, or its contents.

2. **Criminal Law § 146.4— constitutional question—necessity for raising at trial court**

A constitutional question which is not raised and passed upon by the trial court will not be considered on appeal.

3. **Homicide § 21.7— second degree murder—sufficiency of circumstantial evidence**

The State's evidence was sufficient to support defendant's conviction of second degree murder where it tended to show that deceased lived with de-

fendant's estranged wife; defendant was embroiled in a custody dispute with his estranged wife which centered around a plan by the wife and deceased to take the children to another state; the murder weapon was found in the truck defendant was driving when arrested; defendant had particles of gunshot residue on the palm and back of one hand; defendant often drove a metallic gray Toyota Celica owned by a friend, and on the day of the shooting, witnesses saw a metallic gray compact car chasing deceased's truck upon a mountain road and later speeding down the same road; the driver of the gray car had a full beard, and defendant has a beard; defendant told an S.B.I. agent he had been "stalking" deceased for more than a month; and defendant told another S.B.I. agent that he appreciated the continued investigation by the S.B.I. even though the agents "had the motive, the gun, and the man."

4. Criminal Law § 48.1— right to remain silent—evidence of assertion of constitutional rights

The admission of an S.B.I. agent's testimony that, during the course of questioning, defendant "stopped right there and asserted his Constitutional right" violated defendant's constitutional right to remain silent and was prejudicial error in this second degree murder case.

Judge WEBB dissenting.

APPEAL by defendant from *Gudger, Judge.* Judgment entered 17 January 1985 in Superior Court, POLK County. Heard in the Court of Appeals 31 October 1985.

Attorney General Lacy H. Thornburg by Associate Attorney General Sylvia Thibaut for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Geoffrey C. Mangum for defendant appellant.

COZORT, Judge.

Defendant Thomas Hooper was tried upon an indictment, proper in form, for the murder of Todd Bradfield. He was convicted of second-degree murder and sentenced to fifteen years in prison. Defendant appeals from this conviction alleging that the trial court erred by denying his motion to suppress, by denying his motion to dismiss because of insufficient evidence, and by allowing testimony of an S.B.I. agent that at a crucial stage during questioning the defendant asserted his constitutional right to remain silent. We grant a new trial based on the erroneous admission of the S.B.I. agent's testimony.

The State's evidence tended to show the following:

On 28 July 1983, at approximately 10:00 a.m. Todd Bradfield was found fatally wounded inside his truck on Hogback Mountain Road in Polk County, North Carolina. Mr. Bradfield died several days later without ever regaining consciousness.

Prior to 28 July 1983, the deceased lived with the defendant's estranged wife, Sarah Hooper, in Travelers Rest, South Carolina. The three Hooper children also lived with Ms. Hooper in Travelers Rest. The deceased and Ms. Hooper planned to move with the Hooper children in the fall of 1983 to a house being built on Hogback Mountain in Polk County, North Carolina. The defendant, who lived in Greenville, South Carolina, with his friend, C. J. Peterson, Jr., opposed such a move because it meant that the children would be moving out of state. A custody dispute between Ms. Hooper and the defendant ensued and a hearing was scheduled for early August of 1983 to determine whether the children would start school in North Carolina or South Carolina.

In order to establish his right to custody of the three Hooper children, upon the advice of his attorney, the defendant conducted "surveillance" of the Hooper home in Travelers Rest to find out if the deceased was living with Ms. Hooper. Defendant, along with several of his friends, took over two hundred photographs of the deceased and Ms. Hooper, including photographs of the deceased and Ms. Hooper making love.

On 28 July 1983, Amelia Medford, who lived on Hogback Mountain Road, was working in her yard when she heard what sounded like a car backfiring several times, followed by the sound of a car crash. As Mrs. Medford walked down Hogback Mountain Road toward the sound, she observed a gray compact car traveling down Hogback Mountain Road "at quite a clip." Mrs. Medford could not give any specifics about the model or make of the car. After walking down the road Mrs. Medford observed a tan and brown pickup truck with its front end off the road and its motor running. Mrs. Medford and a friend called the police from a neighbor's house on Hogback Mountain.

Jerry Ross, Chief of the Tryon City Police Department, and Officer Richard Foley were the first to arrive at the crime scene. Chief Ross inspected the truck and noticed a bullet hole in the

passenger's door. He found four spent .45 caliber cartridges and some ammunition on the floorboard and a bullet on the side of the roadway. All this evidence was turned over to the North Carolina S.B.I.

Wallace Crawford testified that about 10:00 a.m. on 28 July 1983, he left his house and traveled down Hogback Mountain Road toward Tryon, North Carolina. When he was about a mile and a half down from the Medford house, he saw a light tan pickup truck with a "cap" on it traveling up Hogback Mountain and a metallic blue or gray small sports car chasing the pickup. Mr. Crawford described the driver of the car as a man with a full whiskered face with gray streaks and fluffy dark hair. Mr. Crawford could not describe the driver of the truck. Mr. Crawford described what he saw to S.B.I. Agent Ned Whitmire who was at the crime scene when Crawford came back from Tryon. At trial, Mr. Crawford was unable to positively identify the defendant as the man he had seen in the car on the day of the shooting.

S.B.I. Agent Whitmire testified that he was familiar with the defendant and the deceased because he had investigated another matter involving both men. Agent Whitmire knew that a conflict existed between defendant and Bradfield. Agent Whitmire surmised from Mr. Crawford's description of the driver of the car that it was probably defendant.

Agent Whitmire contacted Officer Danny Clyde of the Greenville Police Department and informed Officer Clyde that there had been a shooting in North Carolina, that the defendant was the suspect, and that Agent Whitmire would be in Greenville shortly with a warrant for defendant's arrest on a charge of assault with a deadly weapon. Agent Whitmire told Officer Clyde of the defendant's address in Greenville and asked Officer Clyde to arrest defendant on a fugitive warrant. The defendant was driving a 1971 GMC Sprint truck in Greenville when he was stopped by Investigator Helton of the Greenville Sheriff's Department and informed that an investigation was being conducted by authorities in North Carolina and that a fugitive from justice warrant was being sought against him. Defendant voluntarily went with the investigator to the Greenville Law Enforcement Center.

The defendant was served with a fugitive from justice arrest warrant in the afternoon of 28 July 1983. A court order was obtained which allowed an atomic absorption test for the presence of gunshot residue to be performed on defendant. The defendant was questioned by Agent Steve Reed of the North Carolina S.B.I. concerning his surveillance of the Hooper residence in Travelers Rest and his activities that day. Agent Reed testified that the defendant told him that he had been working surveillance on the deceased because the deceased had moved in with defendant's wife. Agent Reed also testified that defendant told him that he had been "stalking" Todd Bradfield since the middle of June. Agent Reed further testified that after answering a series of questions "[defendant] stopped right there and asserted his Constitutional rights."

A search warrant was obtained to search the truck that defendant was driving when he was stopped. The truck was owned by P. I. Inc., not defendant. Pursuant to the search warrant, the officers seized from the truck a green duffel bag, a Colt .45 caliber automatic gun, a dark wig, a box containing 39 rounds of .45 caliber ammunition, a .30 caliber carbine with a loaded clip, an address book, and two checkbooks. The .45 caliber gun was sent to the S.B.I. for identification and testing.

Agent Steve Carpenter of the S.B.I., an expert in firearm identification, testified that a portion of a bullet jacket obtained from the deceased's skull was fired from the .45 caliber gun seized from the truck. Carpenter also testified that the spent shells found at the crime scene were fired from the same gun and that bullets found at the crime scene had also been fired from the gun. In addition Carpenter testified that the cartridges found in the truck were the same type of cartridges found at the crime scene.

Finally, Agent Whitmire testified at trial that while defendant was out on bond, Whitmire met defendant in Greenville and defendant told Whitmire he appreciated the S.B.I.'s ongoing investigative efforts, even though "[the agents] had the motive, the gun [and] the man."

The defendant's evidence tended to show the following:

On the day of the shooting Mrs. Sylvia Epps, a neighbor of defendant's wife, testified that she saw the defendant crossing a

neighbor's yard around 9:45 a.m. Mrs. Mildred Davis testified that she was having her hair done at Mrs. Epps' house about 9:45 in the morning on the day of the shooting and Mrs. Epps commented that Tom Hooper was crossing the neighbor's yard. Another witness, Phillip Hinsdale, testified that he called defendant at the home of C. J. Peterson, Jr., in Greenville, South Carolina, on the morning of July 28 within five minutes one way or the other of 10:30. Several witnesses testified that defendant had a good reputation in the community.

The defendant brings forth three assignments of error on appeal: (1) the trial court erred in denying defendant's motion to dismiss based on the sufficiency of the evidence; (2) the trial court erred by allowing S.B.I. Agent Steve Reed to testify that defendant gave several statements and then "stopped right there and asserted his Constitutional rights"; and (3) the trial court erred by denying defendant's motion to suppress evidence based on an invalid arrest.

[1] First we address the defendant's contention that the trial court erred by denying the defendant's motion to suppress. The only evidence seized by the police was seized from a search of the truck defendant was driving when he was stopped by the police. The State argues that the defendant did not have standing to oppose the search of the truck because there is no evidence the defendant either owned, leased, or had permission to use the truck.

To have standing the defendant must have a legitimate expectation of privacy in the thing to be searched. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978); *State v. Thompson*, 73 N.C. App. 60, 325 S.E. 2d 646 (1985). The defendant has the burden of showing this expectation. *Rawling v. Kentucky*, 448 U.S. 98, 104, 65 L.Ed. 2d 633, 641, 100 S.Ct. 2556, 2561 (1980); *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979). Defendant presented no evidence showing any legitimate property interest in the truck, the green duffel bag, or its contents. Neither defendant nor the owner of the truck, testified at the suppression hearing. Defendant has failed to show that he had any expectation of privacy in the things to be searched. Therefore, defendant lacks standing to object to the search in this case.

[2] On appeal, the defendant further argues that evidence of defendant's statements and evidence seized after his arrest should not have been admitted at trial because no probable cause existed for his arrest. Defendant presented no such argument to the trial court. It is well established that the theory upon which a case is tried in lower court must control in construing the case on appeal. A constitutional question which is not raised and passed upon by the trial court will not be considered on appeal. *State v. Cooke*, 306 N.C. 132, 291 S.E. 2d 618 (1982).

[3] We now address defendant's contention that the evidence was insufficient to show that the defendant was the person who killed Todd Bradfield. Upon a motion to dismiss in a criminal action, "all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977). In a homicide case there must be substantial evidence from which a jury might reasonably infer: (1) that the deceased died as a result of a criminal act; and (2) that the act was committed by the defendant. *State v. Lee*, 294 N.C. 299, 302, 240 S.E. 2d 449, 451 (1978). The State has presented sufficient evidence to meet both requirements.

The evidence favoring the State is primarily circumstantial. However, there is a substantial amount of circumstantial evidence from which a jury could reasonably infer that defendant had the motive, opportunity, and means to shoot Bradfield. The evidence of motive showed that defendant had watched the deceased for almost one and one-half months, taking pictures of deceased and his estranged wife in all aspects of their relationship. Defendant was embroiled in a custody dispute with his estranged wife which centered around Ms. Hooper's and the deceased's taking the children to another state. There was substantial evidence from which the jury could infer that defendant had a reason to kill Bradfield.

There was evidence from which it could be inferred that the defendant had the means to commit the homicide. The murder weapon was found in the truck defendant was driving when he

was stopped by the police. A jury might reasonably infer that this gun did in fact belong to defendant. Further evidence indicated that defendant had particles of gunshot residue on both the palm and back of his hand which indicated that defendant could have fired a gun.

The State presented evidence from which it could be reasonably inferred that defendant had the opportunity to commit the crime. Defendant had observed the habits of the deceased for about one and one-half months. Ms. Hooper testified that defendant often drove a gray metallic Toyota Celica which belonged to his friend, C. J. Peterson, Jr. Witnesses described a gray metallic compact car chasing the deceased's truck up Hogback Mountain Road on the day of the shooting and speeding down the same road after the sound of a car crash was heard. One witness, who could not positively identify defendant as the driver of the car, described the driver of the gray metallic car as a light-complected man in his mid-30's to 40's with a full beard and dark fluffy hair. The defendant had a beard and was in his early 40's.

Statements made by the defendant to law enforcement officers implied that he was the one who shot the deceased. The defendant told S.B.I. Agent Steve Reed that he had been "stalking" the deceased since the middle of June. Defendant told S.B.I. Agent Ned Whitmire that he appreciated their continued investigation even though "[the agents] had the motive, the gun, [and] the man." From the substantial evidence presented by the State, a jury could reasonably infer that the defendant had the motive, means, opportunity, and actually did commit the crime.

The defendant cites the cases of *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971), and *State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978), for the proposition that there is insufficient evidence to convict him. These cases are distinguishable. In *Jones* the husband was tried for the murder of his wife. The evidence tended to show the husband was extremely intoxicated on the night of his wife's murder, there had been an angry exchange between the husband and wife, and the husband was carrying a .22 caliber pistol and had bloodstains on his jacket when arrested. *Jones, supra*, at 61-65, 184 S.E. 2d at 862-65. In that case, unlike this case, the murder weapon was not produced, and defendant made no out-of-court statements which would tend to incriminate him.

In *Lee* the defendant was charged with the murder of his girl friend. The evidence showed that the girl friend was killed with a .25 caliber gun and that defendant had access to a .25 caliber gun but that others in his family also had access to the gun. *Lee, supra*, at 301, 240 S.E. 2d at 450. The two lead fragments taken from the girl friend's body could not be used for identifying the weapon from which they may have been fired; and, therefore, the murder weapon was not positively identified. The Supreme Court found that even though sufficient evidence existed to show opportunity, means, and perhaps the mental state, the State's case must fail because there was not substantial evidence offered to show that defendant actually committed the murder. *Id.* at 303, 240 S.E. 2d at 451. The facts of this case show that the murder weapon was found shortly after the murder in the truck which defendant was driving, and that defendant made an incriminating statement to an S.B.I. agent from which it could be inferred that he actually committed the murder. This assignment of error is overruled.

[4] Next we address defendant's contention that the trial court erred by allowing S.B.I. Agent Steve Reed to testify, over objection, that defendant in the course of questioning "stopped right there and asserted his Constitutional rights." It is well established that the State may not introduce evidence that a defendant exercised his Fifth Amendment right to remain silent. *State v. Ladd*, 308 N.C. 272, 283-84, 302 S.E. 2d 164, 171-72 (1983). The words the defendant uses to invoke his constitutional rights are not to be introduced at the trial. *Id.* A defendant must be allowed to invoke his constitutional right to remain silent without fear that he will be penalized for having done so. *Id.; Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). As noted by the North Carolina Supreme Court in *Ladd*, "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Id.* at 284, 302 S.E. 2d at 172, *quoting Grunewald v. United States*, 353 U.S. 391, 425, 1 L.Ed 2d 931, 955, 77 S.Ct. 963, 984-85 (1956) (Black, J., concurring).

The text of S.B.I. Agent Reed's testimony reveals the prejudicial nature of his statement:

> Q. Mr. Reed, will you tell us, please, what statement Mr. Hooper made to you there on the date that you questioned him, that would be July the 28th of '83?

A. Mr. Hooper stated that he had been working surveillance on Mr. Bradfield because Bradfield had moved in with his wife, Sarah Hooper. He said that he had in his possession over two hundred photographs of Mr. Bradfield and Sarah Hooper and that he and some of his friends had made these photographs. He said that one of the friends that had helped him make these photographs was Ed Penry, and he described Ed Penry as an expert photographer. He further said that, on occasions, his roommate, Pete Peterson, had helped him with the surveillance and that he said that Mr. Peterson "was with me this morning," and then *stopped right there and asserted his Constitutional rights* at that point. [Emphasis added.]

Taken in full context the testimony shows that when the defendant reached a crucial place in his statement to the police, he then invoked his constitutional right to silence. The actual words the defendant used to invoke his constitutional rights were, "Well, I better stop right there." The agent's artful paraphrasing of the defendant's assertion was more harmful than what the defendant actually said. The introduction of Agent Reed's statement violated the defendant's constitutional right to remain silent as guaranteed by the Fifth and Fourteenth Amendments.

Because the statement was introduced in violation of the defendant's constitutional rights, he is entitled to a new trial unless we determine that the erroneous admission of Agent Reed's statement was harmless beyond a reasonable doubt. G.S. 15A-1443(b); *Ladd, supra*, at 284, 302 S.E. 2d at 172. There must be no reasonable possibility that the admission of the erroneous statement contributed to the conviction. The burden is on the State to show that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). However, "[o]verwhelming evidence of guilt may render constitutional error harmless." *State v. Brown*, 306 N.C. 151, 164, 293 S.E. 2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642, 1103 S.Ct. 503 (1982).

The evidence presented in this case, although sufficient to withstand a motion for nonsuit, is not overwhelming. We cannot say that there is no reasonable possibility that the admission of

the agent's statement might have contributed to the defendant's conviction. The admission of the agent's description of the defendant's exercise of his right to remain silent, taken in the context of the agent's testimony, was prejudicial error.

New trial.

Judge BECTON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not believe the statement by Mr. Reed that the defendant stopped talking to him and asserted his constitutional rights is prejudicial error. This is not a case in which the defendant remained silent and this was used against him. Mr. Reed properly testified as to what the defendant told him. I do not see how it is more harmful to the defendant for Mr. Reed to have testified as he did rather than merely to have said the defendant stopped talking to him, which in the majority view would not have constituted prejudicial error.

CITY OF WINSTON-SALEM v. E. V. FERRELL, JR., J. C. SMITH AND WIFE, SUSIE S. SMITH, AND CLYDE G. BARBER, TRUSTEE FOR FIRST UNION NATIONAL BANK, GENE T. KOCH (JEANNE T. [KOCH]), TRUSTEE FOR FIRST UNION NATIONAL BANK, AND WILLIAM A. VOGLE, TRUSTEE FOR FIRST UNION NATIONAL BANK v. J. D. CAVE CONSTRUCTION COMPANY

No. 8521SC132

(Filed 4 February 1986)

1. Appeal and Error § 6.2— inverse condemnation—interlocutory—immediately appealable

An appeal in an inverse condemnation action was interlocutory in that the issue of damages was unresolved, but the determination of liability was immediately appealable and the court's order in finding that the City had inversely condemned portions of the defendants' land clearly affected the City's and contractor's substantial rights in that the contractor was joined by the City as a third party defendant under N.C.G.S. 1A-1, Rule 14, which an-

ticipates the disposition in one trial of cases involving multiple parties and provides the third party defendant the opportunity to participate fully in the determination of the third party plaintiff's liability. N.C.G.S. 1-277, N.C.G.S. 7A-27(d).

2. **Eminent Domain § 13.3— inverse condemnation—counterclaim to condemnation action—properly before court**

An inverse condemnation claim was properly before the court where it was asserted as a counterclaim to the City's condemnation action. N.C.G.S. 40A-51.

3. **Eminent Domain § 13.4— inverse condemnation—roadway outside sewer construction easement—evidence sufficient**

In a condemnation action for sewer outfall construction easements in which defendants counterclaimed for inverse condemnation of a roadway and staging area outside the easements, the trial court's order finding that the roadway had been inversely condemned was affirmed where the court could have found from the evidence that the contractor's use of the roadway was essential to provide access to the construction site, that such use necessarily flowed from the construction of the improvement in keeping with the design of the condemnor, that it resulted in an appropriation outside the easements, and that the use was not for a momentary period.

4. **Eminent Domain § 13.4— inverse condemnation—staging area outside sewer construction easement—evidence not sufficient**

In a condemnation action for sewer outfall construction easements in which defendants counterclaimed for inverse condemnation of a roadway and staging area outside the easements, the trial court's order finding that the staging area had been inversely condemned was reversed where the evidence did not show that the use of the staging area was necessary to complete the project and showed at most that certain employees of the City were aware that the contractor was using the area and that it was outside the easements.

5. **Eminent Domain § 13— inverse condemnation—award of attorney fees—no error**

The trial court properly awarded defendants attorney fees in an inverse condemnation action because the City did not include the property in its Declaration of Taking. N.C.G.S. 40A-8, N.C.G.S. 40A-51(a).

APPEAL by plaintiff, City of Winston-Salem, and third-party defendant, J. D. Cave Construction Co., from *Freeman, Judge*. Order entered 24 October 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 September 1985.

In August 1982 plaintiff, the City of Winston-Salem (the City), contracted with third-party defendant J. D. Cave Construction Company (the contractor) for the construction of improvements to the City's sewer system. The City provided plans to the contractor requiring that portions of the "Stratford Road Outfall" be con-

structed across the land of defendants, E. V. Ferrell, Jr. and J. C. Smith. The plans identified permanent and construction easements to be acquired by the City.

In September 1982, prior to the filing of a condemnation action by the City, the City's agents, acting within the scope of their employment, instructed the contractor to begin construction of the Stratford Road Outfall. The contractor entered upon defendants' land, graded and gravelled a roadway outside the areas identified as areas to be acquired by the City, and began to haul pipe into the construction site. The contractor used a second area outside the identified easements to store pipes and equipment. The parties refer to this as the "staging area." In each instance the contractor's employees were aware that they were using land outside the City's designated easements.

The contractor neither requested nor received permission from the City regarding its clearing and use of the roadway or its use of the staging area. However, Kermit Parrish, a construction inspector supervisor for the City, was aware of the contractor's activities outside the easements the City intended to acquire. Parrish testified that part of his job was to ensure that the contractor stayed within the City's easements. In addition, each day of construction either he or someone assigned by him used the roadway to gain access to the construction site. Parrish testified that City survey crews, on the site periodically, also used the roadway.

On or about 20 October 1982, defendant Smith became aware of the activities taking place on his land. He discussed the contractor's use of the roadway with Delmore Hester, the City's senior real estate agent in charge of acquisition. Hester assured him that the contractor would immediately discontinue use of the roadway and restore the area to its original condition. Hester sent Smith the following letter regarding their conversation:

> As I discussed with you in our telephone conversation, the City will hold the contractor (J. D. Cave Construction Company) responsible to regrade, lime, fertilize and sow with fescue all area outside of the right away [sic] which was disturbed by hauling pipe to the Stratford Road Sewer Project.
>
> We apologize for any inconvenience this may have caused.

Hester spoke with the contractor's president, J. D. Cave (Cave), regarding the roadway, and sent him a copy of the above letter. Cave, however, understood Hester to say that his company could continue to use the roadway as long as the property was restored to its original condition upon completion of the project. The contractor continued to use the roadway. It was not reseeded until June 1983.

On 3 February 1983 the City filed a Complaint and Declaration of Taking describing permanent and construction easements across defendants' land. The roadway and the staging area were not included in the description. Defendants counterclaimed, alleging in part that the use of areas outside those described in the complaint constituted inverse condemnation. The City subsequently filed a third-party complaint against the contractor seeking indemnification for any liability the City incurs arising out of the contractor's "unauthorized" use of land outside the easements described in the complaint.

Pursuant to N.C. Gen. Stat. 40A-47, the court entered an order finding that the City inversely condemned portions of defendants' land outside those described in the complaint—specifically, the roadway and the staging area. In addition it awarded defendants costs, disbursements and attorney fees pursuant to N.C. Gen. Stat. 40A-8(c).

The City and the contractor appeal.

Ronald G. Seeber and Ralph D. Karpinos for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by F. Joseph Treacy, Jr. and Richard J. Keshian, for defendant appellees.

Roy G. Hall, Jr.; Liner & Bynum, by David V. Liner; and Caudle & Spears, by Lloyd C. Caudle, for third-party defendant cross appellant.

WHICHARD, Judge.

I.

[1] We note that the order is interlocutory in two respects:

First, the issue of damages remains unresolved. The determination of liability nevertheless is immediately appealable. *Highway Commission v. Nuckles*, 271 N.C. 1, 13-14, 155 S.E. 2d 772, 783 (1967).

Second, the court failed to rule on the City's third-party complaint against the contractor. As the judgment adjudicates "fewer than all the claims or the rights and liabilities of fewer than all the parties," and fails to state that the judgment is final or that there is no just reason for delay in accordance with N.C. Gen. Stat. 1A-1, Rule 54(b), the judgment is interlocutory and can be reviewed only if it affects a substantial right pursuant to N.C. Gen. Stat. 1-277 or N.C. Gen. Stat. 7A-27(d). *Oestreicher v. Stores*, 290 N.C. 118, 121-24, 225 S.E. 2d 797, 800-02 (1976).

The order clearly affects the City's substantial rights. *Nuckles, supra.* The contractor was joined by the City as a third-party defendant pursuant to N.C. Gen. Stat. 1A-1, Rule 14. "This rule anticipates the disposition in one trial of cases involving multiple parties." *Cody v. Dept. of Transportation*, 60 N.C. App. 724, 726, 300 S.E. 2d 25, 28 (1983). Rule 14 provides that "the third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim."

When a third-party defendant has an opportunity to participate fully in the determination of third-party plaintiff's liability, it is bound by a judgment in favor of the original plaintiff (here, the defendants by counterclaim). *See* W. Shuford, *North Carolina Civil Practice and Procedure*, Sec. 14-12 (2d ed. 1981); 3 *Moore's Federal Practice* Par. 14.13. Thus, the order finding the City liable affects the contractor's substantial rights. We therefore consider the appeals of both the City and the contractor.

II.

The issue is whether the trial court, sitting as the trier of fact without a jury, could find and conclude from the evidence presented that the City had, by inverse condemnation, taken a temporary easement in the roadway and "staging area" which were used by its contractor but were outside the easements formally taken. We hold that it could so find as to the roadway but not as to the staging area.

III.

[2] Defendants' claim is in

> "inverse condemnation," a term often used to designate "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of power of eminent domain has been attempted by the taking agency."

Charlotte v. Spratt, 263 N.C. 656, 662-63, 140 S.E. 2d 341, 346 (1965), *quoting from Jacksonville v. Schumann*, 167 So. 2d 95, 98 (Fla. Dist. Ct. App. 1964). " 'Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so.' " *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E. 2d 1, 8 (1970), *quoting from* Bohannon, Airport Easements, 54 Va. L. Rev. 355, 373 (1968).

"The legal doctrine indicated by the term, 'inverse condemnation,' is well established in this jurisdiction." *Spratt*, 263 N.C. at 663, 140 S.E. 2d at 346.

> Where private property is *taken* for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor.

Id.

An inverse condemnation remedy is now provided in this jurisdiction by statute. Where property has been taken and no complaint containing a declaration of taking has been filed, the owner "may initiate an action to seek compensation for the taking." N.C. Gen. Stat. 40A-51.

The owners here did not "initiate an action" but instead asserted in the City's condemnation action a counterclaim alleging that property not included therein had in fact been taken. Our Supreme Court has indicated, however, that "principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing pro-

ceeding." *Dept. of Transportation v. Bragg*, 308 N.C. 367, 371 n. 1, 302 S.E. 2d 227, 230 n. 1 (1983). Defendants' assertion of a counterclaim in this condemnation action by the City thus properly placed the inverse condemnation issue before the court.

IV.

> " 'Taking' under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof."

Ledford v. Highway Comm., 279 N.C. 188, 190-91, 181 S.E. 2d 466, 468 (1971), *quoting from* 26 Am. Jur. 2d, *Eminent Domain* Sec. 157 (1966), adopted in *Penn v. Coastal Corporation*, 231 N.C. 481, 484, 57 S.E. 2d 817, 819 (1950).

V.

Under the terms of its contract with the City, the contractor is an independent contractor, *i.e.*,

> [o]ne who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to details of the work . . . .

Drake v. Asheville, 194 N.C. 6, 9, 138 S.E. 343, 344 (1927), *quoting Beal v. Fibre Co.*, 154 N.C. 147, 149-50, 69 S.E. 834, 835 (1910). The contractor was to furnish all necessary materials, labor and equipment. The City's reserved right to supervise the contractor's performance in order to assure compliance with project specifications, to change the plans for the project, and to remove any "incompetent or disorderly" employee does not alter the contractor's status as an independent contractor. *Denny v. Burlington*, 155 N.C. 33, 70 S.E. 1085 (1911); *see generally* 18 McQuillan, *Municipal Corporations*, Sec. 53.76a (3d ed. rev. 1977).

As a general rule, a municipality is not liable for the torts of its independent contractors. *Drake*, 194 N.C. at 10, 138 S.E. at

345. "The law with respect to the liability of the contractors of a municipality for wrongful acts generally is the same as that applying to contractors of a private business. A contractor meeting the requirements of an independent contractor is, subject to exceptions . . ., solely responsible for his own wrongful acts." *Horne v. City of Charlotte*, 41 N.C. App. 491, 493, 255 S.E. 2d 290, 292 (1979).

Where, however, a contractor "is employed to do an act allegedly unlawful in itself, such as committing a trespass, the municipality is solely liable for the resulting damages." *Horne*, 41 N.C. App. at 493-94, 255 S.E. 2d at 292. *See also*, as generally instructive, *Sales Co. v. Board of Transportation*, 292 N.C. 437, 441, 233 S.E. 2d 569, 572 (1977); *Highway Commission v. Reynolds Co.*, 272 N.C. 618, 624, 159 S.E. 2d 198, 203 (1968); *Moore v. Clark*, 235 N.C. 364, 367-68, 70 S.E. 2d 182, 185 (1952); *Cody v. Dept. of Transportation*, 45 N.C. App. 471, 473, 263 S.E. 2d 334, 335 (1980). Similarly, a municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor. 4A *Nichols on Eminent Domain* Sec. 14.16[2] at 14-380, *quoting Board of Comrs. of Little Rock v. Sterling*, 597 S.W. 2d 850, 852 (Ark. Ct. App. 1980); *see also Julius Keller Const. Co. v. Herkless*, 59 Ind. App. 472, 484, 109 N.E. 797, 802 (1915) (if by reason of a defective plan injury to others results as a necessary consequence, the fact that the performance of the work is committed to an independent contractor will not shield the city from liability). Damages to land outside the easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within just compensation to which defendant landowners are entitled. *Id.*

Further, contract provisions which require that work "be accomplished upon public property or upon private property for which the [City] holds a permanent easement and/or a construction easement" and the contractor "confine its operations within the specified right of way or . . . present evidence to the [City] that it has permission of any landowner whose property it may encroach upon," do not alter the city's liability for such damages. "If a municipality would otherwise be liable for the acts of an independent contractor, it cannot evade liability to third persons by stipulating in the contract that the contractor should protect the

public and that he should be liable for damages resulting from his wrongful acts." McQuillin, *supra*, Sec. 53.77 at 435-36.

VI.

The issues were determined by the court sitting without a jury. *See* N.C. Gen. Stat. 40A-47. "When . . . issues are tried before the court sitting without a jury, the trial court sits as both judge and jury. Findings of fact so made, if supported by competent evidence, are as conclusive on appeal as a jury verdict." *Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 661, 301 S.E. 2d 523, 528 (1983); *see also Reynolds Co. v. Highway Commission*, 271 N.C. 40, 50, 155 S.E. 2d 473, 481 (1967). The court determines the weight and credibility of conflicting evidence and when different inferences may be drawn from the evidence, the ultimate decision is for the court. *Reynolds*, 271 N.C. at 50, 155 S.E. 2d at 481.

VII.

[3] Considering the evidence here in light of the foregoing legal principles, we find the following regarding the roadway over defendants' property:

The contractor's president, Cave, testified on deposition as follows:

The contractor had started clearing a right-of-way to the sewer outfall construction site. The City told Cave there was "some problem" with that right-of-way, so the contractor "moved off." A city engineer then told him he could cross the property of defendants. He was told that the City had acquired the right-of-way over defendants' property and to "go ahead . . . it's no problem."

The city engineer was present the day the contractor started construction across defendants' property. The engineer did not tell the contractor not to proceed or that there was any problem with proceeding across defendants' property. There was a city inspector present every day that the contractor worked on defendants' property, but the contractor was never told not to use the roadway. Based on a conversation with Delmore Hester, the city's senior real estate agent, and on Hester's letter to defendant Smith, *supra*, Cave thought his company had permission from the City to use defendants' property. He understood that use of the

roadway was "all right as long as it was put back in the manner in which it was found."

When the first load of pipe came in, the contractor "couldn't get it in on the other end so it had to come down the right-of-way." Cave stated: "There's no way to get in there with equipment and cut that dirt out. So we had to pick an alternate route. So that's the way we came. We came down through the right-of-way itself." Cave further stated: "[W]e had to use that road coming down to get our stone in and pipping [sic] in." He finally stated that his company had to clear at least a path to get a truck through.

The testimony of defendant Smith at trial tended to corroborate Cave's deposition testimony. In particular, Smith testified that Cave told him he had graded the road into defendants' property and "that that was the only way he had to haul pipe in."

The trial court, as the trier of fact, could find from the foregoing evidence that the contractor's use of the roadway over defendants' property was essential to provide access to the City's sewer outfall construction site, that such use thus necessarily flowed from the construction of the improvement in keeping with the design of the condemnor, and that it thus resulted in an appropriation of land outside the easements. 4A Nichols, *supra.* The evidence clearly establishes that the use was not for "a momentary period," *Ledford, supra,* but extended over a period of several months. We thus hold that the court could find and conclude that the City inversely condemned a temporary easement in the roadway over defendants' property. The order, insofar as it relates to the roadway, is therefore affirmed.

VIII.

[4] Considering the evidence in light of the foregoing legal principles, we find the following regarding the staging area on defendants' property:

Cave testified on deposition that he used the area "as a staging area for equipment and supplies." The area was outside the construction easement and was probably approximately "100 by 200" feet. The contractor used the area the entire time it was in the process of constructing the sewer line across defendants' property. While the city never gave the contractor permission to

work outside its designated easements, City inspectors on the job had an opportunity to observe the contractor's use of the area and no one from the City ever told Cave to remove his company's materials.

A construction inspector supervisor testified at trial that he observed the contractor's use of the staging area but did not tell Cave to move his company's supplies and equipment. He further testified that the City did not store any materials on the staging area and that he did not tell Cave his company could use the area.

Unlike the evidence regarding the contractor's use of the roadway, the evidence regarding its use of the staging area does not show that such use was necessary to complete the project. It shows at most that certain employees of the City were aware that the contractor was using the area and that the area was outside the easements. Thus, the general rule that a municipality is not liable for the torts of its independent contractors applies to the staging area. *Drake, supra.* We hold that the court could not find and conclude, on this record, that the City inversely condemned a temporary easement in the staging area on defendants' property. The order, insofar as it relates to this area, is therefore reversed.

IX.

[5] The court awarded defendants attorney fees in accordance with N.C. Gen. Stat. 40A-8. N.C. Gen. Stat. 40A-8(c) provides:

> If an action is brought against a condemnor under the provisions of G.S. 40A-20 [dealing with the filing of a petition praying for the appointment of commissioners of appraisal] or 40A-51 seeking compensation for the taking of any interest in property by the condemnor and judgment is for the owner the court shall award to the owner as a part of the judgment after appropriate findings of fact a sum that, in the opinion of the court . . . will reimburse the owner as set out in subsection (b) [his reasonable costs; disbursements; expenses (including reasonable attorney, appraisal, and engineering fees); . . .].

N.C. Gen. Stat. 40A-51(a) provides, in part, "[i]f property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and *no complaint containing a declaration of taking has been*

filed the owner of the property, may initiate an action to seek compensation for the taking." (Emphasis supplied.) While the City filed a Declaration of Taking, it did not include the property here held to have been inversely condemned. We thus find the court's assessment of costs proper.

X.

Insofar as the order relates to the roadway, it is affirmed; insofar as it relates to the staging area, it is reversed. The cause is remanded for an assessment of damages for the taking of the roadway, a determination regarding the third-party defendant's liability, and an award of costs pursuant to N.C. Gen. Stat. 40A-8(c).

Affirmed in part, reversed in part, and remanded.

Judges WELLS and PHILLIPS concur.

DONALD RAY LUMLEY, EMPLOYEE, PLAINTIFF v. DANCY CONSTRUCTION COMPANY, INC., EMPLOYER AND INA/AETNA INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC742

(Filed 4 February 1986)

Master and Servant § 68— workers' compensation—scarring of arteries in wrists—occupational disease

The evidence supported determinations by the Industrial Commission that adventitial scarring to the ulnar arteries in both wrists suffered by a carpenter's helper who regularly used a jackhammer in demolition work constituted an occupational disease within the meaning of N.C.G.S. 97-53(13) and that this disease was caused by plaintiff's employment with defendant.

APPEAL by defendants from an Opinion and Award of the Industrial Commission. Opinion and Award entered 12 February 1985. Heard in the Court of Appeals 5 December 1985.

Plaintiff brought this action seeking to recover workers' compensation for temporary total disability, permanent partial disability and disfigurement caused by adventitial scarring to the ulnar arteries in both wrists. Plaintiff contends the scarring was the result of an occupational disease contracted during his em-

ployment as a carpenter's helper with the defendant Dancy Construction Company.

On 22 May 1984, this matter was heard by Deputy Commissioner Morgan R. Scott. Commissioner Scott entered an opinion and award which contained the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff began working for defendant-employer in 1977 as a carpenter's helper. He worked at the Baptist Hospital location until 1980. His job involved regular use of a jackhammer for demolition work although he would not necessarily operate it on a daily basis. When he did operate it, he would activate it by applying pressure on the handles with both hands. The jackhammer operated by use of compressed air and was used to break up concrete and other structures. It would jerk plaintiff's hands and body when he used it, and he used it for periods of 20 to 60 minutes. The workers rotated jobs so that no one would have to use the jackhammer all day. Plaintiff's job duties also included running drills and using a sledgehammer.

2. Several months after plaintiff began working for defendant-employer, he began to experience numbness and pain in his hands and wrists after using the jackhammer or screwing screws. He continued to have problems and his hands would be numb even before starting work, but he did not seek medical attention. In April 1982 he was assigned to work at the Hanes Plant where the crew was tearing down a wall. The burning and numbness became so severe that he found it difficult to hold onto objects. In June he went to Dr. Chandler who referred him to Dr. Koman, an orthopaedic surgeon.

3. Dr. Koman admitted plaintiff to the hospital on November 15, 1982 and performed tests which indicated that there was constriction of the ulnar arteries in both hands. He performed surgery and found adventitial scarring of both arteries which he stripped. The blood flow was improved by the procedure and plaintiff was discharged on November 18. On January 5, 1983, plaintiff informed Dr. Koman that he had

just returned to work but he had developed swelling behind the scar. Dr. Koman advised him not to work for one more month. There is no evidence as to whether plaintiff was able to do his regular job at the close of that month period. When he next saw Dr. Koman on May 23, 1983, he was complaining of more problems in his right hand. Dr. Koman restricted him to light work and admitted him to the hospital in July for additional surgery to resect the artery which had thrombosed. He was released to light work on October 1, 1983 and was discharged to regular work on November 14, 1983.

4. As a result of the repetitive trauma to his hands while operating the jackhammer and using sledgehammers, plaintiff developed adventitial scarring to the ulnar arteries in both wrists. This scarring is caused by repetitive or singular trauma to the palm of the hand and causes constriction of the artery. Plaintiff was placed at an increased risk of developing adventitial scarring by reason of his employment as compared to the general public not so exposed. The thrombosis which subsequently developed was also causally related to the scarring and his employment.

5. Plaintiff contracted adventitial scarring to the ulnar nerves in both wrists, an occupational disease which is characteristic of and peculiar to his particular employment and which is not an ordinary disease of life to which the general public is equally exposed.

6. As a result of said occupational disease, plaintiff was temporarily totally disabled from an unknown date in September 1982 through February 6, 1983 except for approximately two days when he did work. He was also temporarily totally disabled from May 23 through November 13, 1983. Defendant-employer did not offer him suitable work during the periods when he was only released to light work. He reached maximum medical improvement on November 14, 1983.

7. As a result of the aforesaid occupational disease, plaintiff sustained a 10% permanent partial disability to his right hand and a 5% permanent partial disability to his left hand.

8. As a result of the aforesaid occupational disease and subsequent surgery, plaintiff sustained permanent bodily disfigurement described as follows:

> Plaintiff has a scar which runs from his right palm over the wrist onto his forearm. From the wrist it extends approximately three inches towards the elbow. The scar is redder than the surrounding skin. Approximately one-half of the scar is up to one-half inch in width and appears to be slightly depressed and the remainder of the scar appears to be raised, darker than the other scarring and approximately one-fourth inch in width.

9. Plaintiff is thirty-one years old and has a tenth grade education. He has had no special work training. His employment history includes working for a furniture company, delivery work for a bottling company as well as construction work where his primary experience lies. He is presently employed on a part-time basis in the shipping department of a furniture company.

10. As a result of the aforesaid occupational disease, plaintiff has sustained permanent bodily disfigurement which mars his appearance to such an extent that it may reasonably be presumed to lessen his future opportunities for remunerative employment and so reduce his future earning capacity. The fair and equitable amount of compensation for said disfigurement under the Workers' Compensation Act is $150.00.

11. Plaintiff's average weekly wage was $171.98.

Based upon the foregoing stipulations and findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Plaintiff contracted adventitial scarring to the ulnar arteries in both of his wrists, an occupational disease which is characteristic of and peculiar to his employment with defendant-employer and which is not an ordinary disease of life to which the general public is equally exposed. G.S. 97-53(13); *Booker v. Duke Medical Center*, 297 N.C. 348 (1979).

2. Plaintiff is entitled to compensation at the rate of $114.65 per week for the period of temporary total disability

he sustained as a result of this occupational disease. This period of temporary total disability is uncertain but it includes the periods from October 1, 1982 through February 6, 1983, except for two days when he worked, and from May 23 through November 13, 1983. G.S. 97-29.

3. Plaintiff is entitled to compensation at the rate of $114.65 per week for 30 weeks for the 10% permanent partial disability he sustained to his right hand and the 5% permanent partial disability he sustained to his left hand as a result of this occupational disease. G.S. 97-31(12) and (19).

4. Plaintiff is entitled to compensation in the amount of $150.00 for the permanent bodily disfigurement he sustained as a result of this injury by accident. G.S. 97-31(22).

Based upon these conclusions the deputy commissioner awarded benefits. From this award the defendants appealed to the Commission. On 12 February 1985, the Commission affirmed the opinion and award of the deputy commissioner, and the defendants appealed.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Robert J. Lawing and Jane C. Jackson, for defendant appellants.

Yokley & Teeter, by D. Blake Yokley, for plaintiff appellee.

ARNOLD, Judge.

The defendants argue that "plaintiff Lumley cannot recover benefits under the North Carolina Workers' Compensation Act because he does not suffer from an occupational disease which is characteristic of and peculiar to his employment as a carpenter's helper." We disagree.

An occupational disease is defined by G.S. 97-53(13) as:

Any disease, other than hearing loss covered in another subdivision of this section, 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.

Defendants argue plaintiff failed to meet two of the requirements set forth in the statute.

First they argue that plaintiff failed to present any evidence to support the Commission's finding that adventitial scarring of the ulnar arteries is peculiar to the occupation of carpenter's helper. In *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979), our Supreme Court set forth the test for determining whether a disease was "characteristic of and peculiar to" a trade or profession. Chief Justice Sharp, writing for the Court, stated:

> A disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. *See Harman v. Republican Aviation Corp.*, 298 N.Y. 285, 82 N.E. 2d 785 (1948). Appellees argue, however, that serum hepatitis is not "peculiar to" the occupation of laboratory technicians since employees in other occupations and members of the general public may also contract the disease.
>
> Statutes similar to G.S. 97-53 have been examined by the court of many states. Conn. Gen. Stat. § 5223, for example, defined an occupational disease as "a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such." (Current version at Conn. Gen. Stat. Ann. 31-275 (West 1972). In *Lelenko v. Wilson H. Lee Co.*, 128 Conn. 499, 503, 24 A. 2d 253, 255 (1942) that statute was construed as follows:
>
> "The phrase, 'peculiar to the occupation,' is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations (see Oxford Dictionary; Funk & Wagnalls Dictionary) . . . . To come within the definition, an occupational disease must be a disease which is a natural incident of a particular occupation, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general. *Glodenis v. American Brass Co.*, 118 Conn. 29, 40, 170 A. 146, 150."
>
> In *Ritter v. Hawkeye-Security Insurance Co.*, 178 Neb. 792, 795, 135 N.W. 2d 470, 472 (1965) the Nebraska Supreme

Court examined a statute almost identical to our own. *See* Neb. Rev. Stat. § 48-151 (1974). In upholding a disability award to a dishwasher who developed contact dermatitis as a result of the use of cleansing chemicals in his work, the court made the following remark:

"The statute does not require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally."

Similarly, in allowing an award to a nurse's aide who contracted tuberculosis from her patients, the Supreme Court of Maine in *Russell v. Camden Community Hospital*, 359 A. 2d 607, 611-12 (Me. 1976) said:

"The requirement that the disease be 'characteristic of or peculiar to' the occupation of the claimant precludes coverage of diseases contracted merely because the employee was on the job. For example, it is clear that the Law was not intended to extend to an employee in a shoe factory who contracts pneumonia simply by standing next to an infected coworker. In that example, the employee's exposure to the disease would have occurred regardless of the nature of the occupation in which he was employed. To be within the purview of the Law, the disease must be so distinctively associated with the employee's occupation that there is a direct causal connection between the duties of the employment and the disease contracted."

Courts in other jurisdictions have likewise rejected the proposition that a particular illness cannot qualify as an "occupational disease" merely because it is not unique to the injured employee's profession. *Young v. City of Huntsville*, 342 So. 2d 918 (Ala. Civ. App. (1976)), *cert. denied*, 342 So. 2d 924 (Ala. 1977); *Aleutian Homes v. Fischer*, 418 P. 2d 769 (Alas. 1966); *State ex rel. Ohio Bell Telephone Co. v. Krise*, 42 Ohio St. 2d 247, 327 N.E. 2d 756 (1975); *Underwood v. National Motor Castings Division*, 329 Mich. 273, 45 N.W. 2d 286 (1951).

Id. at 472-474, 256 S.E. 2d at 198-199. In response to the defendants' argument in *Booker* that the disease in question was an or-

dinary disease of life which the general public could contract, Chief Justice Sharp further stated:

> Clearly, serum hepatitis *is* an "ordinary disease of life" in the sense that members of the general public may contract the disease, as opposed to a disease like silicosis or asbestosis which is confined to certain trades and occupations. Our statute, however, does not preclude coverage for all ordinary diseases of life but instead only those "to which the general public is *equally exposed* outside of the employment." G.S. 97-53(13) (emphasis added).
>
> . . . .
>
> As the Michigan Supreme Court observed when faced with a similar argument in *Mills v. Detroit Tuberculosis Sanitarium*, 323 Mich. 200, 209, 35 N.W. 2d 239, 242 (1948): "[T]he statute does not place all ordinary diseases in a non-compensable class, but, rather those 'to which the public is generally exposed outside of the employment.' The evidence in this case indicates that the plaintiff was exposed in his employment to the risk of contracting tuberculosis in a far greater degree and in a wholly different manner than is the public generally." The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation.

Id. at 475, 256 S.E. 2d at 200.

In their brief defendants seem to argue that the test set forth by our Supreme Court was modified by our opinion in *Keller v. City of Wilmington*, 65 N.C. App. 675, 678, 309 S.E. 2d 543, 545 (1983), *disc. rev. allowed*, 310 N.C. 625, 315 S.E. 2d 690 (1984) (appeal withdrawn upon settlement May 1984), in which we stated that the Commission improperly awarded compensation to the plaintiff for phlebitis because that occupation was "not peculiar to the occupation of patrol officer, but rather is peculiar to all occupations which require a great deal of sitting whether the profession be that of a secretary, judge or airline pilot." It is well settled that this Court may not overrule nor modify decisions of the Supreme Court of North Carolina. *See, Cannon v. Miller*, 313 N.C. 324, 327 S.E. 2d 888 (1985). Thus, any language in *Keller* which might be interpreted as defining the language "peculiar to"

differently than was set forth in *Booker* is ineffective and should have no precedential value.

An examination of the transcript of the proceeding reveals the following evidence to support the Commission's finding that adventitial scarring of the ulnar arteries is an occupational disease within the meaning of G.S. 97-57(13). Dr. Louis Andrew Koman, an orthopedic surgeon, gave the following competent testimony:

> Q. Okay, what I'm getting at, Doctor, is, as opposed to an ordinary disease of life in which the general public is equally exposed outside of an employment, is ulnar artery thrombosis more characteristic and peculiar to a trade that involves the repetitive trauma to the palm area of the hand?
>
> A. Yes.

This evidence is sufficient to meet the test set forth in *Booker* for determining whether a disease meets the "peculiar to" requirement set forth in the statute. Thus, we find the Commission properly determined that plaintiff suffered from an occupational disease within the meaning of G.S. 97-57(13).

Defendants also argue the plaintiff failed to produce sufficient competent evidence to establish a causal link between his employment and the contraction of the occupational disease. In reviewing an award of the Industrial Commission it is well established that this Court does not weigh the evidence but may only determine whether there is evidence in the record to support the findings of the Commission. If there is any evidence which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980).

In occupational disease cases the causal connection between the disease and the employee's occupation must of necessity be based upon circumstantial evidence. *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). There is evidence in the record which shows that before plaintiff went to work for Dancy Construction Company he had not had any problem with his hands or wrists, neither had he seen a physician about such prob-

lems prior to going to work for Dancy. The evidence further showed that after plaintiff started operating a jackhammer and other pneumatic tools he began to notice a lot of burning sensation in his hands and wrists and that sometimes his hands would get numb. The evidence further shows that because of these problems plaintiff was referred to Dr. Koman. Dr. Koman gave the following pertinent evidence regarding the causation question:

> Q. Well, in the case of Donald Lumley, do you have an opinion satisfactory to yourself, to a degree of reasonable certainty, based on the hypothetical facts that I gave you, assuming the hearing officer should find those to be the facts, as to whether or not the repetitive use of the jackhammer and other pounding by the hands in the construction laborer —or by a construction laborer could or might have caused the ulnar artery thrombosis—
>
> —In this case?
>
> THE WITNESS: I'm not sure whether yes or no—just let me do it this way.
>
> I'd say that with the right hand, since we know that he had the adventitial scarring before, and he had been—you know, he had lived his whole life—we know he had adventitial scarring, we know that we released it and it was doing all right. And in between that, he was relatively closely monitored, and the only thing that he related that changed when he started having symptoms was going back to work.
>
> So I think, based on that, my feeling is that certainly his return to work and whatever activity he was doing at work, whether it was related to a jackhammer, using his hands as a hammer, being struck by boards, whatever, contributed to the thrombosis following his initial injury.
>
> The initial adventitial scarring could have been caused by work; it might not have been caused by work. It certainly is compatible with a compatible mechanism for repeated minor trauma which causes problems with the ulnar artery. But again, there is no direct cause and effect. You can't take one and say the other, without having seen him first.

My feeling is, medically, that it's—that probably it was related to his difficulty. Whether that fits legally or not, I don't know.

Q. (Mr. Yokley) When you say probably related to his difficulty, would you tell us what you mean by probably related?

THE WITNESS: By probably—medicine is not exact, in that repeated trauma, using a jackhammer, using your hand as a hammer, pounding, holding boards which bounce back as you strike them can—is certainly repeated trauma and is compatible in—in an individual to cause thrombosis or scarring of—of any artery. And the ulnar artery happens to be one which is more susceptible because of its anatomic location.

So, yes, there—it's possible that that—that could cause it. And my—and my feeling is that it—if it did not cause it, it certainly contributed and/or aggravated the condition, and I can't say that it caused it.

Now, in the case of the right hand, which was surgically examined—clinically examined before he returned to work and after he returned to work, unless there is something of which I'm not privileged that occurred outside of his work, he—my professional—my expert opinion is that trauma—that further trauma from the time of the first surgery until the time of his second surgery caused the re-thrombosis of the thrombosis of his right ulnar artery. And if the only trauma which he encountered was at work, then it's my opinion that work caused it. If there is trauma which can be demonstrated that occurred outside of work, then that would have contributed to it. But I don't have access to what he did 24 hours a day.

Q. (Mr. Yokley) Then may—may I couch the question in this form, then, Doctor?

Assuming that prior to becoming a construction worker and prior to using a jackhammer that Mr. Lumley had no numbness in either hand and had no symptoms as described to the medical people when he sought help, and assuming that he became engaged in the construction business as a

construction laborer; and assuming further, as a part of that job that he had, he repeatedly used his hands as a hammer and he repeatedly used a jackhammer; and assuming further, that for a period of about eight months prior to the surgery—first surgery that was performed that the symptoms, as described to you, had been in existence, and assuming your findings that you made in your examination of Mr. Lumley; assuming those facts, if the commissioner should so find, do you have an opinion to a reasonable medical certainty as to whether or not the repeated trauma by Mr. Lumley on the job could or might or probably caused the ulnar arterial thrombosis that you found?

. . . .

THE WITNESS: Okay. Yes, given the set of circumstances you described, with no problems and normal arteries before beginning work, the type of work that he did and the use of a jackhammer could cause ulnar artery thrombosis or adventitial scarring with decreased flow through the ulnar arteries.

This medical evidence, coupled with the testimony of the plaintiff, is sufficient to support the Commission's finding that the occupational disease was caused by plaintiff's employment with Dancy Construction Company.

The opinion and award of the Industrial Commission is

Affirmed.

Judges WELLS and PARKER concur.

JAMES PARKS v. DEPARTMENT OF HUMAN RESOURCES

No. 8510SC390

(Filed 4 February 1986)

1. Administrative Law § 8— appeal to superior court from State Personnel Commission—summary judgment not proper—court's order sufficient for review

Petitioner's right to judicial review of a State Personnel Commission opinion affirming the termination of his employment was clearly set forth in N.C.G.S. 150A-51, and respondent's and petitioner's motions for summary judg-

ment were procedurally incorrect; however, the trial court's order allowing respondent's motion for summary judgment was tantamount to affirming the Full Commission's ruling upholding petitioner's dismissal and sufficiently set forth a reviewable basis for affirming the Full Commission's ruling.

2. **Master and Servant § 10— O'Berry Hospital employee—discharge for failure to report abuse—no warnings given—reversed**

The trial court erred by affirming the State Personnel Commission's decision to uphold petitioner's termination of employment at O'Berry Hospital for failure to report abuse of residents where a review of the whole record revealed that the O'Berry Center promulgated an Administrative Policy Manual which indicated that failure to report suspected abuse could result in disciplinary action while abuse could result in termination; the O'Berry manual referred to the State Personnel Manual, which indicated that three warnings were required prior to dismissal of an employee for unsatisfactory performance of duties; the O'Berry manual and the State manual characterized negligence as relating to performance of duties; two letters from O'Berry officials to petitioner indicated that petitioner was terminated for negligence in the performance of his duties; and there were no warnings given for the unsatisfactory performance of petitioner's duty to report acts of resident abuse. N.C.G.S. 126-35.

APPEAL by petitioner from *Davis, James C., Judge.* Judgment entered 18 January 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 24 October 1985.

On 6 February 1983 petitioner James Parks was employed as a Health Care Technician by the Department of Human Resources at the O'Berry Center in Goldsboro, North Carolina. As of 6 February 1983 petitioner had been employed continuously by the State of North Carolina for approximately seven (7) years. The O'Berry Center is a residential treatment center for the mentally retarded.

On 6 February 1983 petitioner was on duty with another Health Care Technician, Johnny Earl Bryant. Petitioner and Bryant shared supervisory responsibility for 13 residents of the O'Berry Center. Petitioner and Mr. Bryant worked on the B Shift from 6:30 a.m. to 3:00 p.m. Their responsibilities included providing general health care to respondent's residents in Environmental Living Complex VI. On 6 February 1983 petitioner went to eat his lunch at 11:00 a.m. Upon petitioner's return from lunch a resident named Richard was observed by petitioner standing near the door with two chairs around his neck. Petitioner did not report this observation to his superiors at O'Berry Center. Mr.

Bryant and petitioner were relieved by the C Shift and they left O'Berry Center.

At 9:00 p.m. on 6 February 1983 Michael Burris, a developmental technician observed bruises on Richard's buttocks and shoulder. Mr. Burris informed management of Richard's bruises. O'Berry Center management personnel initiated a preliminary investigation of the circumstances surrounding Mr. Burris' discovery of Richard's bruises. During the preliminary investigation a resident of the O'Berry Center informed the management of the center that "Johnny Bryant had hit Richard and him with a pool stick." A medical examination of Richard revealed that his bruises could have been caused by being struck by a cue stick. Mr. Bryant and petitioner were requested to return to O'Berry Center for questioning.

Mr. Bryant and petitioner were interviewed separately by management personnel of O'Berry Center. Mr. Bryant and petitioner each denied having any knowledge of Richard's bruises. However, petitioner volunteered his observation of Richard standing near a door with two chairs around his neck. Petitioner informed management that he had questioned Mr. Bryant with respect to this incident. Petitioner informed his interviewers that Mr. Bryant had admitted to him that he had placed the chairs around Richard's neck to prevent Richard from banging his head against the wall. Petitioner's statements were reduced to writing and used to confront Mr. Bryant about this incident. Mr. Bryant denied the charges and asserted that he had observed petitioner abusing the residents. On 6 February 1983 petitioner and Mr. Bryant were suspended following each other's allegations of patient abuse and their failure to report these incidents.

On 10 February 1983 petitioner was informed by letter that his negligence in reporting observations of resident abuse was in violation of State and O'Berry policies. The letter written by Chief of Residential Services further informed petitioner that his employment at the O'Berry Center was terminated effective 6 February 1983. Mr. Bryant received a similar letter. In compliance with procedures prescribed by the State Personnel Commission petitioner filed a grievance for wrongful termination. On 24 February 1983 and 7 March 1983 petitioner met with J. H. Lyall, Ph. D., Director of O'Berry Center. On 8 March 1983 Dr.

Lyall informed petitioner by letter that petitioner's termination would be upheld.

Petitioner appealed from Dr. Lyall's decision to uphold his termination. On 15 September 1983 petitioner had a hearing before Joseph L. Totten, Hearing Officer for the State Personnel Commission. In an opinion dated 1 December 1983 the termination of petitioner's employment was upheld, but petitioner was awarded back pay, other employment benefits and attorney's fees not to exceed $300.00. Petitioner appealed to the Full State Personnel Commission which adopted the Hearing Officer's Conclusions of Law and Findings of Fact. The Full Commission affirmed the termination of petitioner's employment.

Pursuant to G.S. 150A-45 petitioner filed in Superior Court, Wake County, a petition for review of the Full Commission's decision. Petitioner and respondent moved the court for summary judgment. On 17 January 1985 the court denied petitioner's motion for summary judgment, but granted respondent's motion for summary judgment. Petitioner appeals.

Lacy H. Thornburg, by Ann Reed, Special Deputy Attorney General, for the Department of Human Resources, appellee.

Hulse & Hulse, by Herbert B. Hulse, for petitioner appellant.

JOHNSON, Judge.

The question we must decide is whether a review of the whole record reveals that there is substantial evidence therein to support the Full Commission's ruling that petitioner was dismissed for just cause. We conclude that the court's order affirming the Full Commission's ruling is not supported by a review of the whole record.

[1] The scope of review and power of the Superior Court in reviewing an agency decision is set forth in the Administrative Procedure Act as follows:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

G.S. 150A-51.

Respondent and petitioner improperly made motions for summary judgment in the Superior Court. As set forth hereinabove, the task of the Superior Court was to affirm, remand for further proceedings, reverse, or modify the Full Commission's decision after examining all of the competent evidence and pleadings which comprise the whole record to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. *See Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n*, 43 N.C. App. 493, 259 S.E. 2d 373 (1979). However, respondent and petitioner's motions for summary judgment initiated a different inquiry by the court into whether there was a triable material issue of fact. *See Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), *aff'd per curiam*, 297 N.C. 696, 256 S.E. 2d 688 (1979).

Petitioner's right to judicial review is clearly set forth in G.S. 150A-51, *supra*. Respondent and petitioner's motions for summary judgment were procedurally incorrect. However, the trial court's order allowing respondent's motion for summary judgment was tantamount to affirming the Full Commission's ruling upholding petitioner's dismissal. The court's order was as follows:

> This cause coming on before the undersigned judge on motion of respondent for summary judgment and it appearing to the court that there is no genuine issue as to any material fact and that the respondent is entitled to a judgment as a matter of law; IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of respondent against petitioner and that this action is dismissed with the costs to be taxed against the petitioner.

This Court has held that a statement by a Superior Court judge that an agency failed "to support its Conclusion of Law that the Petitioner was grossly incompetent within the purview of G.S. 93D-13(a)(2)" constituted a succinct and adequate statement of its reasons for reversing the agency's decision. *Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd.*, 38 N.C. App. 222, 226, 247 S.E. 2d 668, 670 (1978). In the case *sub judice* the court's order sufficiently sets forth a reviewable basis for affirming the Full Commission's ruling.

[2] We now turn to the whole record which was before the court to review, and determine whether there is substantial, competent evidence which would support the Full Commission's ruling. In affirming the hearing officer's decision to uphold respondent's dismissal of petitioner the Full Commission adopted the Findings of Fact and Conclusions of the hearing officer as its own. In the opinion of the hearing officer we find that conclusion number two (2) raises the issue we must address on appeal. In pertinent part that conclusion is as follows:

> The Petitioners' acts and omissions in the chairs incident constituted personal conduct, which is grounds for their immediate dismissals . . . .

Petitioner contends that the whole record which was submitted to the court reveals that the Full Commission's decision to uphold respondent's dismissal of him was contrary to law. The argument forwarded by petitioner is that respondent may not dismiss him for performance of duty reasons until he has been given the warnings required by G.S. 126-35. *See Jones v. Dep't of Human Resources*, 300 N.C. 687, 268 S.E. 2d 500 (1980).

On 6 Feburary 1983 two directives were in effect relating to disciplinary action for abuse and neglect of residents by

employees of the O'Berry Center. These directives classify various infractions, whereby, an employee may be subject to specified disciplinary actions. Respondent contends that petitioner was dismissed with just cause for his personal conduct. Petitioner contends that all communications with him indicated that his dismissal was for actions which are classified in the directives as unsatisfactory performance of duties.

O'Berry Center promulgated an Administrative Policy Manual. The subjects of that manual are abuse, neglect and corporal punishment of residents. The policy section of the manual contains the following statement "Employees found guilty of abuse shall be terminated. Failure to report suspected abuse may be subject to disciplinary action." The definitional section of the manual contains five sections including one section entitled "Neglect."

> III *Neglect*: Any situation in which the staff do (sic) not carry out duties or responsibilities which in turn affects the health, safety or well being of a resident.
>
> EXAMPLES;
>
> —Failure to implement programs as designed by the interdisciplinary team.
>
> —Failure to insure adequate intake of food or water.
>
> —Failure to assure resident is appropriately dressed.
>
> —*Neglect is failure to report appropriately any observed or suspected abuse.*
>
> —Leaving residents unattended.

(emphasis ours and in original). We note that the examples listed in Section III all share the common element of an act of omission. This document is internally consistent in that the acts of omission, such as failure to report abuse, "may be subject to disciplinary action." However, when an employee commits acts of resident abuse that employee "shall be terminated." The Administrative Procedure Manual, promulgated by O'Berry Center, makes reference to the State Personnel Manual. The pertinent provisions of the policy statement in the State Personnel Manual are as follows:

> The causes for dismissal fall into two categories: (1) *causes relating to performance of duties, and (2) causes relating to personal conduct detrimental to State service.* Suspension may be necessary in either category and may be used in accordance with the provisions of this policy under suspension.
>
> 1. *Performance of Duties.* Employees who are dismissed for unsatisfactory performance of duties should receive at least 3 warnings: First, one or more oral warnings; second, an oral warning with a follow-up letter to the employee which sets forth the points covered in the discussion; third, a written warning which will serve notice upon the employee that a continuation of the unacceptable practices may result in specific pay losing disciplinary action or dismissal.

(emphasis in original). Clearly suspension may be appropriate in cases of personal misconduct or unsatisfactory performance of duties. It is equally clear that three (3) warnings are required prior to dismissal of an employee for unsatisfactory performance of duties.

The State Personnel Manual also separately enumerates those causes for dismissal which are related to performance of duties and personal misconduct.

> *Performance of Duties*—The following causes relating to the performance of duties are respresentative of those considered for suspension or dismissal: . . .
>
> 2. Negligence in the performance of duties.

(emphasis in original). Thus, the O'Berry Center's Administrative Procedure Manual and the State Personnel Manual categorize negligence as a cause for dismissal relating to performance of duties. Neither of these two directives pertinent to this case categorize negligence as falling within the realm of personal conduct.

We now turn to the question of whether petitioner's failure to report his observation of resident abuse should be classified as negligence. We find respondent's communications with petitioner helpful in this regard. The first letter petitioner received notifying him of his dismissal was from W. L. West, Chief of Residential Services.

Mr. James C. Parks
1219 Porter Street
Goldsboro, N. C. 27530

Dear Mr. Parks:

Pursuant to the allegations which led to your suspension February 6, 1983, I wish to inform you of our decision. A thorough investigation of the allegations and the condition surrounding the incident reveal that *you have been negligent in reporting observations* which you admit were acts of resident abuse. *Negligence in the performance of duties is in direct violation of State and O'Berry policies.* As a result of these violations, your employment at O'Berry Center is terminated. . . .

(emphasis ours). This letter reveals that respondent was terminated for negligence in performance of his duties. To further illustrate that this terminology was not the result of loose drafting we find that a letter dated 8 March 1983 written by Dr. Lyall affirmed the reason given for petitioner's termination.

Mr. James Parks
1219 South Porter Street
Goldsboro, N. C. 27530

Dear Mr. Parks:

On February 24, 1983 and March 7, 1983, I met with you to discuss your grievance for termination of employment from O'Berry Center.

Having been offered no additional information from you regarding the reason for your termination, *I still find you negligent in reporting an act of resident abuse that you observed* and I am upholding your termination. . . .

(emphasis ours). Dr. Lyall upheld petitioner's dismissal because of petitioner's negligence. There were no warnings given to this employee for this unsatisfactory performance of his duty to report acts of resident abuse.

Respondent contends that there is substantial evidence in the record to support its position that petitioner's failure to report patient abuse was personal conduct such that petitioner's

dismissal for just cause was an appropriate disciplinary action. We hold that the trial court erred in affirming the Full Commission's decision to affirm petitioner's dismissal as being for just cause. The record that was before the trial court does not support a determination that respondent was entitled to a judgment as a matter of law. Both directives referred to hereinabove unquestionably support petitioner's assertion that respondent's termination of petitioner was an inappropriate disciplinary action. The trial judge had before him two letters which asserted that petitioner's negligence was the basis for terminating petitioner's employment. Petitioner has controverted respondent's contention that a permanent state employee may be dismissed for unsatisfactory performance of his duties prior to receiving the three warnings mandated by the State Personnel Manual.

The requirement of G.S. 126-35 pointed out in *Jones, supra* is that a permanent state employee is entitled to three separate warnings giving notice that his performance is unsatisfactory. Based on the whole record, we conclude that there was not substantial competent evidence which would support the Full Commission's conclusion that petitioner's actions should be classified as personal conduct such that he was dismissed for "just cause."

Reversed and remanded.

Judges WEBB and PHILLIPS concur.

CAROLE TUCKER HUTTON, ADMINISTRATRIX OF THE ESTATE OF CLARA AULT TUCKER v. WILLOWBROOK CARE CENTER, INC.

No. 8521SC423

(Filed 4 February 1986)

Hospitals § 3.2— intermediate care facility—negligent treatment of patient—evidence properly excluded

Where plaintiff alleged that defendant intermediate care facility was negligent in its care and treatment of deceased which resulted in her injury and ultimate death, defendant's defense was based in large part on the contention that by following its general policies and practices it gave deceased the

care it had contracted to provide for her, and plaintiff put before the jury considerable evidence regarding general conditions at the facility as they related to deceased, the trial court did not err in excluding testimony by witnesses in rebuttal which tended to show mistreatment by defendant of named patients other than deceased, or in excluding during rebuttal two reports resulting from an investigation of defendant by the Department of Human Resources.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 28 September 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 October 1985.

Horton, Hendrick & Kummer, by Hamilton C. Horton, Jr., and Gray Robinson, for plaintiff appellant.

J. Robert Elster, Michael L. Robinson and Petree, Stockton, Robinson, Vaughn, Glaze & Maready, of counsel, for defendant appellee.

BECTON, Judge.

Plaintiff, Carole Tucker Hutton, appeals from an entry of judgment on a jury verdict in favor of defendant, Willowbrook Care Center, Inc. (Willowbrook). Hutton's lawsuit is based on her claim that Willowbrook was negligent in its care and treatment of Clara Ault Tucker resulting in her injury and, ultimately, her death. The jury returned a verdict finding that defendant was not negligent.

On 18 March 1980, Ms. Tucker was admitted as a patient to the Willowbrook nursing home. Ms. Tucker was 73 years old, paralyzed on her right side from a stroke, incontinent, and, for the most part, unable to speak. Willowbrook contracted to provide food, lodging, and nursing and medical care as needed by Ms. Tucker. The evidence shows that from March 1980 to 24 January 1982 when Ms. Tucker died, she was hospitalized five times for various reasons. In December 1982, Ms. Hutton, as administratrix of Ms. Tucker's estate, filed a complaint against Willowbrook alleging that the care Ms. Tucker received was "grossly negligent, callous, and cruel, causing extreme pain and suffering . . . and constituting a proximate cause of her ultimate death." Willowbrook answered denying any negligence on its part and alleging that, if it were negligent, the plaintiff and her family, the beneficiaries of decedent's estate, were contributorily negligent.

At trial, Ms. Hutton offered extensive testimony of Willowbrook's alleged negligent care and mistreatment of Ms. Tucker. Willowbrook's testimony indicated that care and treatment of Ms. Tucker was adequate in light of the fact that Willowbrook was an "intermediate care facility" rather than a "skilled care facility." As Ms. Hutton was aware upon admission of Ms. Tucker, an intermediate care facility is less expensive and does not provide around-the-clock supervision of patients or therapy programs, as do skilled care facilities. Patients are checked periodically at intermediate care facilities. This evidence was offered to show that Willowbrook exercised ordinary care toward Ms. Tucker. Ms. Hutton offered several witnesses in rebuttal. They were permitted to testify extensively, over objection by defendant, about general conditions at Willowbrook as they affected Ms. Tucker. The trial court sustained objections to the admission of testimony by these witnesses in rebuttal that tended to show mistreatment by Willowbrook of named patients other than Ms. Tucker. The trial court also excluded during rebuttal two reports resulting from an investigation by the Department of Human Resources.

Ms. Hutton appeals, assigning error to the trial court's exclusion of certain rebuttal testimony and to two Department of Human Resources reports. We find no error.

Ms. Hutton argues that the exclusion of rebuttal testimony was reversible error because the testimony was relevant to discredit defense witnesses. Ms. Hutton contends that these defense witnesses had testified about general policies at Willowbrook and that the conditions at Willowbrook were satisfactory. A review of the testimony, however, reveals that these witnesses generally were asked about these policies and conditions only as they related to Ms. Tucker. An example is found reproduced in plaintiff Hutton's brief in which the defense attorney examined a former nursing employee:

> Q. There has been some testimony about whether or not water and liquids were provided to Mrs. Tucker. Would you describe to the jury what the practice was insofar as water in Mrs. Tucker's room from you[r] personal knowledge and involvement in it?
>
> A. Water and ice. They had a water and ice carton. It was passed every morning about 10:00 A.M. and every afternoon between 3:30 and 4:00.

Q. Were you one of the people that did that from time to time?

A. No, sir. That was nurse's aides.

Q. And was that a standard procedure done every day?

A. Yes, sir.

Q. Even on Saturdays and Sundays?

A. Yes, sir.

Q. What was the practice during the time of Mrs. Tucker's stay at Willowbrook with regard to checking on patients? That is, periodically going to the patient's room? Was that done on a set schedule?

A. Yes, sir. Patients are checked every two hours and then periodically in-between.

Q. Describe what you mean by periodically in-between.

A. If you walk by, you are checking on them. In and out of the rooms, up and down the halls.

Hutton argues that the defendant's introduction of this "new evidence" opened the door for plaintiff to introduce rebuttal testimony. *See, e.g., Highfill v. Parrish*, 247 N.C. 389, 100 S.E. 2d 840 (1957). Hutton concedes that the evidence she offered in rebuttal might not have been admissible in her case in chief.

Evidentiary rulings by a trial court will not be disturbed on appeal absent a showing that the court abused its discretion. *Gay v. Walter*, 58 N.C. App. 360, 362-63, 283 S.E. 2d 797, 799-800 (It was not an abuse of discretion to exclude rebuttal evidence.), *modified on other grounds*, 58 N.C. App. 813, 294 S.E. 2d 769 (1982); *see Hold v. City of Statesville*, 35 N.C. App. 381, 241 S.E. 2d 362 (1978) (There was no merit to argument that court erred in refusing to admit rebuttal witness.). In the case at bar, the trial court allowed plaintiff to offer several witnesses' testimony in rebuttal and excluded only those portions tending to show Wil-

lowbrook's treatment of other specifically named patients.[1] In light of the evidence allowed by the court, we cannot say the trial court abused its discretion; the additional evidence was cumulative at best, or, at worst, reversibly prejudicial. Willowbrook had completed its defense and would have been compelled by the nature of the excluded testimony to refute the additional allegations.

It is true that Willowbrook's defense was based in large part on the contention that, by following its general policies and practices, Ms. Tucker received the care Willowbrook contracted to provide for her. But, in the case at bar, this did not "open the door" to require the trial court to allow *all* evidence of Willowbrook's actions since 1980. Although testimony showing that these policies were not followed regularly with respect to Ms. Tucker is proper rebuttal evidence in this case, testimony that Willowbrook mistreated and failed to care properly for other patients reasonably could be considered irrelevant, immaterial, collateral, highly prejudicial, and, perhaps, more in the nature of additional evidence rather than rebuttal evidence. *Cf. Gay*, 58 N.C. App. at 362-63, 283 S.E. 2d at 799.

We also find no abuse of discretion by the trial court in excluding the factual findings in the reports of the investigators for the Department of Human Resources. Hutton argues that the facts contained in the investigator's reports are admissible (1) as relevant and proper rebuttal testimony, and (2) because the investigations were conducted pursuant to authority granted by law. We find it unnecessary to address the second prong of this

1. For example, Ms. White was allowed to testify on rebuttal, over objection, that patients who called for assistance at night were not attended; that patients were sometimes only partially clothed; and that her father, a patient at Willowbrook, was allowed to remain with only his pajama top on. Ms. Peeples, a former Willowbrook nurse's aide, testified, often over objection, that there was a shortage of blankets; that patients, including Ms. Tucker, were left totally or partially unclothed with their doors open; that patients, including Ms. Tucker, were left cold and wet; that some employees would fail to change Ms. Tucker's bed when wet; and that some nights two employees were left to care for sixty patients. Ms. Fink, another former nurse's aide, testified over objection that Ms. Tucker was not given a water pitcher; that Ms. Tucker was left in wet sheets; that Ms. Tucker was left lying in her own feces; that nurse's aides cursed and mistreated Ms. Tucker; that call buzzers were placed where patients could not reach them; and that the center was understaffed.

argument because we conclude that the trial court did not abuse its discretion in excluding evidence from these reports as irrelevant and improper rebuttal. Nothing in the reports relates to Ms. Tucker. The problems at Willowbrook that are noted in the reports relate to the general conditions and practices at the facility. In light of our conclusion that Willowbrook did not open the door to the introduction of general evidence of problems at Willowbrook, we cannot say the trial court abused its discretion in excluding these reports as irrelevant, prejudicial or improper rebuttal evidence. After all, the trial court is in a better position to know whether such evidence offered during rebuttal would be unfair to the defendant. This was a private action grounded in negligence, not a public proceeding by the Department of Human Resources, and the plaintiff succeeded in putting before the jury a great deal of evidence regarding general conditions in relation to Ms. Tucker.

For the reasons set forth above, we find

No error.

Judges WEBB and MARTIN concur.

IN RE: JAMES A. KING, ADMINISTRATOR, C.T.A. OF THE ESTATE OF GARLAND C. NORRIS, DECEASED AND TRUSTEE OF THE TRUST UNDER THE WILL OF GARLAND C. NORRIS FOR MARY N. KING AND FRANCES HILL NORRIS ET AL., AND OF THE TRUST UNDER THE WILL OF GARLAND C. NORRIS FOR MARY BOLDRIDGE NORRIS

No. 8510SC602

(Filed 4 February 1986)

Executors and Administrators § 37— administration fees—time action was "initiated"—increase in fees inapplicable

An amendment to N.C.G.S. 7A-307 increasing the fees assessed in the administration of estates which stated that the amendment "shall become effective August 1, 1983, and shall apply to all actions initiated on and after that date" was inapplicable to decedent's estate, since the estate was opened for probate on 23 October 1980 and letters of trusteeship for each of the trusts established in the will were issued on 23 July 1981; further, the fact that court involvement continued past the effective date of the amendment would not subject the estate to higher administration fees.

In re King

APPEAL by the Clerk of Superior Court of Wake County from *Bailey, Judge*. Order entered 5 March 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 21 November 1985.

North Carolina General Statute 7A-307 sets the fees assessed in the administration of estates. This appeal concerns the interpretation of the provision governing the effective date of amendments to the statute increasing those fees. The provision states that the amendments "shall become effective August 1, 1983, and shall apply to all actions initiated on and after that date." 1983 Session Laws, c. 713, s. 109.

Garland C. Norris died on 30 September 1980. On 23 October 1980, the decedent's will was admitted to probate in Wake County Superior Court and the clerk appointed James A. King as Administrator C.T.A. of the estate. Upon appointment King filed a preliminary inventory of the estate with the clerk. On 27 October 1980 and 19 January 1981, the estate paid to the clerk the maximum filing fees pursuant to G.S. 7A-307(a)(2).

On 23 July 1981, the clerk issued Letters of Trusteeship naming James A. King as trustee of two trusts established by the will of the deceased. King filed initial inventories of the trusts with the clerk on 10 November 1981 and paid the appropriate fees pursuant to G.S. 7A-307(a)(2). On 20 August 1982, King filed annual accounts for the trusts and again paid the appropriate fees pursuant to the statute.

After 1 August 1983, King presented a final account for the estate to the clerk. At such time the clerk assessed additional fees of $1,100 under the authority of G.S. 7A-307(a)(2) as amended on 8 July 1983.

Annual accounts for the trusts were filed with the clerk on 19 September 1983 and inventory fees greater than those allowed prior to the amendment of G.S. 7A-307(a)(2) were assessed. On 30 May 1984, the clerk entered an order directing King as administrator and trustee to pay the clerk the sums assessed in accordance with the amended statute.

King appealed to the superior court. After hearing arguments by counsel, the court made the following conclusions of law:

1. Since the Estate of Garland C. Norris was opened for probate on October 23, 1980, the costs to be assessed against the Estate of Garland C. Norris are governed by G.S. § 7A-307(a)(2) as it existed prior to its amendment on July 8, 1983. Under the former G.S. § 7A-307(a)(2) a maximum cumulative fee of $2,000.00 could be assessed and such maximum cumulative fee has been assessed and collected for the Norris Estate.

2. The filing of the final account in the Norris Estate after August 1, 1983, did not constitute the initiation of an action so as to make the provisions of amended G.S. § 7A-307 (a)(2) applicable.

3. Since Letters of Trusteeship for Trust A and Trust B were issued on July 23, 1981, the costs to be assessed against such Trusts are governed by G.S. § 7A-307(a)(2) as it existed prior to its amendment on July 8, 1983. Under the former G.S. § 7A-307(a)(2) a maximum cumulative fee of $2,000.00 could be assessed against each Trust.

4. The filing of annual accounts with respect to Trust A and Trust B after August 1, 1983, did not constitute the initiation of an action so as to make the provisions of amended G.S. § 7A-307(a)(2) applicable.

The court therefore ordered that the clerk recover no additional fees from the estate and that the fees assessed against the trusts be those set forth in the statute prior to the 8 July 1983 amendments.

From the order entered by the court, the clerk of superior court appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Reginald L. Watkins, for appellant.

Poyner, Geraghty, Hartsfield & Townsend, by N. A. Townsend, Jr., Cecil W. Harrison, Jr. and Robert B. Womble, for appellee.

ARNOLD, Judge.

Appellant contends that the superior court erred in concluding that the costs to be assessed against the estate and the

two trusts are governed by G.S. 7A-307(a)(2) as it existed prior to its amendment. Appellant maintains the important factor is that the administration of the estate and of each trust continued after 1 August 1983, the effective date of the amendments. In support of this argument, appellant relies upon the interpretation made by the Administrative Office of the Courts in a memorandum sent to the clerks of the superior courts which in pertinent part provided:

> Problems will arise in the determination of charges when the estate has been opened before August 1, 1983, but proceedings in the estate are still pending. . . . [A]s to estates which were opened prior to August 1, 1983, the old fees should be charged up to, *but not including, the first annual accounting.* . . . For the first *annual* accounting, and for all proceedings thereafter the new schedule of fees and costs would apply. (Emphasis in original.)

The sole issue presented for review is the interpretation of the term "actions initiated" in the directive stating that the amendments to G.S. 7A-307(a)(2) "shall become effective August 1, 1983, and shall apply to all actions initiated on and after that date." 1983 Session Laws, c. 713, s. 109. Chapter 713 of the 1983 North Carolina Session Laws does not define "actions initiated." Accordingly, we must resort to rules of statutory construction in determining the meaning and effect of these words.

The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. To ascertain this intent the courts should consider the language of the statute, the spirit of the Act and what it sought to accomplish, the change or changes to be made and how these should be effectuated. The statute should be construed contextually and harmonized if possible to avoid absurd or oppressive consequences. *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 171 S.E. 2d 427 (1970).

First, we note that an estate proceeding is technically not an "action" within the meaning of G.S. 1-4 which defines actions as including only criminal and civil actions. Yet, as appellant and appellee concede, the legislature intended that the word "action" include estate proceedings in this limited instance.

Second, the legislature mandated that the amendments, including those to G.S. 7A-307, applied to all actions "initiated" on or after 1 August 1983. Therefore, the question becomes: when is an estate proceeding "initiated"? We agree with the superior court that the proceedings regarding estate administration were "initiated" prior to 1 August 1983 since the estate was opened for probate on 23 October 1980. We further agree with the superior court that any action or proceeding relating to the trusts was "initiated" prior to 1 August 1983 since Letters of Trusteeship for each of the trusts were issued on 23 July 1981.

This interpretation and its resulting effect on estate proceedings is consistent with the effect of the 1983 amendments on fees in criminal and civil actions. A criminal action is initiated upon the issuance of criminal process or the return of a bill of indictment or related instrument. G.S. 15A-301, *et seq.*; G.S. 15A-641, *et seq.* A civil action is initiated upon the filing of a complaint with the court or the issuance of a summons pursuant to Rule 3 of the North Carolina Rules of Civil Procedure. Each of these type actions, as in the administration of a trust or an estate, requires further involvement of the court. Yet neither the criminal action nor the civil action is subject to the higher fees simply because court involvement continues past the effective date of the amendment. There is no language within the Act to amend to indicate that the legislature intended to treat estate proceedings differently from criminal or civil actions. Therefore, the same result as to trust and estate administration would seem to be the intent of the legislature.

The order of the superior court is therefore

Affirmed.

Judges WELLS and PARKER concur.

ANCHOR PAPER CORPORATION; SAM B. WOODS, JR. AND J. L. HUGHES, D/B/A ANCHOR PAPER COMPANY, A PARTNERSHIP v. ANCHOR CONVERTING COMPANY, INC.

No. 8526SC273

(Filed 4 February 1986)

Unfair Competition § 1— sale of paper converting company—no violation of Business Opportunity Sales Act

The trial court properly dismissed defendant's counterclaim for violations of the Business Opportunity Sales Act, N.C.G.S. 66-94, *et seq.*, where there was competent evidence to support the trial judge's finding that plaintiffs sold a paper converting company to defendant; in order for defendant to recover on its counterclaim under the Act, defendant would have had to present evidence, and the court would have had to find, that plaintiffs guaranteed that the purchaser would derive certain income from the business opportunity or that plaintiffs represented that they would provide a sales program or marketing program which would enable defendant to derive income in excess of the price paid for the business opportunity; and evidence supported the trial court's finding that "no representations" were made until after the sale was consummated and that the agreement was for plaintiffs to be sales and purchase agents on a commission basis.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 9 October 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 October 1985.

In their complaint plaintiffs sought payment on account for certain paper goods sold and delivered to defendant and commissions earned by the individual plaintiffs. Defendant counterclaimed alleging fraud, unfair and deceptive trade practices and violations of the Business Opportunity Sales Act, G.S. 66-94, *et seq.* The case was tried before a judge without a jury. Plaintiffs took a voluntary dismissal of their claim for commissions and tendered into evidence a verified statement of account. At the close of defendant's evidence, plaintiffs moved for an involuntary dismissal of defendant's counterclaim. The trial judge entered judgment for plaintiffs on their account and dismissed defendant's counterclaim. Defendant appeals.

Helms, Mulliss and Johnston by Robert B. Cordle, L. D. Simmons, II and Charles F. Bowman for plaintiffs-appellees.

Newitt and Bruny by Roger D. Bruny and John G. Newitt, Jr. for defendant-appellant.

PARKER, Judge.

Defendant's sole assignment of error is the granting of plaintiffs' motion to dismiss defendant's counterclaim based on violations of the Business Opportunity Sales Act. The evidence adduced at trial tended to show the following: plaintiffs, Woods and Hughes, were officers, directors and principal shareholders of Anchor Paper Corporation (APC), which was in the business of buying and selling paper products and converting them into paper by-products. On 17 November 1979, Woods and Hughes met with Levi Sabir and Wynelle Sebree from Florida to negotiate the sale of certain pieces of equipment from plaintiffs to Sabir and Sebree, who were interested in starting a paper converting business in Florida. The scope of the negotiations expanded, however, until agreement was reached on 18 December 1979 for plaintiffs to sell the entire paper converting operations of Anchor Paper to Sabir and Sebree.

Sabir and Sebree incorporated Anchor Converting Company, Inc. (ACC), the defendant, in North Carolina. The newly formed corporation purchased the paper converting operation from APC for $200,000. Plaintiffs Woods and Hughes agreed to remain part of the new operation as salesmen, using their contacts gained from their management of APC. Plaintiff Anchor Paper Company sold the raw paper to ACC for use in its business.

Defendant contends that in the sale, Woods and Hughes made representations to defendant's incorporators concerning sales, profitability, expenses and existing accounts and that the transaction was subject to the Business Opportunity Sales Act.

The trial judge made the following findings of fact:

> 4. In November, 1979, Wynelle Sebree and Levi Sabir, both residents of Florida, who desired to go into the paper converting business, approached APC concerning the possibility of purchasing certain paper converting machinery from it.
>
> 5. Sebree and Sabir were both experienced in business affairs and Sabir had extensive experience in the paper converting business.
>
> 6. After inspecting the equipment, Sebree and Sabir agreed that ACC would purchase the equipment and also a

certain inventory of paper which Sabir had examined and which was necessary for ACC to commence operations.

7. The plaintiffs, Woods and Hughes, agreed to act as sales and purchase agents for ACC on a commission basis, and did so until June, 1980, when their commissions were unpaid.

8. No representations were made to ACC by APC, Woods or Hughes, concerning the volume of business or expenses of doing business which might be experienced by ACC until after consummation of the transaction when in January, 1980, Hughes at ACC's request made and gave to it a handwritten projection of figures as to projected sales and expenses which were based upon assumptions as to expected sales territory and sales force which were supplied to him by ACC.

The trial court concluded as a matter of law that ACC is indebted to plaintiffs for goods sold and delivered to it as set forth in plaintiffs' first claim for relief; and upon the facts and the law, ACC has shown no right to relief upon its counterclaim.

Defendant did not except to the trial court's findings of fact. Accordingly, the findings are presumed to be supported by evidence and are binding on appeal. *Jarman v. Jarman*, 14 N.C. App. 531, 188 S.E. 2d 647, *cert. denied*, 281 N.C. 622, 190 S.E. 2d 465 (1972). The only question raised by defendant's exception to the judgment is whether the trial court's findings of fact supported its conclusions of law. *Jackson v. Collins*, 9 N.C. App. 548, 176 S.E. 2d 878 (1970).

The North Carolina Business Opportunity Sales Act, N.C.G.S. 66-94 provides:

> For the purposes of this Article, "business opportunity" means the sale or lease of any products, equipment, supplies or services for the purpose of enabling the purchaser to start a business and in which the seller represents:
>
> . . . .
>
> (3) The seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or that the seller will

refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity; or

(4) That it will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity, provided that this subsection shall not apply to the sale of a marketing program made in conjunction with the licensing of a federally registered trademark or a federally registered service mark, or when the purchaser pays less than one hundred dollars ($100.00).

There is no contention that omitted subsections (1) and (2) are applicable. For defendant to have recovered on its counterclaim under the Business Opportunity Sales Act, defendant would have had to present evidence, and the court would have had to find, that plaintiffs guaranteed that the purchaser would derive certain income from the business opportunity or that plaintiffs represented that they would provide a sales program or marketing program which would enable defendant to derive income in excess of the price paid for the business opportunity.

When the trial judge sits as trier of fact, the trial judge's findings are binding on appeal provided there is competent evidence to support the findings. *Seders v. Powell, Commissioner of Motor Vehicles*, 298 N.C. 453, 259 S.E. 2d 544 (1979). In other words, credibility of the witnesses is for the trial judge and findings based thereon will not be set aside even if there is evidence to the contrary. *Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 250 S.E. 2d 250 (1979). In the instant case, not only was there competent evidence to support the trial judge's findings; defendant has not excepted to those findings. The findings clearly support the challenged conclusion of law. The trial court found that "no representations" were made until after the sale was consummated and that the agreement was for Woods and Hughes to be sales and purchase agents on a commission basis. Based on these findings, the transaction did not come within the purview of the Business Opportunity Sales Act; plaintiffs were not required to comply with the provisions of that Act and the trial judge properly concluded that defendant had no right to relief upon its counterclaim.

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

FIDELITY BANKERS LIFE INSURANCE COMPANY v. PATRICIA DORTCH, ANN C. DORTCH, ANN HUNTER DORTCH, ELIZABETH D. BESWICK AND CENTRAL BANK OF THE SOUTH, TRUSTEE FOR JOHN J. DORTCH RETIREMENT PLAN AND TRUST

No. 8518SC736

(Filed 4 February 1986)

1. **Insurance § 29— life insurance proceeds—interpleader of claimants—determination based on equitable considerations**

When an insurer interpleads the claimants to benefits under a policy, there is a waiver of the restriction and conditions regarding the changes of beneficiaries under the policy, and the court should then make a determination regarding who is entitled to the proceeds of the policy based upon equitable considerations.

2. **Insurance § 29.1— life insurance—change of beneficiary—intent of insured**

When determining who is entitled to the proceeds of a life insurance policy based upon equitable considerations, the court should first and foremost consider the intent or wishes of the insured regarding who was to benefit from the proceeds of the policy. In this case the trial court erred in awarding proceeds to insured's former wife, named beneficiary of the policy, where it was clear that insured intended for the benefits of the policy to be paid into his Keogh Plan established to benefit his wife and daughters, and he did all he could do to obtain this result, but this result was not accomplished because of the failure of the insured's trustee, the technical owner of the policy, to properly execute the insured's wishes.

APPEAL by defendants, Ann C. Dortch, Ann Hunter Dortch, Elizabeth D. Beswick and Central Bank of the South, from *DeRamus, Judge.* Judgment entered 21 March 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 December 1985.

On 19 October 1972 John J. Dortch acquired a life insurance policy from Fidelity Bankers Life Insurance Company in the face amount of $33,000. Patricia Dortch, Mr. Dortch's wife on that date, was designated the primary beneficiary under the policy. In November 1975, Mr. Dortch transferred ownership of the policy

to Central Bank of the South as trustee of his retirement or Keogh Plan which his law firm had established.

In April 1979 John Dortch and Patricia Dortch executed a separation agreement which provided that Mr. Dortch would retain Patricia Dortch as beneficiary of his retirement plan until he remarried, left the law firm or fulfilled his obligation to pay alimony. John and Patricia Dortch were divorced, and on 10 August 1980 Mr. Dortch married Ann Campbell Dortch. On 3 September 1980, Mr. Dortch properly executed a change of beneficiary form for the retirement account. On this form he designated Ann C. Dortch, Elizabeth D. Beswick and Ann Hunter Dortch as the beneficiaries under the Keogh Plan. The Keogh Plan was supposed to contain the proceeds from the Fidelity life insurance policy. The change of beneficiary form was delivered to a trust officer of Central Bank with instructions that the bank as trustee "take appropriate action with regards to the change." The bank received the form on 8 September 1980, however, no action was taken to change the beneficiary of the policy at that time.

On 9 April 1984 Mr. Dortch died. Patricia Dortch filed a claim for the benefits as designated beneficiary under the policy. Ann C. Dortch, Elizabeth D. Beswick and Ann Hunter Dortch filed claims for the benefits as designated beneficiaries under the Keogh Plan, and Central Bank filed a claim of benefits as trustee under the Keogh Plan. On 14 June 1984, Fidelity Life Insurance Company filed this interpleader action requesting that the court determine which of the defendants should receive the proceeds of the policy and asking that it be discharged from any further liability under the policy. On 15 June 1984, Central Bank forwarded Mr. Dortch's form changing beneficiaries under the plan. On 4 September 1984 Central Bank requested that the beneficiary under the policy be changed to the retirement plan.

On 21 March 1985, the trial court entered summary judgment awarding Patricia Dortch the proceeds of the policy. From this judgment, the other defendants appealed.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan and Douglas E. Wright, for defendant appellants.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Charles T. Hagan III, for defendant appellee.

ARNOLD, Judge.

The issue presented for review is whether the court erred in allowing Patricia Dortch's motion for summary judgment and in denying the motion for summary judgment by Ann C. Dortch, Ann Hunter Dortch, Elizabeth D. Beswick and Central Bank of the South. Believing the trial court improperly awarded summary judgment in favor of Patricia Dortch, we reverse.

Provisions of an insurance policy which relate to the procedures that must be followed in order to change the beneficiaries under the policy are conditions which are inserted for the protection of the insurer, not to protect the original beneficiaries. *See, Sudan Temple v. Umphlett*, 246 N.C. 555, 99 S.E. 2d 791 (1957). The beneficiary designated under policies in which the owner reserves the right to make changes in the beneficiary had no vested rights under those policies. *See, Gray v. Insurance Co.*, 254 N.C. 286, 118 S.E. 2d 909 (1961). An insurer may waive any provisions inserted in the insurance contract solely for its benefit. *Bray v. Benefit Association*, 258 N.C. 419, 128 S.E. 2d 766 (1963); *Burgess v. Insurance Co.*, 44 N.C. App. 441, 261 S.E. 2d 234 (1980).

Some states have adopted a rule that restrictions or conditions regarding the formalities which must be followed to effect a change of beneficiary under the policy are waived when the insurer pays the proceeds of the insurance policy into court and interpleads the claimants to the proceeds. *Couch on Insurance* 2d (Rev. ed.) § 28:93. Under this rule the rights of the claimant are determined on equitable consideration rather than under the technical terms and conditions of the contract. *Id.* The provisions regarding change of beneficiaries are inserted to protect the insurer from becoming liable for double payments under the policy. When the insurer pays the proceeds into the court this negates the possibility that the insurer will be subjected to double liability, thus, there is no reason to enforce these restrictions. *See, New York Life Insurance Company v. Lawson*, 134 F. Supp. 63 (1955). The North Carolina courts have not spoken to the issue of whether this rule applies in this state. However, in *Sudan Temple v. Umphlett*, 246 N.C. 555, 99 S.E. 2d 791 (1957), our Supreme Court quoted this rule with approval before determining that they need not determine the effect of the interpleader action under the facts in that case.

[1] North Carolina courts have consistently attempted to effectuate the intent of the insured in determining who is to receive the benefits under the policy. *See, Teague v. Insurance Co.*, 200 N.C. 450, 157 S.E. 421 (1931). In *English v. English*, 34 N.C. App. 193, 237 S.E. 2d 555, *disc. rev. denied*, 293 N.C. 740, 241 S.E. 2d 513 (1977), this Court enunciated the doctrine of "substantial compliance" as a method of effectuating the intent of the insured. The rule that filing an interpleader constitutes a waiver of the strict compliance with the requirement of the policy is also an effective method of insuring that the insured's wishes regarding who should receive the benefits of the policy are honored, while at the same time protecting the insurer from double liability under the policy. *See Dell v. Varnedoe*, 148 Ga. 91, 95 S.E. 977 (1918); *see also Cable v. Prudential*, 89 A.D. 2d 636, 453 N.Y.S. 2d 86 (1982). We believe this rule is a logical extension of the principle set forth in *Teague* and *English* that the intent of the insured should be carried out where practicable. Therefore, we adopt the rule that when an insurer interpleads the claimants to benefits under a policy there is a waiver of the restriction and conditions regarding the changes of beneficiaries under the policy, and the court should then make a determination regarding who is entitled to the proceeds of the policy based upon equitable considerations.

[2] The polar star of the equitable considerations should be the intent or wishes of the insured regarding who was to benefit from the proceeds of the policy. In the case *sub judice* it is clear that the insured intended for the benefits of the policy to be paid into his Keogh Plan established to benefit his wife and daughters. The insured did all that he could do to obtain this result. The only reason this result was not accomplished was the failure of the insured's trustee, the technical owner of the policy, to properly execute the insured's wishes. Thus, we hold that the judgment awarding the proceeds of the policy to the insured's former wife must be reversed and the case remanded for entry of judgment consistent with this opinion.

Reversed and remanded.

Judges WELLS and PARKER concur.

UNIVERSITY MOTOR LODGE, INC. v. NORMA (DEDE) OWENS, U-HAUL COMPANY OF EASTERN NORTH CAROLINA AND U-HAUL COMPANY OF MISSISSIPPI

No. 8515SC681

(Filed 4 February 1986)

Negligence § 53.8— canopy over breezeway—no duty of motel to post clearance signs

In an action to recover for the negligence of the individual defendant in driving a truck under a canopy with insufficient clearance, the trial court did not err in refusing to submit an issue relating to the contributory negligence of plaintiff in failing to post any signs at the overhead canopy which indicated its height and warned operators of trucks to use another exit, since the law imposed no duty on plaintiff to give notice of the canopy and the vertical clearance underneath it which was plainly obvious to any ordinarily intelligent person and to defendant who had eyes to see and an unobstructed view; defendant testified that she was concerned that the truck might not clear under the canopy, but she failed to take the time to ascertain this fact before proceeding; and defendant's evidence presented no facts from which it could be inferred that plaintiff had more knowledge than defendant of the alleged danger or unsafe condition, particularly in light of the fact that no truck had ever struck the canopy during the twenty years of its existence.

APPEAL by defendants from *Bowen, Judge*. Judgment entered 22 March 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 3 December 1985.

On 5 August 1982, defendant Owens rented a U-Haul truck in Mississippi from defendant U-Haul Company of Mississippi. The truck, a TC model approximately nine feet two inches in height, was owned by defendant U-Haul Company of Eastern North Carolina. On 15 August 1982, Owens drove to plaintiff's motel in Chapel Hill, and upon registration, advised plaintiff that she was driving a U-Haul truck. Plaintiff instructed Owens to park the truck behind the building for aesthetic reasons.

On 16 August 1982, Owens attempted to leave the parking lot behind plaintiff's motel and drove the truck toward a permanent overhead stationary canopy. This canopy allowed guests to walk between buildings during a rainstorm; it is possible to drive an automobile under it. When Owens attempted to go under the canopy, the top portion of her truck struck the canopy. There was evidence that the vertical clearance ranged from eight feet ten

inches to around nine feet. The parties stipulated that "[t]he costs of rebuilding the overhead canopy and repairing the damage caused by the collision in question was $14,352.29."

Plaintiff instituted this civil action alleging that defendant Owens was negligent in the operation of her truck. Defendants denied any negligence on the part of defendant Owens, and specifically alleged that plaintiff was contributorily negligent since it failed to post any signs at the overhead canopy which indicated its height or clearance or which warned operators of trucks to use another exitway. In its reply, plaintiff asserted that Owens had the last clear chance to avoid the collision.

At trial, the court submitted an issue to the jury relating to the negligence of defendant Owens, but refused to submit an issue relating to the contributory negligence of plaintiff. From a jury verdict in favor of plaintiff, defendants appealed.

Haywood, Denny, Miller, Johnson, Sessoms and Haywood, by Stewart W. Fisher, for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog, by Robert W. Sumner, for defendants-appellants.

DeBank, McDaniel, Heidgerd, Holbrook and Anderson, by Douglas F. DeBank, for defendants-appellants.

PARKER, Judge.

In their sole assignment of error on appeal, defendants contend the trial court erred in refusing to submit to the jury an issue relating to the contributory negligence of plaintiff in failing to post any signs or warnings on the overhead canopy as to its height or clearance from the ground below it. We disagree.

"[A]n innkeeper is not an insurer of the personal safety of his guests but is required 'to exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril.' " *Rappaport v. Days Inn*, 296 N.C. 382, 383, 250 S.E. 2d 245, 247 (1979). "The owner of the premises is liable for injuries resulting from his failure to exercise ordinary care to keep in a reasonably safe condition that part of the premises where, during business hours, guests and other invitees may be expected." *Id.* at 383-84, 250 S.E. 2d at 247, and "[t]he owner's duty extends to a

parking lot provided by the owner for the use of the invitees." *Game v. Charles Stores Co.*, 268 N.C. 676, 678, 151 S.E. 2d 560, 562 (1966).

The owner must give warning of hidden conditions and dangers of which it had knowledge, express or implied. *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283 (1959). However, the owner or proprietor is not under a duty to warn an invitee of a danger or condition which is obvious, *Spell v. Contractors*, 261 N.C. 589, 135 S.E. 2d 544 (1964), or of which the invitee has equal or superior knowledge. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967).

Defendants concede in their brief that there are no North Carolina cases which hold that a landowner is under a duty to post warnings and notices as to the height and vertical clearance of overhead canopies on his premises under which vehicles may pass. The question is whether this condition was "obvious" or whether Owens had equal or superior knowledge of this condition.

Our courts have found that the following conditions were so obvious as to negate the landowner's duty to warn: (i) slight depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets, *Evans v. Batten*, 262 N.C. 601, 138 S.E. 2d 213 (1964); (ii) triangular screen located at a right angle to a grocery store exit, *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338 (1963); (iii) sharp-edged concrete slab near gasoline pumps at filling station, *Little v. Oil Corp.*, 249 N.C. 773, 107 S.E. 2d 729 (1959); (iv) overturned chair in dimly lit dance hall, *Revis v. Orr*, 234 N.C. 158, 66 S.E. 2d 652 (1951), and (v) single step down at exit from bank even though there was no sign or other warning at the step down at the door, *Benton v. Building Co.*, 223 N.C. 809, 28 S.E. 2d 491 (1944).

Black's Law Dictionary defines "obvious" as follows:

> Easily discovered, seen, or understood; readily perceived by the eye or the intellect; plain; patent; apparent; evident; clear; manifest.

The law imposes no duty upon plaintiff to give notice of the stationary overhead canopy and the vertical clearance underneath it, "which was plainly obvious to any ordinarily intelligent person using his eyes in an ordinary manner, [and] to [defendant Owens]

who had eyes to see and an unobstructed view. . . ." *Little*, 249 N.C. at 777, 107 S.E. 2d at 731. Defendant Owens testified that she was concerned that the truck might not clear under the canopy, but she failed to take the time to ascertain this fact before proceeding beneath the canopy.

In addition, defendants' evidence presents no facts from which it can be inferred that plaintiff had more knowledge than defendant Owens of the alleged danger or unsafe condition, particularly in light of the fact that the breezeway had been in existence for almost twenty years and no truck had ever struck the breezeway. *See, Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917 (1944) (a new fangled electronically controlled door not a hidden peril because no previous malfunctions had occurred). Defendant Owens could see the canopy, and she had knowledge of the height of the truck.

The cases relied upon by defendant, *Illinois Central Railroad Company v. Farris*, 259 F. 2d 445 (5th Cir. 1958) and *Norfolk Southern Railway Co. v. Davis Frozen Foods, Inc.*, 195 F. 2d 662 (4th Cir. 1952), are distinguishable. In both cases, a vehicle was travelling on a public road and struck a railway overpass.

For the reasons outlined above, we hold the trial court did not err in refusing to submit to the jury an issue relating to plaintiff's contributory negligence.

The judgment appealed from is

Affirmed.

Judges ARNOLD and WELLS concur.

DURHAM COUNCIL OF THE BLIND FOR ITSELF AND ALL OTHERS SIMILARLY SITUATED v. RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA; MARK G. LYNCH, SECRETARY OF THE DEPARTMENT OF REVENUE OF NORTH CAROLINA; CITY OF DURHAM; RONALD L. STEPHENS, DISTRICT ATTORNEY FOR THE FOURTEENTH PROSECUTORIAL DISTRICT; STATE OF NORTH CAROLINA

No. 8510SC431

(Filed 4 February 1986)

1. **Injunctions § 5.1— operating bingo games without license—action for injunction proper**

Though the general rule is that equity will not restrain the enforcement of a statute providing a criminal penalty for its violation, an exception to this rule is that the court has jurisdiction to enjoin the enforcement of an alleged unconstitutional statute when it plainly appears that otherwise property rights will suffer irreparable injury which is both great and immediate if the enforcement of the statute is not enjoined; therefore, plaintiff could properly bring an action to restrain defendants from prosecuting plaintiff for operating bingo games without a license where plaintiff alleged that it was a charitable organization which had been denied a license to continue to operate bingo games, and plaintiff would not be able to operate such games which had provided it with income unless the people operating the games were willing to subject themselves to at least one prosecution for a felony.

2. **Gambling § 4— bingo games—licensing requirements not unconstitutional**

There was no merit to plaintiff's contention that certain of the licensing requirements for conducting bingo games were unconstitutional as applied to plaintiff and that defendant Secretary of Revenue should be required to issue a license to it, since a reading of the requirements to be classified as one who conducts a bingo game shows that the State intends that most of the money earned by an exempt organization be used for a charitable purpose, this is a purpose which is within the State's power to reach, and restrictions on the use of leased buildings and prohibitions against subleasing and contracting with anyone to conduct bingo games are reasonably related to the accomplishment of this goal. N.C.G.S. 14-309.7(c).

APPEAL by the plaintiff from *Hobgood, Judge*. Judgment entered 15 January 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 29 October 1985.

The plaintiff brought this action to restrain the defendants from prosecuting the plaintiff and all other organizations similarly situated who are not able to comply with the provisions of G.S. 14-309.7 and 309.8. The record does not show that the plaintiff was certified to represent a class. The plaintiff alleged that it is a

charitable organization which has been denied a license to continue to operate bingo games. It alleged further that the licensing statute for bingo games unconstitutionally discriminates against the plaintiff because there is not a rational basis for the class which is allowed to conduct bingo games in this state.

The court entered a temporary restraining order and a preliminary injunction restraining the defendants from prosecuting the plaintiff. After a hearing on the merits of the case the court dissolved the injunction and dismissed the action. The plaintiff appealed.

Blanchard, Tucker, Twiggs, Earls & Abrams, P.A., by Howard F. Twiggs and George E. Kelly III, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David S. Crump and Assistant Attorney General Newton G. Pritchett, Jr., for defendant appellees.

WEBB, Judge.

[1] The first question posed by this appeal is whether the plaintiff may proceed by a civil action for an injunction against the enforcement of a criminal statute. G.S. 14-309.5 provides that it is a Class H felony to operate a bingo game without a license. The plaintiff seeks to avoid prosecution under this statute. The general rule is that equity will not restrain the enforcement of a statute providing a criminal penalty for its violation. *D & W, Inc. v. Charlotte*, 268 N.C. 577, 151 S.E. 2d 241, *supplemental opinion*, 268 N.C. 720, 152 S.E. 2d 199 (1966). An exception to this rule is that the court has jurisdiction to enjoin the enforcement of an alleged unconstitutional statute when it plainly appears that otherwise property rights will suffer irreparable injury which is both great and immediate if the enforcement of the statute is not enjoined. *Walker v. Charlotte*, 262 N.C. 697, 138 S.E. 2d 501 (1964). In this case the plaintiff will not be able to operate bingo games which have provided it with income unless the persons operating the games are willing to subject themselves to at least one prosecution for a felony. We hold the superior court had jurisdiction to hear this case. *See Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1957).

[2] The plaintiff concedes that playing bingo is gambling and it does not have a constitutional right to operate a bingo game. It

argues that the General Assembly has by G.S. 14-309.6(1) defined exempt organizations which are allowed to conduct bingo games upon procuring a license to do so. It contends that it is an exempt organization and the licensing requirements which it cannot meet create a class which has no rational basis. It says we should hold that certain of the licensing requirements are unconstitutional as applied to the plaintiff and that the defendant Lynch should be required to issue a license to it.

G.S. 14-309.7(c) provides that if an exempt organization leases a building in which to conduct bingo games (1) it must lease it for one year and actually occupy and use it on a regular basis for six months before a bingo game is conducted; (2) the total monthly rent must not exceed 1½% of the total assessed ad valorem tax value of the property; (3) no subleasing is permitted; and (4) the exempt organization may not contract with any person for the purpose of conducting a bingo game. G.S. 14-309.8 provides that no more than two sessions of bingo may be conducted in one week and they must be conducted by the same exempt organization. The plaintiff says it cannot meet these conditions and is excluded under the law from conducting bingo games. It contends that these conditions create a class which has no rational basis and is unconstitutional.

The Fourteenth Amendment to the United States Constitution and Article I Sec. 19 of the Constitution of North Carolina provide that no person shall be deprived of the equal protection of the laws. These constitutional provisions require that if a class is created there must be a reasonable basis for such classification and the consequent difference in treatment under the law. This means that the creation of the class must be reasonably related to the accomplishment of some purpose which the legislature has the power to reach. *See Hursey v. Town of Gibsonville*, 284 N.C. 522, 202 S.E. 2d 161 (1974). All parties agree that no one has the right to conduct bingo games and that the state has the right to create a class which may do so.

A reading of the requirements to be classified as one who conducts a bingo game shows that the State intends that most of the money earned by an exempt organization be used for a charitable purpose. The General Assembly legislated to this end when it prohibited the use of a leased building if the rent exceeds 1½% of the assessed tax value of a building and when it prohibited sub-

leasing and the contracting with anyone to conduct bingo games. We believe this is a purpose which is within the State's power to reach and the requirements are reasonably related to the accomplishment of this goal. The State contends that the requirement that a building be leased for at least one year and be used for a purpose other than bingo for six months prior to the operation of a bingo game is to insure that only those exempt organizations which have roots in a community be allowed to operate bingo games. We hold that this requirement is reasonably related to a legitimate state interest. We also hold that the requirement that not more than two games a week may be held in a building and that the same exempt organization must conduct the games are reasonably related to a legitimate interest that bingo games not be operated by full time professionals for profit. We hold that the criteria which the plaintiff attacks as creating an unconstitutional class are reasonably related to the accomplishment of a legitimate purpose. It was not error to dissolve the preliminary injunction and dismiss the action.

Affirmed.

Judges BECTON and COZORT concur.

CATHY SURLS O'BRIEN v. MICHAEL G. PLUMIDES

No. 8526SC580

(Filed 4 February 1986)

Attorneys at Law § 7— attorney discharged—compensation for reasonable value of services rendered

Where an attorney, employed under a fixed fee contract to render specific legal services, is discharged by his client prior to completion of the services for which he was employed, he is entitled to compensation for the reasonable value of the services rendered up to the time of his discharge, and the reasonable value of the services rendered is a question of fact to be determined in the light of the circumstances of each case.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 5 March 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 November 1985.

Plaintiff brought this civil action seeking recovery of fees which she paid to defendant attorney for legal representation of her fiance (now husband), John O'Brien. Plaintiff alleged that defendant breached his contract with her and, in the alternative, that defendant was discharged from employment and that the fee which he was paid exceeded the reasonable value of the services which he actually rendered. Defendant answered, denying that plaintiff is entitled to recover any amount.

Defendant moved for summary judgment, supported by his own affidavit. In opposition to the motion, plaintiff filed her own affidavit and one by John O'Brien. Although the affidavits are contradictory in many respects, the material facts are not in dispute. They show that John O'Brien was arrested in Mecklenburg County in the early morning hours of 17 August 1983 on felony charges and was placed in jail. Plaintiff contacted defendant to arrange for O'Brien's legal representation. Defendant appeared in district court on the morning of 17 August to seek a bond reduction. Due to the absence of the arresting officer, the hearing was not held. Defendant then consulted with the presiding judge and arranged for the hearing to be held at the afternoon session of court on the same day. At the afternoon hearing, defendant secured O'Brien's release on his own recognizance. According to defendant, he also began discussions with the district court judge relative to a plea in the case. After O'Brien's release, O'Brien and plaintiff met with defendant at his office, where plaintiff paid defendant $10,000.00 to represent O'Brien through proceedings in superior court, if necessary. On the next day, O'Brien decided that he desired to be represented by another attorney. He informed defendant and, by letter dated 24 August 1983, he discharged defendant from employment. Defendant did not perform any further services for O'Brien and refused demands made by O'Brien and plaintiff to return any portion of the fee. O'Brien was represented by another attorney and entered pleas of guilty in Mecklenburg County Superior Court on 12 January 1984.

The trial court entered summary judgment for defendant. Plaintiff appeals.

Jean B. Lawson for plaintiff appellant.

Michael G. Plumides for defendant appellee.

MARTIN, Judge.

Although plaintiff assigns error to the entry of summary judgment against her, she does not earnestly argue the issue as it relates to her claim for breach of contract. She contends, however, that she is entitled to recover a portion of the fee which she paid to defendant to the extent that it exceeds the reasonable value of the services which he rendered up to the time of his discharge from employment. We agree.

In *Higgins v. Beaty*, 242 N.C. 479, 88 S.E. 2d 80 (1955), our Supreme Court held that if an attorney employed under a fixed fee contract is discharged by his client, without cause, prior to the disposition of the case, the attorney is entitled to the full contract fee and not merely the value of the services which he provided. The decision in *Higgins* was based on the theory that the general law of contracts, and damages upon breach, applies to a contract for legal services. However, in *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E. 2d 305 (1978), *disc. rev. denied*, 296 N.C. 410, 251 S.E. 2d 468 (1979), this Court cited decisions following a modern trend and holding a client's discharge of his attorney is not a breach of contract.

> 'Such a discharge does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate the contract at will.' (Citation omitted.)

Id. at 65, 247 S.E. 2d at 308. Accordingly, this Court held that "[t]he client has the right to discharge his attorney at any time, and . . . upon such discharge the attorney is entitled to recover the reasonable value of the services he has already provided." *Id.* at 66, 247 S.E. 2d at 309.

> 'The rule secures to the attorney the right to recover the reasonable value of the services which he has rendered, and is well calculated to promote public confidence in the members of an honorable profession whose relation to their client is personal and confidential.' (Citation omitted.)

Id. Although *Covington* dealt with a contingent fee contract, we believe that the same rules are applicable to a fixed fee contract such as is involved in this case.

Moreover, since the decision in *Higgins*, our Supreme Court has implicitly adopted the modern rule. By order dated 30 April 1973, the Supreme Court approved the adoption of the North Carolina State Bar Code of Professional Responsibility (The Code). 283 N.C. 783 (1973). The Code, as amended in N.C.G.S. Rules (1984), applicable at all times relevant to this case, provides: "A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned." DR 2-109(A)(3). According to the Code, a lawyer withdraws from employment if "[h]e is discharged by his client." DR 2-109(B)(4). These provisions have been carried forward by the Rules of Professional Conduct of the North Carolina State Bar, which were approved by the Supreme Court on 7 October 1985. --- N.C. --- (1985). *See* Rules of Professional Conduct of the North Carolina State Bar, Rule 2.8(A)(3) and (B)(4). Neither the Code, nor its successor Rules of Professional Conduct, limit the applicability of these rules to contingent fee contracts. Although *Higgins* has not been expressly overruled, we do not believe that its holding reflects current North Carolina law.

Accordingly, we hold that where an attorney, employed under a fixed fee contract to render specific legal services, is discharged by his client prior to completion of the services for which he was employed, he is entitled to compensation for the reasonable value of the services rendered up to the time of his discharge. The reasonable value of the services rendered is a question of fact to be determined in the light of the circumstances of each case.

For the reasons stated, summary judgment for the defendant is reversed and this case is remanded to the Superior Court of Mecklenburg County for trial on the issue of the reasonable value of the services rendered by defendant up to the time of his discharge.

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

VALDESE GENERAL HOSPITAL, INC. v. CHARLES MICHAEL BURNS AND DAVID REUBEN BURNS, JR., COLLECTORS OF THE ESTATE OF MARY FRANCES RITCH BURNS; CHARLES MICHAEL BURNS AND DAVID REUBEN BURNS, JR.

No. 8525SC866

(Filed 4 February 1986)

Fraudulent Conveyances § 3.4— issue as to fraudulent intent—summary judgment improper

The trial court erred in entering summary judgment for plaintiff on its claim for an amount for hospital care rendered to defendants' mother and on its claim that a conveyance to defendants from their mother was fraudulent and therefore void as against plaintiff, since there were genuine issues of material fact as to an exact amount owed by defendants and as to whether defendants' mother transferred her property with intent to defraud.

APPEAL by defendants from *Kirby, Judge*. Order entered 16 May 1985 in Superior Court, BURKE County. Heard in the Court of Appeals 15 January 1986.

This is a civil action wherein plaintiff seeks to recover from Charles Michael Burns and David Reuben Burns, Jr., "Collectors" of the estate of Mary Frances Ritch Burns $37,851.68 for hospital care provided on or about 29 June 1983, 16 July 1983, 28 September 1983, 15 October 1983, and 29 November 1983. Plaintiff also seeks to have a certain conveyance, executed by Mary Frances Ritch Burns to David Reuben Burns, Jr., and Charles Michael Burns on 6 August 1983, set aside and declared void as against plaintiff.

In its complaint plaintiff alleges that Mary Burns is indebted to plaintiff in the amount of $37,851.68 for hospital services rendered. Plaintiff also alleges that the conveyance from Mary Burns to her sons was a fraudulent conveyance in that it was made voluntarily with the intent to defraud the plaintiff.

Defendants filed an answer admitting that the hospital stays and the conveyance occurred but denying the amount of money owed and the fraudulent intent underlying the conveyance.

Defendants also filed a counterclaim alleging that Mary Burns sustained injuries due to plaintiff's malpractice and that a substantial portion of the hospital costs incurred by Mary Burns was due to plaintiff's malpractice.

Plaintiff filed a motion for summary judgment which was supported by interrogatories, admissions, depositions and an affidavit. These documents tend to show that Mary Burns was admitted to plaintiff hospital on five occasions, that Mary Burns conveyed a tract of land to her sons on 6 August 1983 and that Mary Burns owed plaintiff $15,349.02 as of 5:00 p.m. on 6 August 1983.

In opposition to the motion for summary judgment, defendants denied plaintiff's allegations regarding the amount owed to plaintiff and filed an affidavit tending to show that Mary Burns retained sufficient funds after the conveyance at issue to satisfy her obligations to the hospital at the time of the conveyance.

The court entered summary judgment for plaintiff declaring: (1) that defendant collectors were indebted to plaintiff in the amount of $37,851.68; (2) that the conveyance from Mary Burns to her children was fraudulent and therefore void as against plaintiff; and (3) that defendants' counterclaim against plaintiff should be dismissed. Defendants appealed.

Mitchell, Teele, Blackwell, Mitchell & Smith, P.A., by Marcus W. H. Mitchell, Jr., for plaintiff, appellee.

Wilson and Palmer, P.A., by Hugh M. Wilson, for defendants, appellants.

HEDRICK, Chief Judge.

The determinative question presented on this appeal is whether the trial court erred in granting summary judgment for plaintiff with respect to plaintiff's claim for $37,851.68 and whether the trial court erred in granting summary judgment for plaintiff declaring the conveyance from Mary Burns to defendants dated 6 August 1983 to be void.

A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *cert. denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977). All evidence before the court must be construed in the light most favorable to the non-moving party. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978). "[S]ummary judgment may be granted to the party with the bur-

den of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point out specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate." *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976).

In its complaint, plaintiff alleged that defendants were indebted in the amount of $37,851.68 for hospital care provided to Mary Burns. In their answer, defendants denied they were indebted in the amount of $37,851.68. There is no evidence whatsoever in the record before us as to what the total amount defendants are indebted to plaintiff for hospital care provided to Mary Burns.

It is clear from the record before us that there remains a genuine issue of material fact regarding the exact dollar amount defendants owe plaintiff. Therefore, summary judgment in the amount of $37,851.68 must be reversed.

Summary judgment for plaintiff setting aside the conveyance from Mary Burns to the individual defendants must also be reversed. Before a conveyance may be set aside as fraudulent, the finder of fact must find that the conveyance was voluntary, that the conveyance was made without fair and reasonable consideration and that the conveyance was either made with the intent to defraud creditors or made so that at the time of the conveyance the transferor does not retain sufficient property to satisfy his then existing debts. G.S. 39-17; *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914); *Smith-Douglas v. Kornegay; First-Citizens Bank v. Kornegay*, 70 N.C. App. 264, 318 S.E. 2d 895 (1984).

Defendants do not dispute that the conveyance from their mother, Mary Burns, was voluntary and without legally cognizable consideration. Defendants contend that the third element of fraudulent conveyances, intent to defraud or insufficient retained property, is not present in this case.

Summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue. See Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707 (1984). Plaintiff does not

argue that it has shown that Mary Burns transferred the property with the intent to defraud Valdese General Hospital. Instead, plaintiff argues on appeal that the property retained by Mary Burns after the conveyance to defendants was insufficient to satisfy her debt to Valdese General Hospital.

Plaintiff submitted an affidavit from Melvin Harmon, a patient-financial counselor for Valdese General Hospital, that tends to show that Mary Burns owed $15,349.02 at the time of the conveyance. Charles Michael Burns submitted an affidavit that tends to show that Mary Burns retained at least $17,374.99. Defendants dispute the amount owed at the time of the conveyance. Plaintiff disputes the amount retained after the conveyance. Clearly, genuine issues of material fact remain to be resolved. Therefore, summary judgment for plaintiff setting aside the conveyance from Mary Burns to her sons must be reversed.

Although defendants appealed from summary judgment for plaintiff with respect to defendants' malpractice counterclaim, defendants have not brought forward any assignments of error relating to the counterclaim. Therefore, summary judgment for plaintiff on defendants' counterclaim must be affirmed.

Affirmed in part, reversed in part and remanded.

Judges JOHNSON and PHILLIPS concur.

ARTHUR VANN, III v. NORTH CAROLINA STATE BAR

No. 8510SC762

(Filed 4 February 1986)

Judgments § 35— reinstating license to practice law—prior adjudication of issues

In plaintiff's action for a declaratory judgment reinstating his license to practice law, defendant was entitled to summary judgment based on the doctrine of estoppel by judgment since the status of plaintiff's license as an attorney was at issue and was finally adjudicated in earlier proceedings before the State Bar and the Bar Council, plaintiff did not appeal the Bar's order of disbarment, and that judgment was conclusive as to those matters which were at issue and determined in those proceedings.

APPEAL by plaintiff from *Hobgood, Judge*. Judgment entered 6 June 1985 in WAKE County Superior Court. Heard in the Court of Appeals 14 January 1986.

Plaintiff filed an action seeking a declaratory judgment reinstating his license to practice law. In his complaint, plaintiff alleged that on or about 27 September 1978 he tendered his license to practice law to respondent for disciplinary action. No criminal charges were pending against plaintiff at that time; however, on 20 November 1978, criminal charges were instituted against him. On 8 February 1979, plaintiff pled guilty to eleven felony charges of forgery pursuant to a plea bargain and was sentenced to a three-year term of imprisonment. The sentence was suspended and plaintiff was placed on probation for three years on the condition, *inter alia*, that he not practice law during the period of probation. Plaintiff alleged that once the superior court acted under its inherent authority to discipline him, respondent could not impose additional penalties against him for the same conduct and therefore lacked the authority to disbar him. Plaintiff sought to have his law license returned to him as of the termination of his probationary sentence on 8 February 1982.

Respondent moved to dismiss the complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) of the Rules of Civil Procedure on the ground the trial court lacked jurisdiction over the subject matter. Respondent alleged that after plaintiff tendered his license to it, a special committee was appointed to recommend appropriate action to the State Bar Council. The special committee met on 9 March 1979 to consider appropriate action. Plaintiff attended that meeting and participated in it without challenge to the jurisdiction of the State Bar Council to act on his surrender of his license. The special committee recommended plaintiff's disbarment. Plaintiff subsequently wrote the president of the State Bar acknowledging receipt of the special committee's recommendation, waiving his right to appear before the Council and accepting the report of the special committee as being fair and just. By order dated 24 April 1979, plaintiff was disbarred. Plaintiff did not appeal from that order. Respondent also moved to dismiss plaintiff's complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure, for failure to state a claim upon which relief could be granted.

Respondent supported its motions to dismiss with the affidavit of B. E. James, its secretary. In his affidavit, James stated in substance that, as a result of plaintiff's tendering his license to respondent and of the special committee's investigation, plaintiff was disbarred by the State Bar Council by order entered 24 April 1979 and that no appeal was taken from the order of disbarment. James attached as exhibits to his affidavit a copy of the affidavit by which plaintiff tendered his license, the probation judgment entered upon plaintiff's plea of guilty to the forgery charges, the report of the special committee, plaintiff's letter to the president of the State Bar in response to the special committee's report and the order disbarring plaintiff.

By order entered 6 June 1985, the trial court allowed both of respondent's motions and dismissed plaintiff's complaint. From that order, plaintiff appealed.

Arthur Vann, III, pro se.

A. Root Edmonson for defendant.

WELLS, Judge.

Before addressing the merits of plaintiff's appeal, we must first determine the posture of this case on appeal. N.C. Gen. Stat. § 1A-1, Rule 12(b) of the Rules of Civil Procedure provides that, if on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion should be treated as one for summary judgment and disposed of as provided in N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure. *See also DeArmon v. B. Mears Corp.*, 312 N.C. 749, 325 S.E. 2d 223 (1985); *Smith v. Insurance Co.*, 43 N.C. App. 269, 258 S.E. 2d 864 (1979); *Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E. 2d 889 (1979). It is clear from the record on appeal in this case that extensive materials outside the complaint in support of respondent's motions to dismiss were presented to and considered by the trial court. We must also consider these materials in our disposition of plaintiff's appeal. *See Fowler, supra.* We therefore treat the trial court's order as entry of summary judgment for respondent and review it as such. *See DeArmon, supra* and *Smith, supra.*

Summary judgment is appropriate when the pleadings and affidavits on file 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) of the Rules of Civil Procedure. We conclude that the forecast of evidence before the trial court established that there was no genuine issue of material fact and that respondent was entitled to judgment as a matter of law based on the doctrine of estoppel by judgment.

The doctrine of estoppel by judgment is firmly entrenched in the law of this State. *See, e.g., Brondum v. Cox*, 292 N.C. 192, 232 S.E. 2d 687 (1977); *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962); *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157 (1942). Although the doctrine has been stated in a number of different ways, our Supreme Court in *Bryant v. Shields, supra*, stated it quite succinctly:

> It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to parties and privies, in all other actions involving the same matter.

Pertinent sections of Article 4 of Chapter 84 of our General Statutes, *see* N.C. Gen. Stat. § 84-15 *et seq.* (1985), grant to the North Carolina State Bar and the Bar Council jurisdiction and authority to discipline licensed attorneys, including the authority to issue orders of disbarment. It is clear from the record before us that the status of plaintiff's license as an attorney was at issue and was finally adjudicated in the proceedings before the State Bar and the Bar Council. Plaintiff did not appeal the Bar's order of disbarment. Thus, that judgment is conclusive as to those matters which were at issue and determined in those proceedings. *See King v. Grindstaff, supra* and *Bryant v. Shields, supra.* It is also clear from the record that plaintiff is attempting in the present action to relitigate the identical issue considered and finally determined in the proceedings before the State Bar. We hold that he is estopped to do so by the judgment entered in the State Bar proceedings and therefore respondent was entitled to summary judgment in this action.

Accordingly, the judgment of the trial court dismissing plaintiff's action is

Affirmed.

Judges ARNOLD and WEBB concur.

HARRY FRANKLIN MANES v. HILDA HARRISON-MANES

No. 8530DC574

(Filed 4 February 1986)

Divorce and Alimony § 30— equitable distribution of marital property—funds from mother's estate—separate property—use of funds to buy entirety property

Where plaintiff received cash benefits from his mother's estate, deposited the assets into a separate account in his name only, used the account to purchase a $100,000 annuity in his name only, and used the account to purchase a house and lot and an additional vacant lot which were deeded to plaintiff and defendant as husband and wife, the trial court properly concluded that the bank account and annuity remained separate property of the plaintiff, but erred in concluding that the real property remained separate, since the conveyance of property by the entireties itself indicated the "contrary intention" to preserving separate property required by the Equitable Distribution Act, and since use of separate property to acquire entireties property raised a rebuttable presumption of gift of separate property to the marital estate.

APPEAL by defendant from *Snow, Jr., Judge*. Judgment entered 15 April 1985 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 20 November 1985.

Plaintiff Harry Manes and defendant Hilda Harrison-Manes were married in May 1979. In February 1983, plaintiff's mother died. From her estate, plaintiff received cash benefits totalling over $229,000.00. He deposited the assets from his mother's estate into a separate account, in his name only, at First Union Bank. On 20 April 1983, plaintiff purchased a $100,000.00 annuity, in his name only, and on 23 May 1983, he purchased a house and lot and an additional vacant lot which were deeded to plaintiff and defendant as husband and wife. The monies for each of the purchases came from plaintiff's separate account at First Union Bank.

In June 1983, plaintiff changed the First Union account to a joint account, adding defendant's name. On 1 August 1983, plain-

tiff added defendant's name to the annuity document as joint owner/joint annuitant. On 1 September 1983, plaintiff and defendant separated.

In the proceeding for equitable distribution of marital property, the trial court concluded that the real property, annuity, and bank account were acquired in exchange for the separate property of plaintiff and, there being no contrary intention expressly stated in the conveyances, remained the separate property of plaintiff. Defendant appeals.

Smith, Bonfoey and Queen, by Frank G. Queen and Richlyn D. Holt, for defendant appellant.

Brown & Brown, by Gavin A. Brown, for plaintiff appellee.

MARTIN, Judge.

The sole issue raised by this appeal is whether the trial court erred in concluding that the property acquired in exchange for plaintiff's separate property remained separate property. We agree with the trial court that the annuity and bank account remained separate property of the plaintiff. However, for the reasons hereinafter stated, we must vacate that portion of the judgment relating to the real property and remand this case for further proceedings.

Under the Equitable Distribution Act, separate property includes all real and personal property acquired by a spouse by bequest, devise, descent, or gift during marriage and this separate property remains separate property when exchanged for other property "regardless of whether the title is in the name of the husband or wife or both unless a contrary intention is expressly stated in the conveyance." G.S. 50-20(b)(2). In addition, property acquired by gift from the other spouse is considered separate only if stated in the conveyance. *Id.*

In *McLeod v. McLeod*, 74 N.C. App. 144, 156, 327 S.E. 2d 910, 918, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985), another panel of this Court construed G.S. 50-20(b)(2) and held that "[w]hen property titled by the entireties is acquired in exchange for separate property the conveyance itself indicates the 'contrary intention' to preserving separate property required by the statute."

Furthermore, when separate property is used as consideration to acquire entireties property a gift of separate property to the marital estate is presumed which is rebuttable by clear, cogent, and convincing evidence. *Id.*

The trial court, in the present case, concluded that the real property held by the parties as tenants by the entirety remained the separate property of plaintiff because no contrary intention had been expressly stated in the conveyances. In so doing, the court failed to consider the presumption created by *McLeod.* Thus, we must vacate that portion of the judgment adjudging plaintiff to be the sole owner of the real property and remand this case to the trial court for further proceedings. Upon remand, the real property will be considered marital property, subject to equitable distribution, unless plaintiff can rebut the presumption of gift by clear, cogent, and convincing evidence.

The presumption of gift created by the holding in *McLeod* was limited in its application to real property acquired by both spouses, as tenants by the entirety, in exchange for the separate property of one of them. We decline to extend that presumption to jointly held personal property which is acquired in exchange for the separate property of one spouse, as to do so would seem to defeat the legislative intent of G.S. 50-20(b)(2).

Therefore, as to the annuity and First Union Bank account, we find no error in the trial court's conclusion that the property remained the separate property of plaintiff. Although the plaintiff added defendant's name to the bank account and annuity, the record discloses no evidence of any intention that the funds would not remain plaintiff's separate property. The deposit of funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property. *See Brown v. Brown*, 72 N.C. App. 332, 324 S.E. 2d 287 (1985); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 (1985).

Affirmed in part, vacated in part, and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

ARTHUR VANN, III v. NORTH CAROLINA STATE BAR

No. 8510SC857

(Filed 4 February 1986)

Administrative Law § 5; Attorneys at Law § 11— appeal from administrative decision—lack of specificity of petition

A petition for judicial review of the State Bar's denial of a petition for reinstatement to the Bar was properly dismissed where the petition for review failed to comply with the specificity requirements of N.C.G.S. § 150A-46.

APPEAL by petitioner from *Bailey, Judge.* Judgment entered 10 June 1985. Heard in the Court of Appeals 14 January 1986.

Petitioner (Vann) sought review in the superior court of respondent's denial of Vann's petition for reinstatement to the Bar. Respondent moved to dismiss Vann's petition and, following a hearing, the trial court allowed respondent's motion. From the trial court's order dismissing his petition, Vann has appealed to this Court.

Arthur Vann, III, pro se.

A. Root Edmonson for respondent-appellee.

WELLS, Judge.

In its motion to dismiss, respondent asserted that in his petition for review, Vann failed to file a brief as required in administrative appeals to the Superior Court of Wake County and therefore respondent lacked adequate notice of the errors allegedly made by respondent in its proceeding in this matter. In its order, the trial court found that Vann had failed to file the required brief and also found that Vann's petition lacked the specificity required in such appeals by N.C. Gen. Stat. § 150A-46 (1983). We agree that Vann's petition did not meet the statutory requirements and affirm the trial court's order.

Article 4 of Chapter 150A, N.C. Gen. Stat. §§ 150A-43 through -52 (1983), makes provisions for judicial review of final agency decisions in contested cases. Section 46 of the statute provides that petitions for judicial review "shall explicitly state what exceptions are taken to the decision or procedure of the agency . . . ." *Webster's Third New International Dictionary* 801 (1976)

defines "explicit" as "characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied." In his petition, Vann did not except to any finding of fact or conclusions of law, but made only generalized complaints as to certain procedural aspects of the hearing before respondent. Giving the statute the liberal construction required to effectuate and preserve Vann's right to judicial review of respondent's order, *see In re Appeal of Harris*, 273 N.C. 20, 159 S.E. 2d 539 (1968) and *James v. Board of Education*, 15 N.C. App. 531, 190 S.E. 2d 224, *appeal dismissed*, 282 N.C. 672, 194 S.E. 2d 151 (1972), we nevertheless conclude that Vann's petition was not sufficiently explicit to allow effective judicial review of respondent's proceedings.

In his brief to this Court, Vann contends that his allegation that respondent conducted its hearing pursuant to the "new" Rules of the N.C. State Bar, Art. IX, § 25 (1984) rather than under the "applicable" or "old" Rules, Art. IX, § 25 (1975) was explicit enough to merit judicial review. Vann has not seen fit to point out or explain what the differences are, if any, in the "new" and "old" Rules, nor has he suggested how he may have been prejudiced in this respect. Vann follows this argument by references to Paragraph 8.B of his petition arguing it as being a "corollary" to his "new" Rule versus "old" Rule argument. Paragraphs 8.A & B read as follows:

> 8. Petitioner respectfully excepts to the committee's report which was the basis upon which the North Carolina State Bar Council rejected Petitioner's Reinstatement Petition on the following grounds:
>
> A. That the committee placed the Petitioner under the new rules of the Bar rather than the old rules for reinstatement even though both parties agreed that the old rules should apply.
>
> B. That the chairman continually applied a different standard than that set forth by the bar as shown in his questioning of every witness presented.

Such generalized statements characterize the deficiencies of Vann's petition. We reject these arguments.

Vann also argues that the trial court erred in concluding that his petition should be dismissed for his failure to file a brief in

accordance with the Rules of Procedure of the Tenth Judicial District (local rules), contending that he was not properly apprised of the need to file such a brief. Because we have held that the trial court properly dismissed Vann's petition on other grounds, we deem it unnecessary to reach or decide this question.

Affirmed.

Judges ARNOLD and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 FEBRUARY 1986

ABBOTT v. BLUE CROSS & BLUE SHIELD No. 8522SC312	Alexander (83CVS250)	No Error
BALDWIN v. STONE No. 8526DC604	Mecklenburg (84CVD9002)	Affirmed
BLACK v. CARLTON YARN MILLS No. 8510IC688	Ind. Comm. (I-5597)	Affirmed
BROWN v. STATE OF N.C. BD. OF TRANS. No. 8528SC904	Buncombe (82CVS2589)	Affirmed
DELP v. DELP No. 8523SC847	Wilkes (84CVS2)	Affirmed
HODGES v. HODGES No. 8511DC234	Harnett (76CVD0030)	Affirmed
IN RE FORECLOSURE OF SMITH No. 8510SC878	Wake (84SP1246)	Affirmed
JONES v. BRIAN CENTER OF NURSING CARE No. 8510IC684	Ind. Comm. (I-4788)	Dismissed
LANIER v. WILSON TRUCKING CORP. No. 8510SC573	Wake (83CVS2182)	Reversed
STATE v. CONNELLY No. 8511SC469	Harnett (84CRS5974)	No Error
TIPPETT v. TIPPETT No. 8510DC665	Wake (82CVD8661)	Vacated
WILLIAMS v. WAITES No. 8528SC504	Buncombe (83CVS3296)	Reversed

STATE OF NORTH CAROLINA v. DONALD ABERNATHY FREEMAN

No. 8526SC626

(Filed 4 February 1986)

1. **Criminal Law § 34.6— false pretenses—question about prior use of false identification—no error**

The trial court did not err in a prosecution for false pretenses by allowing the prosecutor to question defendant about his use of false identification four or five years prior to the trial. The use of false identification is probative of a witness's tendency to be truthful. N.C.G.S. 8C-1, Rule 608(b).

2. **Criminal Law § 86.2— false pretenses—passing bad checks in the past—admissible**

The trial court did not err in a prosecution for false pretenses by admitting testimony that defendant had been involved in passing bad checks in the past where defendant maintained that he was mistaken about the legitimacy of the checks and the objected to testimony tended to prove his knowledge, intent, and lack of mistake. N.C.G.S. 8C-1, Rule 404(b).

3. **Criminal Law § 86.2— letters written while defendant in prison—testimony admissible**

The trial court did not err in a prosecution for false pretense by permitting a witness to refer to letters written by defendant while defendant was in jail because the testimony did not clearly show that defendant was imprisoned and there was no prejudicial effect in light of defendant's own testimony that he had prior convictions and that he had been involved with other bad check schemes.

4. **False Pretense § 2.1— check cashing scheme—instruction on collateral misrepresentation—no error**

The jury charge did not allow a conviction on a theory not charged in the indictment where defendant was indicted for false pretenses in that he cashed a check drawn on the account of Brown-Invesco Services, the jury charge was that the State must prove that defendant said that Brown-Invesco Services was a janitorial service company in operation or that he misrepresented himself as an employee of the C. W. Haben Company to the cashier of the department store which cashed the check, defendant had to present some identification in order to have the check accepted, and the collateral pretense of employment by C. W. Haben and Associates was a means to the ultimate misrepresentation that Brown-Invesco was a legitimate company and that checks drawn on its account were worthy of acceptance.

5. **False Pretense § 4; Constitutional Law § 78— false pretense offenses—thirty-year sentence—no error**

A thirty-year sentence for false pretenses was not cruel and unusual punishment in that defendant's offense was essentially passing worthless checks where defendant engaged in a misrepresentation beyond presenting worthless checks in that he set up or was involved with an organized check

cashing operation involving the false representation of defendant's employment status and the pretense that Brown-Invesco was a legitimate business. N.C.G.S. 14-100, N.C.G.S. 14-107.

6. **False Pretense § 2.1— check cashing scheme—indictment under N.C.G.S. 14-100—no error**

The trial court did not err by not quashing indictments for false pretenses under N.C.G.S. 14-100 where defendant's alleged conduct was governed by the more specific statutes of N.C.G.S. 14-106 and N.C.G.S. 14-107. As long as defendant makes some additional misrepresentation beyond the presentation of a worthless check, he may be prosecuted under N.C.G.S. 14-100.

APPEAL by defendant from *Burroughs, Judge*. Judgment entered 18 January 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 October 1985.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Ann Reed, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse,[1] *for defendant appellant.*

BECTON, Judge.

The defendant, Donald Abernathy Freeman, appeals five convictions (three counts of false pretenses under N.C. Gen. Stat. Sec. 14-100 (1981) and two counts of conspiracy to commit false pretenses) and the sentences imposed, totalling thirty years.

I

The prosecution presented its case primarily through Harold Brown, defendant's co-conspirator, who testified that Brown and defendant agreed to set up a check-cashing scheme that worked as follows: At the direction of defendant Freeman, Brown went to a bank and opened a business checking account in the name of Brown-Invesco Services, a sham janitorial service company with

1. We note that defendant, purporting to act pro se, has filed numerous supplemental motions, briefs and memoranda prompted by his dissatisfaction with his representation before this Court by the Public Defender. The Public Defender has not been dismissed previously, and we decline to do so now. We also deny defendant's motions. However, because of defendant's litigiousness, we have considered the arguments he presents in his several briefs, and we find them to be without merit.

no employees. Bank officials testified that money was passed from Brown-Invesco to Queen City Janitorial Service. Brown also gave Freeman a sample signature which Freeman used to obtain a signature stamp. Freeman would type checks, use a check-writing machine to fill in dollar amounts, and use the signature stamp to put Brown's signature on the checks. Brown and Freeman also rented a post office box and two motel rooms, one of which was used for business.

Various witnesses presented by the prosecution testified that defendant gave them checks with which to purchase goods and told them to return the excess money to him. They maintained that the defendant said the checks were legal. Two State witnesses testified that they were cashiers at two different Richway stores and that they each cashed checks for a black male using the same driver's license. One of these witnesses had written on the back of the check "Work I.D., C.W. Haben & Associates." Both checks were returned to the stores unpaid. Maurice Clifton testified that defendant gave him a check drawn on Queen City Janitorial Service and that Clifton cashed the check and gave defendant some of the money.

Defendant's witnesses testified that Brown used the signature stamp and gave them checks, but defendant did not. Defendant testified that although he knew how to run a check-writing operation, he was not involved in Brown's scheme. He denied accompanying any of the witnesses to the stores when they allegedly cashed checks for him, but he admitted receiving two checks, which he thought were legitimate, and cashing them at Richway stores.

The defendant contends the trial court committed the following reversible errors: (1) allowing the prosecutor to cross-examine the defendant concerning a specific instance of conduct not probative of truthfulness; (2) admitting into evidence irrelevant and prejudicial testimony about defendant's prior acts; (3) allowing a testimonial reference to letters defendant wrote while in jail; (4) charging the jury on false pretenses in connection with defendant's use of an employment card when this theory was not alleged in the indictment; (5) imposing a thirty-year sentence for false pretenses in violation of the prohibition against cruel and unusual punishment; and (6) denying defendant's motion to quash the false

pretenses indictments which charged general offenses when the legislature had enacted more specific statutes governing defendant's alleged conduct. After careful review of each assignment of error, we hold that the trial court committed no errors. The convictions and sentence are upheld.

II

[1] Defendant's first assignment of error relates to the line of cross-examination by the prosecutor, allowed over objection, questioning defendant about his use of false identification four or five years prior to the trial in this case. Defendant's argument rests on the application of Rule 608(b), N.C. Rules Evid., to the facts in this case. Rule 608(b), identical to its federal counterpart, prohibits the use of extrinsic evidence to prove specific instances of conduct, but it grants the trial court discretion to allow inquiry into specific instances of conduct, if they are probative of the truthfulness of the witness, in order to prove the witness' character for truthfulness or untruthfulness. Defendant cites federal cases to show that certain acts are not probative of truthfulness or untruthfulness. *See, e.g., United States v. Hill*, 550 F. Supp. 983, 989-90 (E.D. Pa. 1982) (prior acts of disorderliness, trespass, and false imprisonment), *aff'd*, 716 F. 2d 893 (3rd Cir. 1983), *cert. denied*, 464 U.S. 1039, 79 L.Ed. 2d 165, 104 S.Ct. 699 (1984); *United States v. Hastings*, 577 F. 2d 38, 40-41 (8th Cir. 1978) (armed robbery); *United States v. Bynum*, 566 F. 2d 914, 923 (5th Cir.) (holding foster children against their will to work for witness), *cert. denied*, 439 U.S. 840, 58 L.Ed. 2d 138, 99 S.Ct. 129, 130 (1978).

Although we agree that many prior specific acts, while criminal, are not necessarily probative of truthfulness, we believe the prior use of false identification is probative of a witness' tendency to be truthful. There is ample support for this in federal decisions under Rule 608(b). *See, e.g., United States v. Mansaw*, 714 F. 2d 785, 789 (8th Cir.) (use of false names), *cert. denied*, 464 U.S. 986, 78 L.Ed. 2d 366, 104 S.Ct. 434 (1983); *United States v. Reid*, 634 F. 2d 469, 473-74 (9th Cir. 1980) (false statements eight years prior to trial regarding name, occupation, and name of business), *cert. denied*, 454 U.S. 829, 70 L.Ed. 2d 105, 102 S.Ct. 123 (1981); *Lyda v. United States*, 321 F. 2d 788, 793 (9th Cir. 1963) (use of false names).

III

[2] Defendant's second assignment of error is that the testimony of certain witnesses, to the effect that defendant had been involved with passing bad checks in the past, should have been excluded as irrelevant and prejudicial. Defendant acknowledges in his brief that the testimony would be admissible if it tended to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident." Rule 404(b), N.C. Rules Evid. Defendant maintained in his own defense at trial that he was mistaken about the legitimacy of the checks and had no knowledge that the janitorial service was a sham. We believe the testimony objected to by defendant tended to prove his knowledge, intent, and lack of mistake as to whether the checks were good. If defendant had been involved with schemes of this type before, his assertions of ignorance and mistake hold less weight. *See United States v. Sparks*, 560 F. 2d 1173, 1175 (4th Cir. 1977) (Evidence that defendant previously passed worthless checks to same airline was probative of intent and knowledge under Rule 404(b).); *see also United States v. DeLoach*, 654 F. 2d 763, 769 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 933, 67 L.Ed. 2d 366, 101 S.Ct. 1395 (1981).

IV

[3] Defendant asserts that the trial court erred in permitting a witness to refer to letters written by defendant while defendant was in jail because it tended to prejudice defendant in the eyes of the jury. We note that, although the testimony indicates that the witness (the recipient of the letters) was in jail, it does not clearly show that *defendant* was imprisoned. In any event, we conclude that there was no prejudicial effect from these references in light of defendant's own testimony that he had prior convictions and that he had been involved with other bad check schemes. The trial court did not abuse its discretion.

V

[4] Defendant's fourth argument is that the jury charge improperly allowed a conviction on a theory not charged in the indictment. The 9 July 1984 indictment for false pretenses charged, in relevant part:

> The property was obtained by means of Donald Abernathy [Freeman] who represented himself to be an employee of Brown-Invesco Service, presenting to Federated Department Stores, Inc., a corporation doing business as Richway for payment for goods and for cashing check number 320 drawn to Donald Abernathy [Freeman], on the account of Brown-Invesco Service, which appeared to be a legitimate business, when in fact, Donald Abernathy knew at the time he presented the check that Brown-Invesco Service was not a legitimate business, but rather had been created by Harold Brown and was existing for the purpose of inducing merchants to cash checks drawn on the account of Brown-Invesco Service which were, in fact, worthless, although the checks appeared to be checks from a legitimate business, presented by persons who appeared to be employees of the business.

The jury charge on this incident was, in part, as follows:

> So I charge in order for the State to prove beyond a reasonable doubt that the defendant is guilty of false pretense, the State must prove five things beyond a reasonable doubt; First, that the defendant said that Brown-Invesco Services was a janitorial service in operation, or that he represented himself to be an employee of C.W. Haben Company to the cashier of Richway Department store.
>
> * * *
>
> So I charge that, if you find from the evidence beyond a reasonable doubt that on or about April 20, 1984 Mr. Freeman, acting either by himself or acting together with Harold Brown, presented a check on Brown-Invesco Services, knowing it was not a real business, or that he presented worker I.D. of C.W. Haben to Ms. Cole, and this representation was false in that Brown-Invesco was not an operating business, or he did not work for C.W. Haben, and that this representation was calculated and intended to deceive, and that Ms. Cole and Richway were, in fact, deceived by it, and that Mr. Freeman thereby obtained money or merchandise, it would be your duty to return a verdict of guilty of obtaining property by false pretense.

Defendant argues that because the second theory, that the false representation was the use of an identification card with "C.W.

Haben & Associates" on it, was not charged in the indictment, it was improper to submit it to the jury. We disagree.

In *State v. Linker*, 309 N.C. 612, 308 S.E. 2d 309 (1983), the defendant had used the bank account of a man named Barry W. Linker to obtain money, but he did so by using his own driver's license with his true name on it, Barry L. Linker. He explained the discrepancy to the bank secretary as an error on the bank account (not as an error on his license). He never represented himself as anyone but Barry L. Linker. The indictments, however, charged defendant with violations under G.S. Sec. 14-100(a) by "representing himself as Barry W. Linker." The Supreme Court said:

> The gist of obtaining property by false pretense is the false representation of a subsisting fact intended to and which does deceive one from whom property is obtained. . . . The state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. . . . If the state's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state's proof varies fatally from the indictments. . . . In that situation, a defendant's motion to dismiss should be allowed with leave to the state to secure another indictment, if so advised. . . . This rule protects criminal defendants from vague and nonspecific charges and provides them notice so that if they have a defense to the charge as laid, they may properly and adequately prepare it without facing at trial a charge different from that alleged in the indictment.
>
> * * *
>
> The Court of Appeals, in affirming defendant's conviction, concluded that the evidence supported "the permissible inference that defendant implicitly represented himself to be Barry W. Linker, when in fact he was not . . . ." We cannot agree with that conclusion in light of the state's own evidence. Defendant positively identified himself with his driver's license to each bank official. He neither told anyone nor did anything to imply that he was Barry W. Linker. Given defendant's constant, positive and verifiable identification of himself as Barry L. Linker, the evidence simply fails

> to support an inference that he impliedly misrepresented himself as alleged in the indictment.

309 N.C. at 614-16, 308 S.E. 2d at 310-11 (citations and footnote omitted). The Court mentioned in a footnote that:

> The state's evidence might arguably allow an inference that defendant misrepresented his account number or gave a wrong account number to Galloway or that he misrepresented to both Galloway and Linda Morgan that he had a Wachovia account when he did not. Neither indictment alleges either type of misrepresentation however.

Id. at 615 n. 2, 308 S.E. 2d at 311.

Applying the rule of *Linker* to the case at bar, the jury charge, taken as a whole, was proper. It allowed a conviction only on the theory that defendant misrepresented Brown-Invesco as a legitimate business. The defendant relies on the disjunctive language in the jury charge to show that the trial court allowed the jury to convict defendant even if they believed the only fact he misrepresented was his employment at C.W. Haben & Associates. But this ignores the undisputed fact that the check was drawn on the account of the Brown-Invesco Company. Defendant had to present some identification in order to have the Brown-Invesco check accepted by the Richway store cashier. It was through this collateral pretense (that he was still an employee of C.W. Haben & Associates) that defendant was able to accomplish the ultimate misrepresentation—that Brown-Invesco was a legitimate company and checks drawn on Brown-Invesco were worthy of acceptance in the stream of commerce. In other words, if the defendant either "said that Brown-Invesco Services was a janitorial service in operation" or implicitly represented that it was, by the C.W. Haben employee ruse, the result was the same: the victims were duped into believing that Brown-Invesco was a business in operation in the community.

There is no question that the indictment charged all of the elements of false pretenses under N.C. Gen. Stat. Sec. 14-100 (1981). The jury charge did not vary from these elements; it simply applied the detailed evidence adduced at trial to the elements charged in the indictment. The trial court is not bound in charging the jury by the description of the crime exactly as it appears

in the indictment. *See State v. Gray*, 292 N.C. 270, 292-93, 233 S.E. 2d 905, 919-20 (1977). The defendant had adequate notice of the charges against him, and the jury was not instructed on elements of the crime which diverged from those in the indictment. In contrast to *Linker*, there was ample evidence in the case at bar that the defendant made the misrepresentation as alleged.

The other cases cited by defendant are also distinguishable. They involve jury charges allowing convictions on theories of the crime based on elements entirely different from those alleged in the indictments. *See, e.g., State v. Brown*, 312 N.C. 237, 249, 321 S.E. 2d 856, 863 (1984) (indictment alleged kidnapping to facilitate felony; jury charge improperly allowed conviction on theory that kidnapping was to terrorize victim).

VI

[5] Defendant's fifth assignment of error is that the imposition of a thirty-year sentence for false pretenses constitutes cruel and unusual punishment because it is disproportionately long when compared with the sentence he would have received for the similar misdemeanor offense of passing worthless checks. *Compare* G.S. Sec. 14-100 (obtaining property by false pretenses) *with* N.C. Gen. Stat. Sec. 14-107 (1985 Cum. Supp.) (worthless checks). Defendant's contention is based on the notion that essentially all he did in this case was pass worthless checks.

It is settled that the State may prosecute under G.S. Sec. 14-100 rather than G.S. Sec. 14-107 if there is any additional misrepresentation beyond the presentation of a worthless check, *State v. Hopkins*, 70 N.C. App. 530, 320 S.E. 2d 409 (1984), even though G.S. Sec. 14-107 more specifically fits the alleged transaction. *State v. Freeman*, 308 N.C. 502, 511-12, 302 S.E. 2d 779, 784-85 (1983). In *Hopkins*, the additional misrepresentation supporting the prosecution under G.S. Sec. 14-100 was the defendant's "affirmative and false representation regarding his employment status." 70 N.C. App. at 533, 320 S.E. 2d at 411. Defendant in *Hopkins* had used an identification card from his former business which had since dissolved. This Court found that he had "perpetuated and [taken] advantage of the appearance of legitimacy surrounding" his former business employer. *Id.* In *Freeman*, the defendant had aided and abetted in misrepresenting to the check-casher, a supermarket, that his cohort was an

employee of a legitimate business. The business "had in fact been set up by the defendant; and . . . the business existed for the sole purpose of inducing merchants to cash worthless checks." 308 N.C. at 511, 302 S.E. 2d at 784.

> A defendant may obtain money or property by falsely representing his own identity (which defendant's cohorts effectively did as purported employees of Budget Merchandise and Financing Company) or he may do so by creating the identity of a "business" calculated to engender confidence in the inherent worth of the check.

Id. at 512, 302 S.E. 2d at 785.

The evidence in the case sub judice demonstrates that the defendant did engage in misrepresentation beyond presenting worthless checks. The evidence showed that he set up or was involved with an organized check-cashing operation involving the false representation of his employment status and the pretense that Brown-Invesco was a legitimate business. The offense of passing a worthless check under G.S. Sec. 14-107 may be accomplished by one who has an ordinary checking account, either personal or drawn on a legitimate business, and draws out money knowing that the funds in the account are insufficient to pay the check upon presentation. This would not involve a misrepresentation beyond the value of the check. The legislature acted within its authority in setting different punishments for offenses under G.S. Secs. 14-100 and 14-107. *See generally Solem v. Helm*, 463 U.S. 277, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983).

VII

[6] Defendant's sixth and final contention is that the trial court should have quashed the false pretenses indictments because more specific statutes govern the defendant's conduct. Specifically, defendant argues that because the legislature enacted G.S. Secs. 14-106 and 14-107 after G.S. Sec. 14-100, and because conduct such as that alleged in the case at bar is more specifically governed by the former statutes than by G.S. Sec. 14-100, the State cannot circumvent legislative intent that this conduct be prosecuted under the more specific statutes. Defendant recognizes and we emphasize that this precise argument was rejected after being addressed in some detail by the Supreme Court in *Freeman*, 308

N.C. at 511-13, 302 S.E. 2d at 784-85, and by this Court in *Hopkins*, 70 N.C. App. at 532-33, 320 S.E. 2d at 411-12. We decline to reproduce the same analysis here. As long as defendant makes an "additional misrepresentation beyond the presentation of a worthless check," he may be prosecuted under G.S. Sec. 14-100. *Hopkins*, 70 N.C. App. at 533, 320 S.E. 2d at 411. In the case at bar, defendant's additional misrepresentation, beyond presenting worthless checks, involved the creation of a fictional business with a bank account.

For the reasons set forth above, we find

No error.

Judges WEBB and COZORT concur.

HORNETS NEST GIRL SCOUT COUNCIL, INC. v. THE CANNON FOUNDATION, INC.

No. 8519DC446

(Filed 4 February 1986)

Deeds § 12.2— executory language in description—conflict with granting, habendum and warranty clauses—description not controlling

The trial court erred by interpreting a 1951 deed from the Kannapolis Girl Scout Council to the Rowan-Cabarrus Girl Scout Council, plaintiff's predecessor in title, in a manner inconsistent with the granting, *habendum* and warranty clauses of the deed where the description contained delimiting language creating an executory interest in The Cannon Foundation and the granting, *habendum* and warranty clauses conveyed a fee simple. N.C.G.S. 55A-45.

APPEAL by plaintiff from *Horton, Judge*. Judgment entered 6 December 1984 in District Court, CABARRUS County. Heard in the Court of Appeals 6 November 1985.

Plaintiff, Hornets Nest Girl Scout Council, Inc. (Hornets Nest), instituted a declaratory judgment action on 15 August 1983 seeking an order and judgment declaring it to be the fee simple owner of a 22½ acre tract of land located in Cabarrus County.

The essential facts are:

Hornets Nest is a girl scout organization operating as a nonprofit corporation based in Charlotte. Hornets Nest serves and controls the scouting activities for eight North Carolina counties, including Cabarrus County. The Cannon Foundation, Inc. (Cannon), is also a nonprofit corporation funded to provide grants for general public welfare purposes including charitable, scientific, religious, literary and educational purposes. The controversy between the parties centers around a 22½ acre tract of land located in Cabarrus County, six miles east of Kannapolis, known today as "Camp Julia."

In 1943 the Kannapolis Girl Scout Association decided to purchase this land for a girl scout camping facility. At that time the girl scout association itself did not have the means to acquire the property. The association enlisted the help of the Kannapolis community in raising money to purchase the property. In 1943 the property was purchased from J. A. Brown and wife for the sum of $6,500.00. A fee simple deed, made to "Kannapolis Girl Scout Association, Incorporated, of the County of Cabarrus," was executed on 11 November 1943 and recorded on 18 November 1943.

In 1951 Kannapolis Girl Scout Association, Inc. conveyed the property to the Rowan-Cabarrus Girl Scout Council, Incorporated. The deed was executed 30 May 1951 and recorded 9 June 1954. The plaintiff's evidence showed that in 1954, when this deed was recorded, there were no photostatic copying machines in Cabarrus County Register of Deeds office. All deeds filed for recordation were typed by Register of Deeds personnel onto a printed form. The original deed was returned to the owner. Using the printed form, the 1951 deed from Kannapolis Girl Scout Association (Kannapolis) to Rowan-Cabarrus Girl Scout Council (Rowan-Cabarrus) was recorded in deed book 255. Every deed in deed book 255 was typed on the printed form. The original deed from Kannapolis to Rowan-Cabarrus was lost. Accordingly, a certified copy of the deed as recorded in the Register of Deeds office was admitted and is part of the record on appeal.

The relevant parts of this deed are set out below. The words which apparently were typed on the form have been italicized by us.

> WITNESSETH, That the said part*y* of the first part, for and in consideration of the sum of—*Tne [sic] dollars ($10.00)*

> *and other valuable considerations*—DOLLARS, to the said party of the first part in hand paid, the receipt whereof is hereby acknowledged, has bargained, sold and conveyed, and by these presents does bargain, sell and convey unto the said party of the second part, *its successors* heirs and assigns the following described real estate . . . :

Following the granting clause in the deed was a description of the property, typed in the space provided on the form. Immediately following the description was the following typewritten provisions:

> If the grantee herein be dissolved or cease to function for the period of one year, the title to the property herein conveyed shall revert to the Girl Scout organization in the community which owned it as of March 1, 1951. If such Girl Scouts shall have ceased to function, the said property shall go to Cannon Mills Foundation, Inc., to be used for the benefit of the Community.

The *habendum* clause which follows provides (the typewritten provisions are italicized):

> TO HAVE AND TO HOLD all and singular the above granted premises, with the appurtenances, unto the said party of the second part, *its successors* heirs and assigns forever. And the said *Kannapolis Girl Scout Association, Incorporated* party of the first part, for *its successors and assigns* ~~heirs~~, ~~executors~~ and ~~administrators~~, does hereby covenant with the said party of the second part, *its successors* heirs and assigns, that *it is* seized of said premises in fee simple; that the said premises are free from all encumbrances; that *it has* good right and lawful authority to sell the same; that *it* will warrant and defend the said premises unto the said party of the second part, *its successors* ~~heirs~~ and assigns, against the lawful claims of all persons whatsoever.

On 28 May 1954 the corporate charter of the Kannapolis Girl Scout Association was suspended and never reinstated. On 4 May 1959 Rowan-Cabarrus Girl Scout Council, Inc. changed its name to Tarheelia Girl Scout Council, Inc. (Tarheelia).

In June, 1967 Tarheelia by general warranty deed conveyed the property to "Hornets Nest Girl Scout Council, Inc." The deed was recorded 26 June 1967 and contained the following reference:

> For reference see deed from Kannapolis Girl Scout Association, Incorporated, to The Rowan-Cabarrus Girl Scout Council, Incorporated, dated May 30, 1951, and recorded in Deed Book 255, page 32, in the Cabarrus County Registry.

In all other respects, the deed purported to convey fee simple title to Hornets Nest. On 30 June 1967 the articles of dissolution of the Tarheelia Girl Scout Council, Inc. were filed with the Secretary of State.

Hornets Nest filed its complaint for declaratory action on 15 August 1983 alleging that it desired to sell the property and convey good and marketable title to any prospective purchaser. The Cannon Foundation filed answer contending that the language in the 1951 deed from Kannapolis to Rowan-Cabarrus created a reversionary interest in Cannon to hold the property in trust for the community of Kannapolis. Additionally, Cannon claimed that Hornets Nest held the property on either a constructive trust or resulting trust and alternatively, that the North Carolina Non-Profit Corporation Act required Tarheelia to reconvey the property to Cannon Foundation upon its dissolution 30 June 1967. On 1 November 1983 Hornets Nest ceased using "Camp Julia" for scouting activities. It has, however, continued to maintain the property.

Although the record is unclear, it appears that a jury was impanelled and then dismissed by the trial judge following the presentation of the evidence. Both sides then made motions for declaratory judgment in their favor as a matter of law. The trial judge heard arguments of counsel and orally announced his judgment in favor of Cannon. At the court's direction the written judgment was prepared by counsel for Cannon. From the judgment ordering title to "Camp Julia" vested in Cannon for the benefit of the community of Kannapolis, plaintiff appeals.

Haynes, Baucom, Chandler, Claytor & Benton, by William M. Claytor and Rex C. Morgan for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Leon L. Rice, Jr., Charles F. Vance, Jr., Elizabeth L. Quick, and M. Ann Anderson, and Brice J. Willeford for defendant-appellee.

EAGLES, Judge.

Plaintiff assigns as error the trial court's interpretation of the 30 May 1951 deed from Kannapolis Girl Scout Association to Rowan-Cabarrus Girl Scout Council in a manner inconsistent with the granting, *habendum* and warranty clauses of the deed. We agree that the trial court's interpretation was erroneous.

At the outset we note two points not addressed by the trial judge in his order but necessary to a proper understanding of the facts before us. First, though there was testimony which could support such a finding, the trial court did not find that the deed from Kannapolis to Rowan-Cabarrus was a deed of gift. The deed recites "Tne [sic] dollars ($10.00) and other valuable considerations DOLLARS . . . in hand paid, the receipt hereof is hereby acknowledged." Where a deed recites the payment and receipt of a consideration it is presumed to be correct and is prima facie evidence of consideration. *Pelaez v. Pelaez*, 16 N.C. App. 604, 192 S.E. 2d 651 (1972), *cert. denied*, 282 N.C. 582, 193 S.E. 2d 745 (1973). Where there is no finding that the transfer was a gift and there is a recitation of consideration paid and received which is presumed correct, the recordation of the 1951 deed more than two years after its execution does not cause the deed to become void *ab initio*. Second, we note that the delimiting language contained in the 1951 deed from Kannapolis to Rowan-Cabarrus does not create a reversionary interest in The Cannon Foundation but an executory interest. A reversionary interest, whether a "possibility of reverter" or a "right of reentry," is a future interest retained by the *grantor* or his heirs and is considered vested for purposes of the Rule Against Perpetuities. Hetrick, Webster's Real Estate Law in North Carolina Sections 35, 37 (rev. ed. 1981); *Charlotte Park and Recreation Commission v. Barringer*, 242 N.C. 311, 88 S.E. 2d 114 (1955), *cert. denied*, 350 U.S. 983, 100 L.Ed. 851, 76 S.Ct. 469 (1956). An executory interest is a future interest conveyed to a *third person*, not the grantor, devisor or creator of

the interest or their heirs. Hetrick, *supra* at Section 40. An executory interest is subject to the Rule Against Perpetuities and must therefore vest in possession within the time period of the Rule, lives in being plus 21 years. *Id.* at Section 41. The clause as drafted in the 1951 deed would appear to violate the Rule. However, the Rule does not apply to charitable trusts. *Reynolds Foundation v. Trustees of Wake Forest College*, 227 N.C. 500, 42 S.E. 2d 910 (1947). The executory limitation over to The Cannon Foundation to hold the property for the benefit of the community would not be subject to the Rule.

The trial court by judgment entered 6 December 1984 made the following pertinent findings of fact:

> 2. The original of said deed was not before the Court, but only a certified copy of the copy on file in the Register of Deeds office. The recorded copy of the deed on page 32 of Volume 255 is a printed deed form which was used for the registration of all deeds recorded in Volume 255 in the Cabarrus County Register of Deeds office. The granting clause and the habendum clause are parts of the printed form of the deed, and the names of the parties, the description, and other provisions are typed into the printed form. The limiting language quoted above appears in type and comprises four lines in the center of the first page of the copy of the deed, and as a practical matter there was not sufficient space or room for the typed limiting language to have been inserted immediately before, in or immediately after the granting clause or the habendum clause as these clauses appear in the printed form deed.
>
> 3. Based on the uncontroverted testimony of James O. Bonds, Register of Deeds of Cabarrus County, the Court finds that none of the deeds presented for recordation in 1951 [sic] was photostated or photocopied but each was adapted by the Register of Deeds by typing on a standard pre-printed form names, dates, descriptions and other provisions not already parts of the form and that the granting and habendum clauses of the deed form would not have been [sic] permitted the insertion of four additional typewritten lines.

In decreeing that title to "Camp Julia" is vested in The Cannon Foundation, Inc. for the benefit of the community of Kan-

napolis, the trial court concluded, in part, as a matter of law the following:

> 4. The cases of *ARTIS v. ARTIS*, 228 N.C. 754, 47 S.E. 2d 228 (1948); *OXENDINE v. LEWIS*, 252 N.C. 669, 114 S.E. 2d 706 (1960); and *WHETSELL v. JERNIGAN*, 291 N.C. 128, 229 S.E. 2d 183 (1976) are distinguishable on their facts and do not apply in the instant case.
>
> 5. The original deed from Kannapolis Girl Scout Association, Inc. to Rowan-Cabarrus Girl Scout Council, Incorporated, dated May 30, 1951, has never been located and was not produced at trial. In the *ARTIS*, *OXENDINE* and *WHETSELL* cases, the court could determine the location in the deed of the limiting language. In the instant case, a certified copy of the deed that was recorded in the Register of Deeds office, which was typed by the Register of Deeds on a pre-printed form, was introduced at trial. The Court, not having the benefit of the original deed to determine the position of the limiting language, construes the intent of the grantor, Kannapolis Girl Scout Association, Inc., from the four corners of the deed, and finds the intent clearly stated, that is:
>
> [Restatement of limiting language contained in 1951 deed]
>
> 6. When Tarheelia Girl Scout Council, Inc. conveyed the property to Hornets Nest Girl Scout Council, Inc., reference was made in that deed to the earlier deed between Kannapolis Girl Scout Association, Inc. and Rowan-Cabarrus Girl Scout Council, Inc. dated May 30, 1951; and because of such reference being contained in said deed, and under the provisions of North Carolina General Statute section 47-18, known as the "Conner Act," the plaintiff, Hornets Nest Girl Scout Council, Inc., was put on notice of all restrictions contained in prior deeds in the chain of title.
>
> * * *
>
> 9. When the typed and pre-printed parts of a deed are inconsistent with each other, the typed language should prevail over the pre-printed language in construing the intent of the grantor. Thus, construing the 1951 recorded deed from its four corners, the typed-in limitation will prevail in deter-

mining the intent of the grantor and the nature of the estate conveyed by the grantor to the grantee.

From a review of the record and North Carolina case law we find that *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948), *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706 (1960) and *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976) control in the instant case. Therefore, the trial court's conclusion of law number 4 is erroneous.

In *Artis* the granting clause of the deed conveyed a fee simple. The *habendum* and warranty clauses were in accord. However, following the property description there was a clause which purported to give a life estate and not a fee. Our Supreme Court held that the deed conveyed a fee. In so holding the following rule was stated: "[W]here the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and *habendum*, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected." *Artis, supra* at 761, 47 S.E. 2d at 232. That is the settled law of this jurisdiction, notwithstanding recurring criticism. The rule stated in *Artis* has been applied in numerous subsequent decisions by our Supreme Court. *Krites v. Plott*, 222 N.C. 679, 24 S.E. 2d 531 (1943) and *Jefferson v. Jefferson*, 219 N.C. 333, 13 S.E. 2d 745 (1941), cited by appellee, have been overruled, to the extent that they conflict with the *Artis* rule. *See Jeffries v. Parker*, 236 N.C. 756, 73 S.E. 2d 783 (1953).

The Rule is not a popular one. It has been described as "an inflexible rule of property which arbitrarily prefers certain formal parts of the deed over the plainly expressed intent of the grantor." *Robinson v. King*, 68 N.C. App. 86, 94, 314 S.E. 2d 768, 773, *cert. denied*, 311 N.C. 762, 321 S.E. 2d 144 (1984). Though criticized as a "harsh technical rule" and a "bad rule in that it frustrates [the] grantor's intent," *Whetsell, supra* at 134, 229 S.E. 2d at 187 (Copeland, J., dissenting), it nevertheless continues to be given effect. In the instant case, while there may be little doubt what the grantor, Kannapolis Girl Scout Association, intended when it placed the reverter and executory clauses in the deed, we are bound by the Rule. *Whetsell, supra.*

The fact that the original deed was lost and not available to the trial court is of no consequence. The trial court, like the title

examining bar, is bound by the certified copy of deed contained in the public records of the Registry for Cabarrus County. This is to prevent uncertainty and confusion in the examination of record titles. As explained by plaintiff's witness James O. Bonds, Register of Deeds for Cabarrus County, all deeds filed of record in 1954 were prepared in the exact same manner, using the same form, because no photostatic copying devices were available at that time.

In *Oxendine v. Lewis, supra,* our Supreme Court applied the *Artis* rule in construing a form printed deed filled in with typewritten language. In *Oxendine,* as in the instant case, the delimiting clause was typed in on the form immediately following the property description. The granting clause conveyed fee simple title. The *habendum* and warranty clauses were in accord. The fact that the description was inserted in a form deed was "without controlling significance." *Id.* at 674, 114 S.E. 2d at 710. The court held that:

> The words in the deed in the instant case, apparently written in with a typewriter, appearing before and after the description of the land conveyed in fee simple and which tend to delimit the fee simple estate conveyed are not in the granting or *habendum* clause, and under a long line of our decisions as above set forth will be deemed surplusage without force or effect.

Id. at 674, 114 S.E. 2d at 710-11.

Here the granting clause conveyed a fee simple. The *habendum* and warranty clauses were in accord. The limiting clause appeared immediately following the typewritten description and was not made a part of the granting, *habendum* or warranty clauses by reference. "Consequently, the incompatible recital must yield to the more effective operative clauses, and must be rejected as repugnant." *Kennedy v. Kennedy,* 236 N.C. 419, 422, 72 S.E. 2d 869, 870 (1952). Hence, the clause inserted after the description which would otherwise tend to delimit the estate granted to Rowan-Cabarrus is deemed mere surplusage without force or effect. *Artis, supra; Oxendine, supra; Whetsell, supra.* As a result, Hornets Nest Girl Scout Council took a fee simple estate under its deed from Tarheelia Girl Scout Council, free and clear of the executory limitation over to Cannon Mills Foundation

found in the 1951 deed from Kannapolis Girl Scout Association to the Rowan-Cabarrus Girl Scout Council (Tarheelia).

Plaintiff also assigns error to the trial court's finding that upon dissolution in 1967, the Tarheelia Girl Scout Council was under a legal obligation by the terms of the Non-Profit Corporation Act to return the 22½ acre tract of land pursuant to the terms of the 1951 deed.

G.S. 55A-45 governs the distribution of assets upon the dissolution of a nonprofit corporation and provides in subsection (2) that:

> Assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred or conveyed in accordance with such requirements;

However, the clause in the 1951 deed limiting the estate granted and providing for an executory limitation over to The Cannon Foundation, Inc. has been deemed mere surplusage and without force or effect. Therefore, upon dissolution 30 June 1967, Tarheelia was under no obligation to convey "Camp Julia" to The Cannon Foundation for use by the community of Kannapolis. As a result, the trial court's findings and conclusion of law to that effect are erroneous.

For the foregoing reasons the judgment of the trial court is reversed and the cause remanded for entry of a judgment consistent with this opinion.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. EMMETT W. HOSEY

No. 8517SC506

(Filed 4 February 1986)

1. Rape and Allied Offenses § 5— second degree rape—sufficient evidence of force and lack of consent

The State produced substantial evidence that defendant had vaginal intercourse with his stepdaughter by force and against her will where it tended to

show that the stepdaughter was only 13 years old; defendant once told her that he had been incarcerated in a penitentiary for shooting a man and the stepdaughter was afraid of defendant; defendant pushed his stepdaughter down onto a bed, pulled her legs apart, held them apart with his knees, held her hands, and began sexual intercourse with her; the stepdaughter did not consent to defendant's actions and screamed and yelled at defendant to stop; and defendant left the room when the stepdaughter was able to lift her leg from under defendant and to kick him in the chest and stomach. N.C.G.S. 14-27.3(a)(1).

2. **Criminal Law § 102.5— improper questions by prosecutor—curative instructions—absence of prejudice**

Defendant was not prejudiced by the prosecutor's questions to defendant's wife as to whether she had attempted to gather evidence that defendant was selling dope and running with women and whether she wrote in her diary that defendant was being untrue to her where the trial court sustained defendant's objections to the questions and gave the jury curative instructions.

3. **Criminal Law § 88.1— exclusion of leading questions on cross-examination**

The trial court did not abuse its discretion in refusing to permit leading questions by defendant during cross-examination of defendant's wife.

4. **Criminal Law § 88.2— exclusion of irrelevant questions on cross-examination**

Questions which defendant asked his wife on cross-examination concerning the number of times she had talked with the district attorney's office about the case were irrelevant and properly excluded by the court.

5. **Rape and Allied Offenses § 6— absence of consent—recapitulation of evidence**

The evidence in a prosecution for rape and incest supported the trial court's instruction that evidence of the State tended to show that the victim, defendant's stepdaughter, allowed defendant to do what he did because she was afraid of him and not because she was willing to have sexual intercourse with him.

APPEAL by defendant from *Long, Judge*. Judgment entered 8 December 1984 in Superior Court, SURRY County. Heard in the Court of Appeals 24 October 1985.

Defendant was charged in proper bills of indictment with one count of rape of his stepdaughter (84CRS4223) and one count of committing incest (84CRS4222). On 4 December 1984, defendant was tried on these indictments. At the close of all the evidence defendant moved the court to dismiss the charges of incest and second-degree rape. Specifically, defendant contended that the State failed to establish that the alleged sexual intercourse was accomplished by force and against the will of Rita Willard (Rita). The court denied defendant's motion. The jury returned verdicts

upon the indictments of defendant as follows: guilty of second-degree rape, G.S. 14-273; and guilty of incest, G.S. 14-178. The court imposed upon defendant the presumptive term of twelve (12) years in prison for the conviction of second-degree rape and the presumptive term of four and one-half (4½) years in prison for incest. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Cathy J. Rosenthal, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David W. Dorey, for defendant appellant.

JOHNSON, Judge.

[1] Defendant assigns error to the trial court's denial of his motion to dismiss the case upon the charge of rape. Defendant contends the State did not produce substantial evidence that he had vaginal intercourse with Rita by force and against her will. When a court considers a defendant's motion to dismiss, 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. *See State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980).

In the case *sub judice* the State's evidence consisting primarily of testimony by Rita when viewed in the light most favorable to the State tended to show the following. Defendant, Emmett Hosey, was married to Martha Hosey and is the stepfather to her three children including her daughter Rita Willard. Mrs. Hosey and her three children, including Rita, began living with defendant upon Mrs. Hosey's separation from her ex-husband Arthur Willard in 1976. Rita was approximately eight years of age at the time. On numerous occasions since Rita was about nine years old defendant would enter her bedroom at night and "feel of her." Rita testified that on these occasions she would roll over as if to awaken. On one of these occasions when defendant entered her bedroom and attempted to roll her over on her back, Rita screamed for her mother. Rita informed her mother of these incidents, but her mother never confronted defendant about the matter.

In 1981, when Mrs. Hosey was hospitalized for a serious heart condition she made arrangements for her children to live with their father Arthur Willard until she was released from the hospital. Arthur Willard was living in a trailer near the trailer in which defendant, Mrs. Hosey and her children were living before Mrs. Hosey was hospitalized. On or about 1 October 1981, Rita, then thirteen years old and temporarily living with her father Arthur Willard, was preparing for a visit with her mother in the hospital. However, the hot water heater in her father's trailer was not working properly, so Rita went to take a shower in defendant's nearby trailer. At the time, defendant was in Arthur Willard's trailer visiting. Shortly after Rita departed for defendant's trailer to take a shower defendant left Arthur Willard's trailer and returned to his trailer. Rita had just finished showering and was getting out of the shower when defendant entered the bathroom and ordered her to get up against the sink whereupon he started rubbing against her and "feeling" her. Defendant then ordered Rita to go into his bedroom and lay down on his bed. Rita complied with her stepfather's order, went into his bedroom and laid on the bed. Defendant followed her into the bedroom, disrobed, began making sexual advances to her, and repeatedly murmured "this is going to feel good." A noise startled defendant such that he raised up and ordered Rita to go into her bedroom, lay down on the bed, and for her not to come out. Rita went into her bedroom, but began drying off and getting into her underclothes. After investigating for the source of the noise defendant locked the door to the trailer, entered Rita's bedroom which did not have a door to it, pushed her down onto the bed, pulled her legs apart, held them apart with his knees, then held her hands and continued his sexual advances and began sexual intercourse with her. Rita testified that she started screaming and yelling "please, just stop" and that she was able to lift her leg from under defendant so that she could kick him in the chest and stomach. Defendant left the room but returned to tell Rita that if she told her mother he would beat her up or kill her. Defendant contends that the foregoing is not substantial evidence of defendant's vaginal intercourse with Rita accomplished by force and against her will. We disagree.

The essential elements for a conviction of second degree rape as proscribed by G.S. 14-27.3 is that the vaginal intercourse took

place "[b]y force and against the will of the other person." G.S. 14-27.3(a)(1).

The force necessary to constitute rape need not be actual physical force. *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1968). "Fear, fright, or coercion may take the place of force." *Id.* at 67, 165 S.E. 2d at 229 (citing *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946)). Rita testified that she was fearful of defendant. Mrs. Martha Hosey and Rita testified that defendant took them to a penitentiary whereupon he informed them that he had been incarcerated there for shooting a man. Testimony by Rita shows a lack of consent. When Rita was trapped alone in the bathroom with defendant, she was nude, dripping wet, and was at the mercy of an adult man whom she was fearful of. Defendant, as her stepfather, had been in a position of authority over her. In *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), the court noted that:

> [T]he absence of an explicit threat is not determinative in considering whether there was sufficient force in whatever form to overcome the will of the victim. It is enough if the totality of the circumstances gives rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual intercourse.

Id. at 409, 312 S.E. 2d at 476. Taking into consideration defendant's position of dominance and control over Rita we conclude that under the evidentiary circumstances the vaginal intercourse was against her will.

Rita testified that defendant not only pushed her onto the bed, but that he also accomplished his penetration of her through the use of force.

> Q. Now, Rita, you've also testified that he penetrated you there in the trailer on the day you testified about. How was he able to accomplish that with you laying there on the bed?
>
> A. He pulled my legs apart.
>
> Q. With his hands?
>
> A. Yes, and put his knees in-between it, and he held my arms.

We hold that considering thirteen-year-old Rita's fear of her stepfather along with the testimony set forth there was sufficient evidence for the jury to find that defendant used sufficient actual force to overcome her will, and any resistance she was capable of. There is no evidence of any consent by Rita to engage in vaginal intercourse with defendant.

[2] Next, defendant contends that the following questions posed by the State to Mrs. Hosey had such a prejudicial impact with the jury that he is entitled to a new trial.

> Q. [Mrs. Hosey] I'll ask you whether or not (sic) on another occasion you and Rita didn't go up to the Truck Stop to gather evidence on Emmitt, thinking he was selling dope or running with women.
>
> Objection.
>
> [Court] Objection sustained. Members of the jury. . . .
>
> A. I've never heard of this.
>
> [Court] Just a moment. Members of the jury, you are not to consider the implications of the question.

During redirect examination of Mrs. Hosey the prosecutor asked the following:

> Q. Mrs. Hosey, I'll ask you why you entered in your diary on August the 9th, 1981, that you thought Emmitt was being untrue to you and running with women. Did Arthur tell you then?
>
> A. Yes.
>
> Mr. Royster: OBJECTION.
>
> COURT: SUSTAINED. Members of the jury, you are not to consider the implications of the question.

A prosecutor may not place before the jury by argument, insinuating questions, or other means, matters not legally admissible in evidence. *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954). In the case *sub judice* the trial judge correctly recognized this possible prejudice to defendant and correctly sustained defendant's objection to the questions posed and issued curative instructions to the jury. As a result of defendant's objections and

the court's rulings on those objections we find nothing in the record to indicate the jury disregarded the court's timely instructions. Defendant's right to a fair trial was not prejudiced by questions posed by the State. This assignment of error is overruled.

[3] The next assignment of error brought forward by defendant's appeal is that his right to present a full defense was denied when the court sustained the State's objection to defendant's use of leading questions during cross-examination of Mrs. Hosey. We disagree.

The law of this State is that it is within the sound discretion of the trial judge to determine whether the use of leading questions will be permitted and absent an abuse of such discretion the ruling by the trial judge will not be disturbed on appeal. *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974). The State did not tender Martha Hosey as a hostile witness. However, testimony by Mrs. Hosey undermined testimony elicited by the State from her daughter, Rita Willard. Mrs. Hosey testified to the effect that Rita Willard, the prosecuting witness, was untruthful. Timely objections by the State to defendant's use of leading questions put the matter within the judge's discretion. "The rule prohibiting leading questions is not based on a technical distinction between direct examination or cross-examination, but on the alleged friendliness existing between counsel and his witness." *Greene* at 492, 206 S.E. 2d at 235. Through the use of leading questions a proponent could easily suggest the desired reply from the eager witness. We cannot say that the trial court abused its discretion by not allowing the use of leading questions by defendant during cross-examination of defendant's wife.

[4] Defendant further argues that his right to a fair trial was denied when the trial court sustained objections by the State to questions posed by defendant on cross-examination. The basis for the trial court sustaining the State's objection was that the questions were not relevant to the issues before the jury.

Defendant's right to cross-examine the State's witnesses is a necessary element of his right to fully defend himself against charges brought against him. *See State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). The scope of the cross-examination is limited to only those matters that are relevant to issues before

the jury. Rule 611(b), N.C. Rules Evid. The questions defendant sought to ask of Mrs. Hosey were as follows:

> Q. Let me ask you this Mrs. Hosey. Did I call you up and ask you to come down and talk with the District Attorney about this case?
>
> A. Yes, you did.
>
> Q. Give him the names of a lot of these folks that have been subpoenaed here in this very case today?
>
> A. I sure did.
>
> Mr. Bowman: OBJECTION, Your Honor. Trial strategy is not relevant.
>
> Court: SUSTAINED to the subject matter.
>
> Q. How many times have you been down there to the District Attorney's office and talked to them about this case?
>
> Mr. Bowman: OBJECTION.
>
> A. Twice.
>
> Court: Just a moment. I fail to see the relevance of that.
>
> Mr. Royster: Judge I think it's relevant to show the lady cooperated with the State.
>
> Court: Would you approach the bench?
>
> (Conference held at bench out of the hearing of the court reporter and members of the jury)
>
> Court: SUSTAINED.

Defendant was given an opportunity to explain to the court any relevance of the proposed line of questioning to the case. The court did not find defendant's arguments persuasive and in its discretion sustained the State's objections. We fail to see the relevancy to which defendant attaches to that line of questioning. The trial court did not abuse its discretion in sustaining the State's objection.

Defendant further contends that during another line of questioning of Mrs. Hosey the trial court abused its discretion by not

fully allowing defendant an opportunity to fully cross-examine her.

> Q. All right, now, how old was Rita when Emmitt brought this trailer down from Riner, Virginia?
>
> A. She would have been twelve.
>
> Q. Did you hear her testify earlier that she was assaulted when she was nine years old in that trailer by this defendant?
>
> A. Yes.
>
> Mr. Bowman: OBJECTION to comparison testimony.
>
> Court: Sustained.
>
> Q. She was twelve years old at that time.
>
> Mr. Bowman: OBJECTION.
>
> Court: SUSTAINED to the form of the question.
>
> Q. How old was Rita when you all lived in this trailer that Emmitt had brought down from Riner, Virginia, when you first moved into it?
>
> A. She was twelve when we first moved into it.

As it appears from the testimony despite the objection by the State to the initial question about Rita's testimony defendant was allowed to establish that Rita was twelve (12) years old when she moved into the trailer Emmett brought from Virginia. Defendant's right to a fair trial was not prejudiced by the trial judge's proper exercise of his discretion to keep the trial on the issues before the jury.

[5] Defendant's final Assignment of Error is that the trial court committed error in its charge to the jury. A trial court is prohibited from expressing an opinion upon the weight and credibility of the evidence during trial or during the course of its instructions to the jury. G.S. 15A-1232. Moreover, a trial court should state the facts to the jury and avoid drawing conclusions for members of the jury. *State v. Washington*, 57 N.C. App. 309, 291 S.E. 2d 270, *disc. rev. denied*, 306 N.C. 563, 294 S.E. 2d 228 (1982). It was incumbent upon defendant to contemporaneously ob-

ject to any misstatement by the court of his contentions. *See State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). "No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto. . . ." Rule 10(b)(2), N.C. Rules App. P. Although defendant failed to preserve any exception to the jury charge we review his assignment of error pursuant to Rule 2, N.C. Rules App. P. The portion of the jury instruction defendant excepts to is as follows:

> Other evidence of the State tends to show that Rita allowed the defendant to do what he did because she was afraid of him and not because she was willing to have sexual intercourse with him.

Rita testified that she was afraid of defendant who was her stepfather, that defendant once told her that he was once incarcerated in a penitentiary for shooting a man. The State's evidence further tended to show that Rita, thirteen years of age, was alone in a confined area with defendant who used physical force by pushing her down onto the bed, pulling her legs apart, holding them apart with his knees, and then holding her hands. After reviewing the Record on Appeal, as a whole, we find that the trial judge correctly instructed the jury. Defendant has received a trial free from prejudicial error.

No error.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DAVID FELTS

No. 8523SC254

(Filed 4 February 1986)

Public Officers § 12— removal of sheriff from office—authority to file action

Neither the Attorney General nor his designate was given specific authority to file an action under N.C.G.S. 128-16 *et seq.* for the removal from office of a sheriff or police officer, that authority being given to the district attorney or county attorney pursuant to N.C.G.S. 128-17.

State v. Felts

APPEAL by defendant from *Sitton, Judge*. Orders entered 12 October 1984, in Superior Court, WILKES County. Heard in the Court of Appeals 25 September 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General Charles H. Hobgood for the State.

McElwee, McElwee, Cannon & Warden by William H. McElwee III and William C. Warden, Jr., for defendant appellant.

COZORT, Judge.

This appeal presents an issue of first impression for our consideration: Whether the Attorney General or his designate in the Special Prosecution Division may file a petition pursuant to G.S. 128-16, *et seq.*, for the removal from office of a sheriff or police officer? Holding that under G.S. 128-16, *et seq.*, the Attorney General or his designate in the Special Prosecution Division has no such independent authority, we vacate the order removing defendant from office as the Chief of Police of North Wilkesboro and remand for dismissal of the Petition.

A Petition to remove North Wilkesboro Police Chief David Felts was filed on 27 July 1984 by Charles H. Hobgood, Assistant Attorney General under then Attorney General Rufus L. Edmisten, reflecting the State of North Carolina as the petitioner and Chief Felts as the defendant. The Petition was signed by Hobgood as "Special Prosecutor."

The Petition recites that it is being brought "pursuant to Article 2 Chapter 128 of the General Statutes of North Carolina" to remove defendant from the office of Chief of Police of North Wilkesboro. The Petition further states:

> 2. That the Honorable Michael A. Ashburn, District Attorney for the Twenty-Third Judicial District, delegated authority to the Special Prosecution Division of the Department of Justice pursuant to G.S. 114-11.6 to file and prosecute this proceeding and to act on his behalf as indicated by the attached letter.
>
> 3. That the Special Prosecutor files this petition upon his own motion pursuant to G.S. 128-17 and as authorized by Michael A. Ashburn, District Attorney.

4. That the defendant, David Felts, is and at all times alleged herein was the Chief of Police of the City of North Wilkesboro, North Carolina, having taken office on or about January 2, 1979.

5. That the defendant should be removed from office pursuant to G.S. 128-16(1) and (2) for the following causes: (1) for wilful and habitual neglect and refusal to perform the duties of his office; and (2) for wilful misconduct and maladministration in office.

By letter dated 20 June 1984, District Attorney Michael A. Ashburn purported to delegate to the Attorney General's office "any authorization that may be required to initiate any criminal or civil action, including the filing of a petition and proceedings thereunder pursuant to Article 2 of Chapter 128, as you may deem necessary and appropriate under the circumstances, concerning the above referenced matter [the voiding of traffic tickets by the North Wilkesboro Police Department]."

An answer and motions were filed on defendant's behalf on 8 October 1984. One motion requested that the Petition be dismissed because the person filing and prosecuting the Petition had no authority to do so. The motion was denied.

At the conclusion of a hearing commenced 8 October 1984 Judge Sitton entered and filed two orders on 12 October 1984. The first order is entitled "Findings of Fact, Conclusions of Law Order" and the second document is entitled "Order." Judge Sitton concluded that defendant, referred to as "respondent" in the order, had committed "willful misconduct and maladministration in office . . . in violation of G.S. 128-16.2 [*sic*]," and that such conduct renders defendant "unfit to continue to serve and hold the office as Chief of Police for the Town of North Wilkesboro." Judge Sitton ordered defendant removed from office and that defendant "is hereby disqualified from holding any law enforcement office in Wilkes County for three years." Finally, defendant was suspended from office pending the outcome of this appeal.

On appeal defendant argues that the trial court erred "in finding as a fact that Michael A. Ashburn, District Attorney for the Twenty-Third Judicial District, had the authority to delegate the prosecution of this action to the Special Prosecution Division

of the Department of Justice pursuant to G.S. 114-11.6 and G.S. 128-17" and that the court erred "in denying the respondent's motion to dismiss of October 8, 1984, based upon improper delegation of authority."

G.S. 128-16 provides, in pertinent part, that

> [a]ny sheriff or police officer shall be removed from office by the judge of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, and hearing thereunder, for the following causes:
>
> (1) For willful or habitual neglect or refusal to perform the duties of his office.
>
> (2) For willful misconduct or maladministration in office.

Such charges under G.S. 128-16 shall be made by complaint or petition and such "complaint or petition shall be entitled in the name of the State of North Carolina . . . ." G.S. 128-17. By its express terms, G.S. 128-17 specifies who may file a complaint or petition for removal:

> The complaint or petition . . . may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the district attorney of the district, or by any such officer upon his own motion.

G.S. 128-17 also specifies who has the duty to prosecute the complaint or petition: "It shall be the duty of the county attorney or district attorney to appear and prosecute this proceeding." G.S. 128-18 specifies that "[t]he accused shall be named as defendant, and the petition shall be signed by some elector, or by such officer."

G.S. 128-17 does not give the Attorney General or his designate the authority to file this action, and the statute cannot be construed to give the Attorney General such authority. In construing a statute, its "words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E. 2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L.Ed. 2d 285, 88 S.Ct. 1418 (1968). When a statute's language is clear and unam-

biguous, it must be given effect, and its clear meaning may not be evaded by the courts under the guise of construction. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E. 2d 184, 192 (1977).

The clear language of G.S. 128-17 specifies that only three classes of persons may file the petition for removal: (1) five qualified electors upon the approval of the county attorney or district attorney; (2) the county attorney; or (3) the district attorney. There is no provision in Article 2, Chapter 128, of the General Statutes authorizing the district attorney or the county attorney to delegate to the Attorney General his duty to file the petition. Unless the Attorney General's authority to file a petition pursuant to G.S. 128-16, *et seq.*, arises elsewhere, we must conclude that the Attorney General has no authority to file a proceeding pursuant to G.S. 128-16, *et seq.*

The Attorney General argues that G.S. 114-11.6 and G.S. 114-2(1) authorize his office to file an action pursuant to G.S. 128-16, *et seq.* We cannot agree.

G.S. 114-11.6 provides:

> There is hereby established in the office of the Attorney General of North Carolina, a Special Prosecution Division. The attorneys assigned to this Division shall be available to prosecute or assist in the prosecution of *criminal* cases when requested to do so by a district attorney and the Attorney General approves. In addition, these attorneys assigned to this Division shall serve as legal advisors to the State Bureau of Investigation and the Police Information Network and perform any other duties assigned to them by the Attorney General. [Emphasis added.]

By its terms, G.S. 114-11.6 allows special prosecutors to prosecute or assist district attorneys in the prosecution of *criminal* cases only. A proceeding brought under G.S. 128-16, *et seq.*, is neither a criminal proceeding nor is it a civil proceeding. *State ex rel. Leonard v. Huskey*, 65 N.C. App. 550, 309 S.E. 2d 726 (1983). As we noted in *State ex rel. Leonard v. Huskey*:

> Although our courts have previously viewed actions brought under the statute as being in the nature of civil actions, *see State v. Hockaday*, 265 N.C. 688, 144 S.E. 2d 867

> (1965) and *State ex rel. Hyatt v. Hamme*, 180 N.C. 684, 104 S.E. 174 (1920), both the Rules of Civil Procedure and the Rules of Criminal Procedure, *see* Chapter 15A of the General Statutes, have been adopted since *Hamme* and *Hockaday* were decided. Since this action does not fall within either Chapter 1A-1 or Chapter 15A, we hold that such actions are neither civil nor criminal, but are merely an inquiry into the conduct of the officeholder to determine whether he is unfit to continue in office. *See In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977).

65 N.C. App. at 554, 309 S.E. 2d at 728-29. Also, that portion of G.S. 114-11.6 which authorizes attorneys in the Special Prosecution Division to "perform any other duties assigned to them by the Attorney General" merely authorizes the Attorney General to delegate those duties which he is elsewhere authorized to perform. It creates no independent authority in its own right. In sum, G.S. 114-11.6 does not authorize the Attorney General or his designate to file an action pursuant to G.S. 128-16, *et seq.*

Nor are we persuaded that G.S. 114-2(1) authorizes the Attorney General or his designate to file an action under G.S. 128-16, *et seq.* G.S. 114-2(1) provides:

> It shall be the duty of the Attorney General: (1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested. [Emphasis added.]

The Attorney General argues that the underlined portion of this provision gives, "the Attorney General and his assistants . . . the authority to appear for the State in any cause, civil or criminal, in which the State may be a party or interested." Furthermore, the Attorney General argues that "[a]n action to remove an unfit law enforcement officer is a cause in which the State is a party and is interested."

While we do not quarrel with the Attorney General's arguments, we note initially that a proceeding under G.S. 128-16, *et seq.*, is neither a civil nor criminal action. *State ex rel. Leonard v. Huskey, supra.* Even if we assume the words "any cause or mat-

ter" in G.S. 114-2(1) are to be construed to include actions other than civil or criminal actions, we are not persuaded that G.S. 114-2(1) contemplates the Attorney General's initiating an action under Article 2 of Chapter 128, where language therein has specifically set out who may file a petition for removal of a sheriff or police officer from office. Had the Legislature intended to give to the Attorney General, in addition to five electors, the county attorney and the district attorney, the authority to bring an action under Article 2, Chapter 128, it could have done so as it has in other statutes. For instance, in certain cases involving charitable trusts, G.S. 36A-48 provides that

> *it shall be the duty of the Attorney General or such district attorney* [who represents the State in the Superior Court for that county] upon notice from the clerk or upon his own motion *to bring an action* in the name of the State against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute accounting of their proceedings in relation to the administration of the fund and the execution of the trust. [Emphasis added.]

Similarly, G.S. 19-2.1 provides that "[w]herever a nuisance is kept, maintained, or exists, as defined in this Article, *the Attorney General, district attorney,* or any private citizen of the county *may maintain a civil action* in the name of the State of North Carolina to abate a nuisance under this Chapter . . . ." [Emphasis added.] *See Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244 (1952) (holds this section designates with particularity who may become relators and prosecute the cause in the State's name). Regarding G.S. Chapter 75 on Monopolies, Trusts and Consumer Protection, G.S. 75-15 provides:

> *It shall be the duty of the Attorney General,* upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, *to prosecute such action* in the name of the State, or any officer or department thereof, as provided by law, or *in the name of the State on relation of the Attorney General,* and to prosecute all officers or agents or employees of such corporations, *whenever in his opinion the interests of the public require it.* [Emphasis added.]

Under G.S. 58-9(5) the Attorney General has the duty to prosecute violations of insurance laws for the insurance commissioner, and under G.S. 106-266.14 the Attorney General has the duty to prosecute violations of milk production and distribution laws. While writs of *quo warranto* have been abolished, the Attorney General is authorized to bring an action in the nature of *quo warranto* to decide conflicting claims to an office. G.S. 1-515.

Equally persuasive is the language of G.S. 114-2(4), providing that "[i]t shall be the duty of the Attorney General: * * * To consult with and advise the prosecutors, when requested by them, in all matters pertaining to the duties of their office." As one Attorney General has noted in the context of criminal cases: "This provision, as well as the express constitutional duty of the district attorneys or solicitors to prosecute criminal cases at the trial level, has been significantly relied on by the Supreme Court in rejecting the authority of the Attorney General to initiate criminal prosecutions in the absence of an express statutory provision authorizing him to do so in the enforcement of a particular statute." Edmisten, *The Common Law Powers of the Attorney General of North Carolina*, 9 N.C. Cent. L. J. 1, 32-33 (1977). *See NAACP v. Eure*, 245 N.C. 331, 95 S.E. 2d 893 (1957); *State v. Loesch*, 237 N.C. 611, 75 S.E. 2d 754 (1953). The duty to "consult with and advise the prosecutors, when requested by them, in all matters pertaining to the duties of their office" gives the Attorney General the authority to advise the prosecutors, not to completely replace them, or act instead of them, unless there is an express statutory provision authorizing the Attorney General to initiate a particular action. *See, e.g.*, G.S. 36A-48; G.S. 19-2.1; G.S. 75-15.

In sum, the Attorney General or his designate is given no specific authority to file an action under G.S. 128-16, *et seq.*, in place of the district attorney or the county attorney. Absent this statutory authorization, the Attorney General is limited to consulting with and advising the district attorney in carrying out his statutory duty to initiate a petition for removal from office of a sheriff or police officer.

In holding that the Attorney General or his designate is without authority to initiate an action pursuant to G.S. 128-16, *et seq.*, we express no opinion on whether the Attorney General

could have brought a similar action under his common law powers. This action was expressly brought pursuant to Article 2, Chapter 128, and not pursuant to the Attorney General's common law powers.

Since the Attorney General was without authority to file the petition, the trial court lacked jurisdiction to hear the matter, and its orders of removal must be vacated. The cause is remanded for entry of judgment of dismissal.

In light of the above, we need not address appellant's second assignment of error as to whether the trial court had the authority to disqualify defendant from holding any law enforcement office in Wilkes County for a period of three years.

Vacated and remanded.

Judges WHICHARD and EAGLES concur.

CECIL K. CHAVIS, AND WIFE VICKY L. CHAVIS v. STATE FARM FIRE AND CASUALTY COMPANY

No. 8513SC809

(Filed 4 February 1986)

Insurance § 122— fire insurance—policy condition requiring production of records—condition precedent to claim

The trial court did not err by granting defendant's motion for a directed verdict at the close of the evidence in an action to recover under a fire insurance policy where plaintiffs failed to comply with a condition precedent for recovery under the policy by not producing copies of bank accounts and F.H.A. loan accounts and by refusing to sign an authorization permitting a representative of defendant to examine their records at banks and other lending institutions. Information about plaintiffs' financial condition was clearly relevant to defendant's arson defense and defendant therefore had the right to inspect the requested records. N.C.G.S. 58-176.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from *Fountain, Judge*. Judgment entered 20 March 1985 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 13 January 1986.

The record on appeal establishes the following uncontroverted facts: Defendant issued to plaintiffs an insurance policy, insuring plaintiffs' home against loss by fire. The policy contained the following provisions:

> The insured, as often as may be reasonably required, shall . . . submit to examinations under oath by any person named by this Company, and subscribe the same; and as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.
>
> . . .
>
> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity; unless all the requirements of this policy shall have been complied with . . . .

Plaintiffs' home and its contents were destroyed by fire on 5 October 1981. Plaintiffs filed a timely claim under the insurance policy.

Plaintiffs filed suit seeking to recover $34,107.79 for the loss suffered as a result of the fire, alleging that defendant had refused to comply with plaintiffs' due demand for payment under the terms of the policy. Defendant filed an answer wherein it alleged that plaintiffs had failed to produce books of account and other records after adequate notice as required by the policy and that the fire was a result of arson.

At the close of all the evidence, the trial judge allowed defendant's motion for directed verdict and entered judgment for defendant, from which plaintiffs appealed.

T. Craig Wright and Burns, Pope, Sessoms and Williamson, by William J. Williamson, for plaintiffs, appellants.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

The sole question presented on appeal is whether the trial court erred in allowing defendant's motion for directed verdict at the close of the evidence. Plaintiffs contend that the issues as to whether they complied with the provision of the policy requiring the insured to produce books of account and other documents would be subject to a test of reasonableness, which would necessarily have to be determined by the jury. We disagree.

Plaintiffs' fire insurance policy is the "Standard Fire Insurance Policy for North Carolina" as provided by G.S. 58-176. The provisions of this policy, including the provisions that compliance with its terms is a condition precedent before the insured can establish a claim for relief, have been held by the Supreme Court to be valid and just to the insured and the insurer. *Zibelin v. Insurance Co.*, 229 N.C. 567, 50 S.E. 2d 290 (1948). Both the insured and the insurer are presumed to know the terms, provisions, and conditions of the policy, and are bound by them. *Midkiff v. Insurance Company*, 197 N.C. 139, 147 S.E. 812 (1929).

Neither plaintiffs nor defendant cite any authority from this jurisdiction dealing specifically with the provision requiring the insured to produce books of account and other records at the request of the insurance company. However, courts of other jurisdictions have held that similar provisions are valid and that the unexcused refusal to produce the required documents precludes recovery on the policy. *Pogo Holding Corp. v. New York Property Ins.*, 73 A.D. 2d 605, 422 N.Y.S. 2d 123 (1979); *Southern Guaranty Ins. Co. v. Dean*, 252 Miss. 69, 172 So. 2d 553 (1965); *Beasley v. Pacific Indemnity Co.*, 200 Cal. App. 2d 207, 19 Cal. Rptr. 299 (1962); *Georgian House of Interiors v. Glens Falls Ins. Co.*, 21 Wash. 2d 470, 151 P. 2d 598 (1944). The object of provisions requiring the insured to submit to an examination under oath is to enable the insurance company to obtain information to determine the extent of its obligation and to protect itself from false claims, *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 3 S.Ct. 507, 28 L.Ed. 76 (1884), and the provision requiring the production of documents is designed to serve the same purpose. *See Southern Guaranty Ins. Co. v. Dean*, 252 Miss. 69, 172 So. 2d 553 (1965).

While these provisions do not give the insurer license to harass plaintiff with aimless questions and demands for docu-

ments, questions asked and documents sought which relate to the validity of the insured's claim are material and relevant. *Happy Hank Co. v. Insurance Co.*, 286 A.D. 505, 145 N.Y.S. 2d 206 (1955), *modified*, 1 N.Y. 2d 534, 136 N.E. 2d 842, 154 N.Y.S. 2d 870 (1956). The financial condition of the insured is relevant to the arson defense in a suit upon a fire insurance policy. *Payne v. Nationwide Mutual Ins. Co.*, 456 So. 2d 34 (Ala. 1984); *Kisting v. Westchester Fire Insurance Company*, 416 F. 2d 967 (7th Cir. 1969).

Compliance with provisions of an insurance policy requiring the insured to produce documents "as often as may be reasonably required" at a "reasonable time and place" is a condition precedent to bringing suit where the insurer notifies the insured of the time and place for production. *Taubman v. Allied Fire Ins. Co. of Utica*, 160 F. 2d 157 (4th Cir. 1947). The "reasonable time and place" clause ordinarily means that a demand must be made within a reasonable period of time and that the location must be in the locality of the insured property. *Butler Candy Co. v. Springfield Fire and Marine Ins. Co.*, 296 Pa. 552, 146 A. 135 (1929).

In *Tire Co. v. Morefield*, 35 N.C. App. 385, 241 S.E. 2d 353 (1978), this Court said that "[a] condition precedent is a fact or event, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." *Id.* at 387, 241 S.E. 2d at 355, citing *Cargill, Inc. v. Credit Assoc., Inc.*, 26 N.C. App. 720, 722-23, 217 S.E. 2d 105, 107 (1975). The burden is on plaintiff to offer evidence in support of all essential elements to establish his claim. *Tire Co. v. Morefield*, 35 N.C. App. 385, 241 S.E. 2d 353 (1978). The occurrence of a condition precedent is an essential element of plaintiff's case, and it is therefore incumbent upon plaintiff to offer proof of compliance with the terms of the contract. *Id.*

Plaintiffs, in the present case, have offered no evidence tending to show that they have complied with the terms of the insurance contract by producing the information requested. In fact, the evidence discloses that plaintiffs had steadfastly refused to comply with defendant's requests to produce copies of their bank and loan accounts. Pursuant to a letter written to plaintiffs' attorney on 25 November 1981, plaintiffs appeared at the court-

house in Elizabethtown, North Carolina for an examination under oath. Mr. Chavis testified at trial that although he had been specifically requested to produce copies of his bank accounts and F.H.A. loan accounts, he did not produce these documents at the examination. When the attorney for defendant, upon learning of their failure to supply the information requested, asked plaintiffs to execute an authorization permitting a representative of defendant to examine their records at banks and other lending institutions, they refused. Mr. Chavis testified that he refused to sign the release on the advice of his attorney and because he felt that his business and financial records were "none of their business."

Plaintiffs do not contend that the time or place for the production of these documents was unreasonable. Rather, they argue that there was an issue for the jury as to whether defendant could reasonably require them to produce these documents. Under the principles discussed above, information about plaintiffs' financial condition was clearly relevant to defendant's arson defense and defendant therefore had the right to inspect the requested records.

Thus, all the evidence at trial discloses plaintiffs' failure to comply with the terms of the contract and particularly with the condition precedent by failing to provide the requested financial information. The evidence discloses an insurmountable bar to plaintiffs' claim, and the trial court properly allowed defendant's motion for a directed verdict.

Affirmed.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

An insurance policy being but a special kind of contract, it is fundamental, of course, that an insured must comply with the terms of the policy before he can recover under it, and the validity of this rule is not questioned by plaintiffs' appeal. What is questioned is whether, as a matter of law, plaintiffs' policy required them to permit defendant to examine the records of every

banking and loan transaction that either of them had ever had. This question is not really addressed by the majority opinion, which is based on the tacit premise that the policy obligated plaintiffs to furnish any information requested that is relevant to any issue raised by the pleadings; a premise that the policy language does not support. And contrary to the implication in the opinion, plaintiffs' case was not dismissed because they refused to produce records that defendant needed in evaluating or defending the claim; it was dismissed because they refused to sign a grossly overbroad authorization that defendant obviously did not need and that plaintiffs had no obligation to sign.

Though defendant argued here that the dismissal is also based on plaintiffs' refusal to produce various papers requested by it other than those referred to in the refused authorization, this is not borne out by the record. That plaintiffs had no duty to produce any documents at all until defendant made a request is conceded, and the record plainly shows that the only request defendant made that was refused was the request to sign the disputed authorization. The only other request to examine documents that defendant made concerned plaintiffs' income tax returns and that request was complied with. The authorization that plaintiffs refused to sign was as follows:

> AUTHORIZATION AND RELEASES OF INFORMATION AND RECORDS
>
> I, Cecil K. Chavis and Vickie Chavis, do hereby authorize any representative of all banks and/or any type of lending institution which I have done any business with to consult with and/or deliver to any representative of State Farm Fire and Casualty Company any and all records referred to or requested by any representative of State Farm Fire and Casualty Company.
>
> This the 4th day of December, 1981.

The scope of this authorization is without parallel. It would enable the company to examine every financial statement and loan application that plaintiffs have ever made, every check they have ever written, and every bank deposit they have ever made. Nothing in the policy obligated plaintiffs to sign such an authorization and the dismissal of plaintiffs' case is clearly without foundation.

Plaintiffs' obligation to produce documents requested by defendant is stated in one sentence of the policy, as follows:

> The insured, as often as may be *reasonably required*, shall exhibit to any person designated by this Company all that remains of *any property herein described*, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be *reasonably required*, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

(Emphasis supplied.) This sentence is about the *insured property*, and it seems plain to me that the only papers it required plaintiffs to produce at defendant's request were the "books of account, bills, invoices and other vouchers" that pertain to the insured property. It did not require them to produce all other books of account, bills, invoices and vouchers that they happened to have access to. Nor did it require them to produce papers such as bank and loan company records, which are neither books of account, bills, invoices nor vouchers. "[B]ooks of account, bills, invoices and other vouchers" are documents which tend to show the ownership and cost of properties; which is why, no doubt, the General Assembly phrased the Standard Fire Policy as it did. Requiring that such documents be produced on request when properties covered by them are the subject of a fire insurance claim serves a necessary purpose and makes sense. But requiring insureds to permit insurance companies to examine personal papers that clearly have nothing to do with the insured property and that may only support one of the myriad defenses that can be asserted in such cases makes no sense whatever. Though fishing expeditions of that type can be indulged in through the discovery process, the General Assembly has not required insureds to acquiesce in such expeditions as a condition to enforcing their rights under the policy. If the General Assembly had intended to deprive insureds of their policy benefits if they did not furnish their companies all information requested that might be relevant to the case—which is utterly inconceivable—it would not have used the language that it did.

That plaintiffs' obligation to produce documents is quite limited by the policy terms was apparently recognized by the defendant at one time. In all events, when defendant scheduled plaintiffs' examinations under oath it directed them to bring to their examination only "a detailed inventory of the items claimed as well as *any bills, invoices, receipts and documents that they have to substantiate their loss.*" (Emphasis supplied.) The statement in the opinion indicating that plaintiff was "specifically requested to produce copies of his bank accounts and F.H.A. loan accounts" and that Chavis so testified is inaccurate. The only record basis for this statement is Chavis' negative answer to a leading question by defense counsel which incorrectly asserted as a fact that such a specific request had been made. While the meaning of Chavis' testimony on this point may be subject to argument, the meaning of defendant's letter specifying the papers plaintiffs were to bring to the examination is not. It is in the record, and it does not mention "bank or loan accounts" of any kind.

The record, as I view it, shows that plaintiffs not only met the policy conditions covering disclosure, but went beyond them. They submitted to examination under oath at the time and place defendant suggested. They answered questions not only about the insured property, but about their assets, debts, and earnings. They also answered questions about claims they had made against others and about claims and charges that had been made against them; and they authorized defendant to obtain copies of their state and federal tax returns for each of the preceding five years. The only thing they did not do that defendant requested of them was sign the authorization quoted above. Their refusal was entirely justified, as banking records are neither "books of account, bills, invoices and other vouchers," and the scope of the authorization was unreasonably broad in any event.

CLIFTON RANDOLPH BROYHILL AND WIFE, GERRI LYNN BROYHILL v. CARTER P. COPPAGE AND WIFE, NORMA BEANE COPPAGE

No. 8525SC291

(Filed 4 February 1986)

1. **Easements § 7.1— easement by necessity—use of roadways before lifetime of witness**

In an action to establish an easement by necessity, the trial court did not err in allowing witnesses to testify regarding the use of the local roadways before their lifetimes since reputation as to customs affecting land is not excluded by the hearsay rule and is not limited to the lifetime of the witness. N.C.G.S. 8C-1, Rule 803(20).

2. **Easements § 7.1— easement by necessity—maintenance and blockage of roadway**

In an action to establish an easement by necessity, evidence that plaintiffs maintained and repaired the disputed roadway and that defendants blocked it, while not highly probative, did not change the overall tenor of the evidence and was not prejudicial to defendants.

3. **Easements § 5— easement by necessity—common ownership**

In order to establish an easement by necessity, it is not necessary to show that the adjoining properties were ever a single tract but only that the adjoining tracts at one time had a common owner.

4. **Easements § 5.3— easement by necessity—sufficiency of evidence**

Plaintiffs' evidence was sufficient to show a necessity for an easement in a roadway across defendants' property at the time of conveyance of plaintiffs' tract from a common ownership in 1931 where it tended to show that, although a second roadway existed across the land of a stranger to plaintiffs' title, this roadway sometimes became impassable and the disputed roadway was used equally with the second roadway.

5. **Easements § 5— location of easement by necessity**

Where a way of necessity is determined to exist, if at the time of the separation of the two estates there was a way in use, plainly visible and known to the parties, the plainly visible and known way will be held to be the location of the way granted unless it is not reasonable and convenient for both parties.

APPEAL by defendants from *Sitton, Judge*. Judgment entered 23 October 1984 in Superior Court, CALDWELL County. Heard in the Court of Appeals 5 November 1985.

In this declaratory judgment action plaintiffs sought and obtained a declaration that they enjoyed an easement by necessity across defendants' land. Defendants appeal.

Wilson and Palmer, by W. C. Palmer, for defendant-appellants.

Beverly T. Beal for plaintiff-appellees.

EAGLES, Judge.

The parties own adjoining land. The two tracts were owned between 1914 and 1931 by Nannie Carter, the great-grandmother of plaintiff Clifton Randolph Broyhill and the grandmother of defendant Carter P. Coppage. Plaintiffs acquired their tract in 1981, at which time they had access to their land only by a road across defendants' land. A dispute arose over plaintiffs' use of the road. Defendants placed gates across the road and told plaintiffs they could not use it. This action followed.

At trial, plaintiffs produced evidence that there once existed two roads to their property, the disputed one and one across the land of a stranger, Wyke. At one time they were used equally. Part of the disputed road was part of an old mail route, which had been used for many years. Part of it was used primarily as a cow path. On occasion, the Wyke road would "morrow up" and become impassable despite plaintiffs' predecessors' efforts, including spreading gravel. In 1961, the disputed road was bulldozed and graveled. Plaintiffs' predecessors built a fence across the Wyke road, and "closed it up." Part of the Wyke road has been covered by a fish pond. Plaintiffs and their predecessors have at various times undertaken maintenance of the disputed road.

Defendants did not offer any evidence. The jury considered one issue, whether plaintiffs were entitled to a right of way across defendants' land "because of necessity." They answered "yes." From the judgment granting an easement along the existing roadway and restraining defendants from interfering with its use, defendants appeal.

I

The reported decisions of our courts regarding easements by necessity are few. Defendants cite only *Oliver v. Ernul*, 277 N.C. 591, 178 S.E. 2d 393 (1971), on which plaintiffs also rely. Accordingly we review *Oliver* before proceeding to the merits.

In *Oliver*, defendants owned three lots, located between a highway and railroad tracks and bounded on the sides by lands of

strangers. Defendants sold plaintiffs two of the lots, retaining their homeplace which was the only lot with road frontage. The railroad was not safely passable by car. Along the edge of defendants' land, defendants attempted to close the dirt path which led to the highway. The trial court allowed defendants' motion for nonsuit.

On appeal, the Supreme Court affirmed the decision of this court reversing nonsuit, 9 N.C. App. 221, 175 S.E. 2d 618 (1970), on the ground that the circumstances revealed that plaintiffs had a way of necessity. The court stated the general law:

> "When one part of an estate is dependent of necessity, for enjoyment, on some use in the nature of an easement in another part, and the owner conveys either part without express provision on the subject, the part so dependent carries or reserves with it an easement of such necessary use in the other part. . . . [P]roperty owners cannot claim a right-of-way of necessity over the lands of a stranger to their title. However, it is not necessary that the person over whose land the way of necessity is sought be the immediate grantor, so long as there was at one time common ownership of both tracts." [Citations omitted.] Furthermore, to establish the right to use the way of necessity, it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that the grantor intended the grantee should have the right of access. [Citations omitted.]

277 N.C. at 599, 178 S.E. 2d at 397. Applying these principles, the court held that under the circumstances defendant-grantors impliedly granted plaintiffs a way of necessity across defendants' retained property. Since there was a plainly visible known way already on the land, the court held that absent a showing that the plainly visible known way would be unreasonable and inconvenient for both parties it would be held to be the location of the way impliedly granted. *Id.*

We note that defendants contend that plaintiffs must show under *Oliver* that they have no "legally enforceable right of access to a public road." We do not find that language in the case, nor do we read it to impose that requirement. *See* 2 G. Thompson, Real Property Section 364 at 442-43 (J. Grimes repl. ed. 1961)

(may arise even where other very inconvenient access exists). The required showing involves "physical conditions" and "use," not absolute legal right.

II

Defendants' first four assignments of error attack the admission of evidence of various matters. Assuming error, *arguendo*, the introduction of inadmissible evidence by itself will not require reversal; the appellant must demonstrate that the error was prejudicial, *i.e.*, that it probably influenced the verdict of the jury. *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863 (1939); G.S. 1A-1, R. Civ. P. 61. The chief argument raised is that the evidence admitted was irrelevant. *See* G.S. 8C-1, R. Ev. 402. The definition of relevance is broad, and does not encompass only facts actually in dispute. *See* G.S. 8C-1, R. Ev. 401. Particularly in a civil case, the appellant must bear a heavy burden if the only asserted ground of inadmissibility is factual irrelevance, as opposed to unfairness or tendency to mislead. *See* G.S. 8C-1, R. Ev. 403.

A

We note initially that many of the objections on which these assignments of error are based were only general objections, and hence technically ineffective to preserve the questions argued on appeal. G.S. 8C-1, R. Ev. 103(a); 1 H. Brandis, N.C. Evidence Section 27 (1982).

B

[1] Defendants argue that the court erred in allowing witnesses to testify regarding the use of the local roadways before their lifetimes. Reputation as to customs affecting land is not excluded by the hearsay rule. G.S. 8C-1, R. Ev. 803 (20). It is not limited to the lifetime of the witness. *See Threadgill v. Town of Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916) (reputation of tree as marker; discussing evidence going back to 1783). *See also County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E. 2d 69 (1977) (private journals admissible to show historic use of right-of-way by public). The evidence was properly admitted.

C

[2] Defendants argue that the court erred in admitting evidence that plaintiffs maintained and repaired the disputed roadway.

Assuming error in admitting the evidence, *arguendo*, it does not appear that the disputed evidence materially affected the jury's findings. Evidence admitted elsewhere without objection indicated that plaintiffs' predecessors had bulldozed the road and used it and that plaintiffs understood they were continuing that use. Their maintenance of the road, while not necessarily probative, did not materially change the tenor of the evidence. We note that plaintiffs need not show absolute necessity; rather they must show "such physical conditions and such use as would reasonably lead one to believe that the grantor *intended* the grantee should have the right of access." *Oliver v. Ernul, supra.* North Carolina, like most other jurisdictions, appears to allow evidence of use and other circumstances evidencing intent to determine whether a way exists by necessity. *See* 2 Thompson, Real Property, *supra* Section 364 at 432-34. This assignment is accordingly overruled.

D

Defendants also assign error to the admission of evidence that they blocked the disputed roadway. Again, while the evidence was not highly probative, it did not change the overall tenor of the evidence. It did serve to place the dispute in context for the jury. We note that defendants did not object at trial that this evidence was needlessly cumulative, nor does it appear that the evidence could have misled the jury in any way. *See* G.S. 8C-1, R. Ev. 403. We note that discretionary rulings under the identical Federal Rule 403 "will rarely be disturbed on appeal." *Chase v. Consolidated Foods Corp.*, 744 F. 2d 566, 571 (7th Cir. 1984). This assignment is also overruled.

E

Defendants object to the admission of an answer regarding the distance of their house from the road. For the reasons discussed in the preceding section, and also because of the isolated nature of the answer, this assignment is also overruled.

III

Defendants' next two assignments of error challenge the denial of their motions for directed verdict. A motion for directed verdict must state the grounds therefor, G.S. 1A-1, R. Civ. P. 50(a), and grounds not asserted in the trial court may not be asserted on appeal. *Lee v. Keck*, 68 N.C. App. 320, 315 S.E. 2d 323,

disc. rev. denied, 311 N.C. 401, 319 S.E. 2d 271 (1984). On a directed verdict motion, the record is reviewed in the light most favorable to the non-moving party, resolving all conflicts in its favor and giving it the benefit of every favorable inference. If there is more than a scintilla of evidence supporting each element of non-movant's case, the motion for directed verdict should be denied. *Clark v. Moore*, 65 N.C. App. 609, 309 S.E. 2d 579 (1983); *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980).

A

[3] The first ground urged by defendants is that plaintiffs failed to produce any evidence that the adjoining properties were ever a single tract. In the trial court defendants failed to urge this ground as justification for a directed verdict, however. In any event, we have found no authority that mere designation of tracts is controlling. What is necessary for an easement by necessity, and what plaintiffs have adequately shown, is that the adjoining tracts have at one time had a common owner. *Oliver v. Ernul, supra* ("common ownership"); 2 Thompson, Real Property, *supra*, Section 363 at 426 ("belonged to same person"). To require that adjoining tracts have been at one time one and the same tract would allow formalities of surveying to defeat the policies underlying the law's recognition of easements by necessity. *See id.* Section 362.

B

[4] Defendants' second asserted ground for directed verdict (properly raised at trial) is that there existed no necessity for the easement at the time of conveyance of the tract from common ownership in 1931. Since another roadway existed and was used in 1931, argue defendants, plaintiffs failed to present a *prima facie* case.

Defendants correctly assert that the easement must arise, if at all, at the time of the conveyance from common ownership. *See Smith v. Moore*, 254 N.C. 186, 118 S.E. 2d 436 (1961). There was evidence that another roadway existed, across Wyke's land, in 1931. However, there was also evidence that this roadway sometimes became impassable and that the disputed roadway was used equally with the Wyke Road. An examination of the various conveyances in the record discloses no transfer, in 1931 or thereafter,

of an easement across the Wyke land, nor any common ownership of plaintiffs' and Wyke's land. As noted earlier, the law does not require that the easement be one of *absolute* necessity, nor does it allow an easement by necessity across the lands of strangers to the title. *Oliver v. Ernul, supra*; 2 Thompson, Real Property, *supra*, Section 364. The circumstances above constitute more than a scintilla of evidence that the grantor intended to allow plaintiffs' predecessors continued use of the road at the time of the conveyance in 1931. *Oliver v. Ernul, supra.* To the extent that other circumstances may have existed which might defeat plaintiffs' claim, defendants failed to produce any evidence of them.

C

In arguing their motions to the trial court, defendants cited as authority *McCracken v. Clark*, 235 N.C. 186, 69 S.E. 2d 184 (1952) and *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946). Neither case is authoritative since neither deals with an easement arising by necessity after conveyance from common ownership. *McCracken* involved an affirmative defense of adverse use, and *Speight* dealt with the establishment of a public way either by legislative action or prescription.

D

We conclude that the court correctly denied defendants' motions for directed verdict. Defendants' next assignment of error, that the court erred in instructing the jury on easement by necessity, rests on the same asserted lack of evidence, and is therefore overruled along with these assignments. We therefore find no error in submission of the issue to the jury.

IV

[5] The only remaining question involves the relief granted. The trial court entered judgment granting plaintiffs an easement along the existing roadway. Defendants assign error, arguing that under *Oliver v. Ernul, supra*, they have the right to select the location of the way. Their right, however, is not absolute. Where a way of necessity is determined to exist, if at the time of the separation of the two estates there was a way in use, plainly visible and known to the parties, the plainly visible and known way will be held to be the location of the way granted unless it is not reasonable and convenient for both parties. *Id.* There was sub-

stantial evidence that the existing road follows paths and roads in existence in 1931. A jury could find, especially in view of the absence of any evidence that the existing road was unreasonable or inconvenient for defendants, that the existing way was the way impliedly granted. *See id.* Defendants did not present any evidence. Since at the time a way of necessity was impliedly granted in 1931 there was in use on the land a way plainly visible and known to the parties, this way will be held to be the location of the way granted, because there is no evidence of record that it is not a reasonable and convenient way for both parties. *Oliver v. Ernul, supra.* The fact that there were some minor alterations to the existing routes in 1961 appears to be *de minimis*, especially in light of defendants' acquiescence over a period of approximately twenty years. Defendants have failed to show prejudicial error in the judgment. No other prejudicial error being shown, the judgment may not be disturbed on appeal.

No error.

Chief Judge HEDRICK and Judge WELLS concur.

FANNY C. ANDREWS v. LEE D. ANDREWS AND CHESTNUT ASSOCIATES, INC.

No. 8518DC511

(Filed 4 February 1986)

1. Adoption § 4— action for divorce—claim for fraudulent adoption—dismissed

The trial court did not err in an action for divorce and equitable distribution by dismissing defendant husband's claim of "fraudulent adoption" involving a child of plaintiff born before the marriage. Adoption is not merely a contractual relation for the purpose of child support and the final order of adoption terminated whatever rights and obligations the natural father had, with defendant assuming all parental obligations. N.C.G.S. 48-15, N.C.G.S. 48-23, N.C.G.S. 48-28.

2. Divorce and Alimony § 30— equitable distribution—all factors for unequal distribution not expressly addressed—no error

The trial court did not err in an action for equitable distribution by not expressly addressing all of the factors listed in N.C.G.S. 50-20(c) before making an unequal distribution where the record as a whole reflects a conscientious effort by the trial court to address the relevant factors. An unequal distribution

is not reversible simply because it fails to expressly address every factor listed in N.C.G.S. 50-20(c).

3. **Divorce and Alimony § 30— equitable distribution—consideration of year old financial statements as current—no error**

The trial court did not err in an action for equitable distribution by considering as current in a hearing in November 1984 financial statements dated November 1983 where defendant did not object at the hearing, defendant did not identify any substantial changes in financial circumstances since November 1983, the evidence reflected substantial income for both parties over a period of years, and statements of financial condition used in the courtroom cannot always be absolutely current, particularly with tax returns. N.C.G.S. 50-20(c)(1).

4. **Divorce and Alimony § 30— equitable distribution—unequal distribution—no error**

The trial court did not err in an action for equitable distribution by making an unequal distribution where it found that an equal distribution would not be equitable, relying on the custody, household services and difficulty of evaluation factors. A finding that a single factor supported an unequal distribution would be within the court's discretion if supported by the evidence; defendant here did not except to the court's findings and they are not reviewable. App. Rule 10(b)(2).

5. **Divorce and Alimony § 30— equitable distribution—beach house not considered as marital property—no error**

The trial court did not err in an action for equitable distribution by not considering a beach house the couple had deeded to their children as marital property and by failing to join the children as parties where defendant never moved to join the children, never introduced any evidence of the existence of the beach house other than vague and conclusory allegations, and the beach house was not identified as marital property in the pretrial order or in defendant's own proposal for equitable distribution.

6. **Divorce and Alimony § 30— equitable distribution—stock awarded to wife—no error**

The trial court did not err in an action for equitable distribution by awarding plaintiff stock in a fast-food franchise where the stock did not involve the marital home or property of great sentimental value, all of the evidence was that defendant refused to deal with the corporation in a reasonable manner, defendant assigned the stock a value of zero, and plaintiff expressed an active interest in rebuilding and managing the corporation. N.C.G.S. 50-20(c)(4).

APPEAL by defendant and plaintiff from *Daisy, Judge*. Judgment entered 13 December 1984 in District Court, GUILFORD County. Heard in the Court of Appeals 18 November 1985.

This is an action for divorce and equitable distribution. Plaintiff wife originally filed an action for divorce from bed and board,

child custody, alimony, support and other relief in 1982. Defendant husband (the corporate defendant is only nominally involved in this appeal; all references hereafter to "defendant" refer to Lee D. Andrews) denied the allegations of the complaint and counterclaimed for child custody. He later filed a complaint for absolute divorce, seeking equitable distribution of marital property and relief from an adoption decree. By the adoption decree, defendant husband became father of plaintiff's child born before their marriage; one other child was born to the couple during the marriage. Following entry of the absolute divorce decree, the court dismissed defendant's claim for "fraudulent adoption" and entered a judgment of equitable distribution. Defendant appealed, and plaintiff cross-appealed.

Smith Moore Smith Schell & Hunter, by Vance Barron, Jr., for plaintiff.

W. Steven Allen for defendant.

EAGLES, Judge.

Defendant brings forward five assignments of error. Plaintiff appeals conditionally, solely to protect herself in the event this court reverses the judgment entered. Since we affirm the judgment, we consider only defendant's assignments.

I

[1] Defendant first assigns error to the order dismissing his claim of "fraudulent adoption." It is not clear just what relief defendant sought by this claim: he asked the court to "give [him] judgment for breach of contract promise related to the adoption" and to order that the natural father be required to support his own child. Defendant did not seek to have his adoption of the child set aside. In any event the provisions of G.S. 48-28 would prevent a collateral attack by defendant on the adoption, since he was a party to the proceeding. *See* G.S. 48-15. The final order of adoption terminated whatever rights and obligations the natural father had, and defendant assumed all parental obligations. G.S. 48-23. Adoption is not, as defendant appears to contend, merely a contractual relation for the purposes of child support, but is a solemn and complete legal substitution of parents. *Crumpton v. Mitchell*, 303 N.C. 657, 281 S.E. 2d 1 (1981); 2 Am. Jur. 2d Adop-

tion Section 83 (1962). *Lowe v. Clayton*, 264 S.C. 75, 212 S.E. 2d 582 (1975), cited by defendant, is distinguishable, since it involved an attack by a non-party natural parent who had allegedly consented to adoption by the party defendants. This assignment is overruled.

II

[2] The equitable distribution litigation over property was extensive and complicated. In view of the intricate finances of the parties, the court found that it could not make a mathematically equal division of their property. To the extent that an unequal division occurred, the court concluded that any extra should go to plaintiff. The court found elsewhere that an equal distribution would be inequitable, because defendant had greater earning potential, because plaintiff had custody of both minor children, and because of plaintiff's services as homemaker and caretaker. (Both plaintiff and defendant work outside the home, plaintiff as an employee of the federal Department of Housing and Urban Development, and defendant as an attorney.) Defendant assigns error, arguing that the court failed to consider all of the factors which are required to be considered in making an unequal distribution, G.S. 50-20(c), and that the findings made do not support an unequal distribution. Plaintiff argues that the division was in fact roughly equal, and that in any event the court adequately considered the statutory factors.

A

The legislature has committed the distribution of marital property to the discretion of the trial court. G.S. 50-20(c); *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). Our review of those decisions is limited to determining whether the court clearly abused its discretion. *Id.*; *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). In making a distribution of marital property, the trial judge must make sufficient findings to indicate what was considered in arriving at the distribution. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). A discretionary order of equitable distribution must be accorded great deference. We should reverse it only if the appellant demonstrates that the findings are so inadequate that the order could not have been the result of a reasoned decision. *White v. White, supra.*

Upon application for a distribution of marital property, the court must divide the property equally, unless the court determines that an equal division would be inequitable. *Id.* In its findings the court need not address the factors listed in G.S. 50-20(c) if it makes an equal distribution. *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *disc. rev. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). The party desiring an unequal division of marital property assumes the burden of showing one or more of the listed factors. *White v. White, supra.* The language of the statute, "shall consider," G.S. 50-20(c), suggests that where the court orders other than an equal distribution, it must make findings with respect to each factor, and this court apparently has applied that rule. *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). It is clear, however, that not every factor will necessarily have relevance to every case, *e.g.* those dealing with children of prior marriages or contributions to education or career development. *Compare* G.S. 50-16.5(a) (list of universally relevant factors); *see Quick v. Quick, supra* (all factors in G.S. 50-16.5(a) must be addressed in findings). In light of the lack of universal relevancy, the applicable burden of proof and the standard of our review, it is clear that an order is not reversibly erroneous simply because it fails to expressly address every factor listed in G.S. 50-20(c). We reached this result implicitly in *Patton v. Patton*, 78 N.C. App. 247, --- S.E. 2d --- (filed: 17 December 1985) (affirming judgment making explicit findings only as to seven of twelve factors).

Our general law governing appeals supports this conclusion. Error alone will not justify reversal; the error must affect some substantial right of the appellant. G.S. 1A-1, R. Civ. P. 61. Mere formal defects in findings ordinarily will be ignored if the substance of the judgment is sufficient. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968) (court submitted issues to itself; harmless error); *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E. 2d 177 (1985) (unnecessary finding simply disregarded). The failure to make certain findings, even when specifically requested, does not rise to the level of reversible error if the requested findings are not material. *Anderson v. Allstate Ins. Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966). Especially in light of the conclusive nature of stipulations, *Gregory v. Cothran*, 262 N.C. 745, 138 S.E. 2d 634 (1964), and the binding effect of pretrial

orders, G.S. 1A-1, R. Civ. P. 16, failure to find facts stipulated to in a pretrial order can hardly be prejudicial. *See Helis v. Usry*, 464 F. 2d 330 (5th Cir. 1972) (failure to find facts on issues not raised in pretrial order not reversible error). With these principles in mind, we now address defendant's specific contentions.

B

Defendant argues that the court erred in failing to consider all the statutory factors listed in G.S. 50-20(c). As noted above, the fact that individual findings were not made in the judgment as to each factor is not in and of itself reversible error. Defendant, with one exception, directs us to no specific evidence supporting a factor which the trial court allegedly ignored. Some factors were not relevant (there were no identified contributions to increases in value of separate property, no identified contributions to education or career development, and there were no support obligations from prior marriages). Many of the other factors (tax consequences, pension rights, age and health, etc.) were the subject of stipulations.

The court made specific findings with regard to the remaining factors. For example, the court specifically found that certain business property awarded to defendant was difficult to evaluate. G.S. 50-20(c)(10). It assigned the property a net value of $5,000 although there was an independent appraiser's report that the building was worth $65,000, minus an undisputed balance due on a deed of trust of $17,000. The error, if any, favored defendant.

The trial court specifically found that plaintiff had custody of the minor children. G.S. 50-20(c)(4). Defendant himself testified that he wanted plaintiff to have the homeplace with its larger equity. The evidence was undisputed that plaintiff had responsibility for the household, including expenses, through the marriage and following the separation.

The trial court devoted substantial attention to the parties' real property holdings, determining their net value but finding that many of them were subject with other parcels to a deed of trust in an amount greater than the value of any single parcel. In addition, the court found that defendant's business property could not be readily marketed. These findings reflect consideration of the nonliquid character of this property. G.S. 50-20(c)(9).

Without elaborating further, the record as a whole reflects a conscientious effort by the trial court to address the relevant factors listed by G.S. 50-20(c). The fact that not every statutory factor was explicitly addressed in the judgment itself is not reversible error.

C

[3] The one factor pointed to specifically by defendant as having been omitted is that the court failed to consider the "income, property, and liabilities of each party at the time the division of property is to become effective." G.S. 50-20(c)(1). He argues that the financial statements dated November 1983 furnished to the court did not provide current financial information as of the date of hearing, November 1984. The financial statements were described as "current" in the pretrial order filed at the beginning of the hearing. To the extent that they were not accurate, defendant should have brought this to the court's attention at the hearing.

Particularly with tax returns, which are usually filed annually, statements of financial condition used in the courtroom cannot always be absolutely current. Many returns, filed in April, *even at filing* reflect a time lag of over three months. That problem does not bar their use as evidence of current financial condition, however, and this court has affirmed judgments accordingly. For example, in *Berger v. Berger*, 67 N.C. App. 591, 313 S.E. 2d 825, *disc. rev. denied*, 311 N.C. 303, 317 S.E. 2d 678 (1984), we affirmed a finding of financial condition made in February 1983, based on 1981 tax returns and the absence of any showing by the defendant of subsequent unusual financial expenditures or other unusual circumstances. *See also* 2 H. Brandis, N.C. Evidence Section 237 (1982) (inference that established state of facts will continue). The evidence reflected substantial income for both parties over a period of years. Defendant did not object at hearing that the financial statements were irrelevant, nor did he identify any substantial changes in financial circumstances since November 1983. On this record, we must conclude that the court acted properly in its consideration of the parties' current financial condition, and that its findings were therefore correct.

D

[4] Defendant argues that the court's findings did not suffice to support its decision to make an unequal distribution. The Su-

preme Court held in *White v. White, supra*, that a party seeking an unequal division must produce evidence of *one or more* of the factors in G.S. 50-20(c). The trial court, *in its discretion*, assigns each factor the particular weight appropriate for that factor in the given case. 312 N.C. at 776-77, 324 S.E. 2d at 832-33. As we read *White*, then, a finding that a single factor supported an unequal distribution, if supported by the evidence, would be within the court's discretion and upheld on appeal. *See State v. Baucom*, 66 N.C. App. 298, 311 S.E. 2d 73 (1984) (analogous result under similar provisions of Fair Sentencing Act). For example, a finding that one party suffered chronic disability arising during the marriage, while the other was young and healthy, might in an appropriate case support a discretionary distribution grossly in favor of the disabled party. *See* G.S. 50-20(c)(3).

Here, the court found that an equal distribution would not be equitable, relying on the custody, household services, and difficulty of evaluation factors. Defendant did not except to the findings that these factors existed; accordingly, they are not reviewable here. App. R. 10(b)(2). *See State v. Harrington*, 78 N.C. App. 39, 336 S.E. 2d 852 (1985) (once sufficient evidence of aggravating factor introduced, decision of fact finder to find factor not reviewable). These findings support the court's discretionary decision to make an unequal distribution. *White v. White, supra.* This argument is also without merit, and these assignments are overruled.

III

[5] Defendant next argues that the court erred in failing to consider a beach house the couple had deeded to their children as marital property, and in failing to join the children as parties. Defendant never moved to join the children as parties, however, and never introduced any evidence of the existence of the beach house other than vague and conclusory allegations. The beach house was not identified as marital property in the pretrial order or in defendant's own proposal for equitable distribution. Under the circumstances, we discern no error.

IV

[6] Finally, defendant argues that the court erred in awarding plaintiff stock in a fast-food franchise. The parties stipulated that the property was marital property. Once property has been prop-

erly designated marital property and valued, and the court has decided in what proportions its value should be divided, there appears to be no other guide than the discretion and good conscience of the trial judge in determining which party gets which specific property. An exception might arise with regard to the marital home, G.S. 50-20(c)(4), or in cases of property of great sentimental value, 24 Am. Jur. 2d Divorce & Separation Section 904 (1983), but that is not the situation here. Defendant has failed to show that the court abused its discretion in awarding this marital property to plaintiff. In fact, all the evidence, including the testimony of the only other stockholder, was that defendant refused to deal with the corporation in a reasonable manner. Defendant himself assigned the stock a value of zero, while plaintiff expressed an active interest in rebuilding and managing the corporation. Defendant should not now complain of its disposition; the assignment is overruled.

CONCLUSION

Defendant has abandoned his remaining assignments of error. App. R. 28(b)(5). Defendant has failed to show that the trial court abused its discretion in evaluating and dividing the marital property. The trial judge, faced with a mass of conflicting evidence, made a commendable, diligent effort to arrive at, and did arrive at, a fair and roughly equal distribution of marital property. We therefore affirm the judgment.

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

PIEDMONT BANK AND TRUST COMPANY v. OBIE STEVENSON AND SHIRLEY M. STEVENSON

No. 8522DC155

(Filed 4 February 1986)

Guaranty § 1— guaranty agreement—intention of parties—jury question

The question of whether the parties intended an ambiguous guaranty agreement to cover only one loan or to also cover further loans was for the jury.

Judge BECTON concurring in the result.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiff from *Fuller, Judge.* Judgment entered 20 August 1984 in District Court, IREDELL County. Heard in the Court of Appeals 23 September 1985.

This is a civil action instituted by Piedmont Bank and Trust Company (herein the Bank) to recover the outstanding indebtedness on a negotiable promissory note executed by defendant Obie Stevenson (herein Stevenson) on 24 July 1979 in the principal amount of $4,188.73. This loan was the third renewal of a note executed by Stevenson on 24 May 1978 in the principal amount of $4,500.00. The 24 July 1979 note was payable in ninety (90) days. Stevenson defaulted on this obligation; the record does not reveal whether or not Stevenson was served with process.

Defendant Shirley Stevenson (herein Mrs. Stevenson) and Stevenson were husband and wife at the time the note which is the subject of this lawsuit was signed. They were divorced in October 1981. On or about 16 September 1977, the same day that Stevenson executed a promissory note for $5,642.67, Mrs. Stevenson executed an "Unconditional Guaranty." Under the guaranty, Stevenson was the primary obligor, Mrs. Stevenson was the guarantor and the Bank was the obligee. The document was labeled UNCONDITIONAL GUARANTY and contained the following language:

> WHEREAS, the above PRIMARY OBLIGOR(S) (hereinafter collectively termed "Customer") desire(s) to obtain extensions of credit and/or a continuation of credit extensions and/or to engage in business transactions and enter into various contractual relationships and otherwise to deal with PIEDMONT BANK & TRUST COMPANY (hereinafter termed "PB&T"); and
>
> WHEREAS, PB&T is unwilling to extend or continue to extend credit to and/or to engage in business transactions and enter into various contractural [sic] relationships with, and otherwise to deal with Customer; unless it receives an unconditional and continuing, joint and several guaranty from the above identified, undersigned GUARANTOR(S) (hereinafter collectively termed "Guarantor"), covering all "Obligations of Customer," as hereinafter defined.

NOW, THEREFORE, in consideration of the promises and of other good and valuable consideration, and in order to induce PB&T from time to time, in its soles [sic] discretion, to extend or continue to extend credit (with or without security) to and/or to engage in business transactions and enter into various contractual relationships with Customer, (Without limiting the generality of the foregoing, this Guaranty is being given in order to induce PB&T to lease and/or sell real, personal and/or mixed property to Customer, to purchase or discount any Acceptances, Accounts, Chattel Paper, Checks, Contracts, Contract Rights, Drafts, General Intangibles, Instruments, Investment Securities, Land Contracts, Purchase Money Security Agreements (Conditional Sale Contracts of real and/or personal property), Real and/or Personal Property Leases, or any other instruments or evidence of indebtedness (with or without recourse) upon which Customer is or may be liable as maker, co-maker, indorser, acceptor, guarantor, surety or otherwise) and otherwise to deal with Customer; Guarantor (jointly and severally, if more than one) hereby absolutely and unconditionally guarantees to PB&T and its successors and assigns the due and punctual payment of all liabilities and obligations of said Customer to PB&T, primary or secondary (whether by way of indorsement or otherwise), whether now existing or hereunder arising, whether arising out of contract(s), tort(s) or otherwise, whether created directly with PB&T or acquired by PB&T through assignment, indorsement or otherwise; whether matured or unmatured; whether absolute or contingent; as and when the same become due and payable (whether by acceleration or otherwise), in accordance with the terms of any such instruments, accounts receivable and other security agreements, land and/or other contracts, drafts, leases, chattel paper, debts, obligations or liabilities evidencing any such indebtedness, obligations or liabilities, including all renewals, extensions and/or modifications thereof (all liabilities and obligations of the Customer to PB&T, including all of the foregoing, being hereinafter collectively termed "Obligations of Customer"); provided, however, that if and and [sic] only if an amount is here specified; to wit:

($5642.67),

(Leave blank, if liability hereunder is unlimited)

then, the maximum liability, jointly and severally, of the undersigned Guarantors hereunder, at any one time outstanding, with respect to the aggregate principal amount of the "Obligations of Customer," shall not exceed the sum of money above specified, plus all interest or Finance Charges, Costs of Court and the reasonable attorneys' fees of PB&T.

Under the covenants and agreements, the guaranty provided among other things that (i) the guarantor waived notice of extensions of credit by the Bank, (ii) the guaranty shall remain a continuing guaranty of payment and (iii) the guarantor could terminate the guaranty by written notice to an officer of the Bank actually involved in the transactions with respect to all obligations arising more than five (5) banking days after receipt of said notice by the Bank officer.

In the years preceding 1977, the Bank had made numerous loans to Stevenson dating back to 1964. Mrs. Stevenson had cosigned on some of the previous loans, but plaintiff asked her to sign a guaranty in connection with this 16 September 1977 loan. There was some evidence that the $5,642.67 note was the consolidation of a prior loan with a new loan. The uncontradicted evidence was that the $5,642.67 loan was fully paid and that no part of the loan which is the subject matter of this lawsuit was an extension or renewal of that loan. David Brown (herein Brown), the loan officer who handled Stevenson's transactions, testified that the Bank was not extending a line of credit to Stevenson when the guaranty was executed.

According to Mrs. Stevenson's testimony, on or before 24 May 1978, she went to her regular branch of the Bank and after being told that both Brown and Bobby Setzer, the people with whom she usually dealt were no longer at that branch, she spoke with Daniel Beaver (herein Beaver), an assistant vice president and loan officer. Mrs. Stevenson asked what her husband's balance was, and informed Beaver that she was obtaining a second mortgage to pay off the loan and that once it was paid, she would not be responsible for any more loans to Stevenson. According to Mrs. Stevenson, Beaver indicated that this course of action would be "okay." The second mortgage was obtained and the Bank paid in full. Beaver testified that Mrs. Stevenson said that she and Stevenson were taking out or had taken out a second mortgage to

pay off the debt, and she would not be liable on any more loans unless she personally came in and signed.

In the meantime, unbeknownst to Mrs. Stevenson, her husband was talking with Brown and through him obtained the $4500 loan which is the subject of this suit. According to Brown, he did not learn until after the loan to Stevenson had been made that Mrs. Stevenson had told Beaver she would not be liable on any more loans with Stevenson.

Prior to trial, both parties moved for summary judgment and both motions were denied. At trial plaintiff called Mrs. Stevenson as a witness; and at the close of plaintiff's evidence, defendant Mrs. Stevenson moved for directed verdict, which was granted. The Bank appeals.

Clontz and Clontz by Ralph C. Clontz, III for plaintiff-appellant.

Roger Lee Edwards for defendant-appellee.

PARKER, Judge.

Plaintiff has brought forward three assignments of error, namely, the trial court's denial of its motion for summary judgment; the trial court's admission of parol evidence which contradicted the terms of the guaranty; and the trial court's granting of Mrs. Stevenson's motion for directed verdict and denial of plaintiff's motion at the close of plaintiff's evidence. We consider the issue raised by the third assignment of error first.

In an action on a contract, the intention of the parties to the contract must be determined from the language of the contract, the purpose and subject matter of the contract and the situation of the parties. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975). When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court. *Brokers, Inc. v. High Point City Board of Education*, 33 N.C. App. 24, 234 S.E. 2d 56, *disc. rev. denied*, 293 N.C. 159, 236 S.E. 2d 702 (1977), and the court cannot look beyond the terms of the contract to determine the intentions of the parties. *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E. 2d 377 (1981). However, when there is ambiguity in the language used, the intent of the parties is a question for the jury and parol evidence is admissible

to ascertain that intent. *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968).

Whether or not the language of a contract is ambiguous or unambiguous is a question for the court to determine. Applying the rules of construction that words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible, we find that the guaranty agreement in the instant case is not clear and unambiguous. Certain language such as "continuing unconditional guaranty" and "all Obligations of Customer" indicates that the guaranty was intended to cover future loans to Stevenson, but the phrase "arising hereunder" could be interpreted to limit the guaranty to loans given contemporaneously with the execution of the guaranty. The language "this Guaranty is being given in order to induce PB&T . . . to purchase or discount Acceptances, Accounts, Chattel Paper, Checks, Contracts, Contract Rights . . . or any other instruments of indebtedness . . . upon which Customer is or may be liable . . .," is consistent with future advances or extension of a line of credit, but the limitation of the maximum amount of liability to exactly $5,642.67 implies an intention to guarantee only a single loan transaction. Limitations as to amount beyond which a guarantor will not be liable are held to indicate a continuing guaranty where that amount is left blank in the instrument, or where the amount is some arbitrary figure. *See generally* 38 Am. Jur. 2d *Guaranty* § 25 (1968), and cases cited therein.

In the instant case, Mrs. Stevenson's defense raises two questions. First, was the guaranty intended to be a specific guaranty guaranteeing only the $5,642.67 loan or was it intended to be a continuing guaranty covering future loans. Second, was the Bank estopped by Mrs. Stevenson's conversation with Beaver and his response. If the answer to the first question is that the guaranty was a specific guaranty, that answer is outcome determinative, and the estoppel question need not be decided.

On a motion for directed verdict, the evidence must be viewed in the light most favorable to the party opposing the motion and the opponent is entitled to every reasonable inference which may be legitimately drawn from the evidence and all conflicts in the evidence resolved in favor of the opponent. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981).

We are not unmindful of the rule that a contract is to be construed against the party drafting the document. Similarly, we recognize that there is authority that construction of contracts of adhesion, such as the one at issue in this case, is for the court when the underlying facts are not in dispute. *See* 3 Corbin on Contracts §§ 554, 559 (C. Kaufman Supp. 1984). However, our research discloses that in this jurisdiction, except in construing insurance contracts, our courts have submitted the question of intent in an ambiguous contract to the jury. As stated in *Hite v. Aydlett*, 192 N.C. 166, 170, 134 S.E. 419, 421 (1926):

> "It is a well-established general rule that if the parties reduce their entire contract or agreement to writing, whether under seal or not, the court will not hear parol evidence to vary or change it, unless for fraud, mistake or the like; but . . . if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court." Davis, J., in *Cumming v. Barbour*, 99 N.C., 332.

See also Root, supra; Silver v. Board of Transportation, 47 N.C. App. 261, 267 S.E. 2d 49 (1980). In view of the foregoing, the question of the parties' intent, *i.e.*, whether the guaranty covered only the one loan or future loans to Stevenson was for the jury. The directed verdict was, therefore, improvidently granted.

For purposes of the new trial, we note that with respect to the estoppel issue, the evidence as to whether Mrs. Stevenson had her conversation with Beaver before or after the loan at issue was made raised a question of fact for the jury. As our ruling on the third assignment of error has also disposed of plaintiff's arguments in its first and second assignments of error, these assignments are overruled.

New trial.

Judge BECTON concurs in the result.

Chief Judge HEDRICK dissents.

Judge BECTON concurring in the result.

Hesitantly, I concur in the result. Although the facts and equities tend to favor the defendant, it is not our task, considering the facts of this case, to determine the intent of the parties, to resolve the estoppel issue, or, in any way, to weigh the facts. Those matters are for a jury which may very well rule for the defendant.

Chief Judge HEDRICK dissenting.

This case was heard in the Court of Appeals on 23 September 1985. I received the majority opinion authored by Judge Parker and concurred in by Judge Becton on 30 January 1986. My analysis of the majority opinion together with the record in this case compels me to the conclusion that the directed verdict for defendant Shirley Stevenson was proper. The guaranty agreement, bearing no date, in my opinion, clearly and unambiguously obligated defendant to pay only $5,642.67, the amount of the indebtedness written into the agreement. Furthermore, I believe that the evidence that defendant obtained from the bank manager the amount due on all of her husband's notes and obligations, borrowed that amount of money from the bank, secured that obligation on a second deed of trust on her home and paid all of her husband's obligations, such evidence being uncontroverted and said facts being admitted by the bank's manager, is sufficient to discharge defendant from any obligations under the "so-called" guaranty agreement. It is inconceivable to me that the bank is not estopped to collect more from this defendant as a matter of law.

I vote to affirm.

STATE OF NORTH CAROLINA v. ALVIN C. WEAVER

No. 8527SC737

(Filed 4 February 1986)

1. **Criminal Law § 34.1— evidence of other crimes—prejudicial error**

In a prosecution for breaking and entering and larceny, the trial court committed prejudicial error in admitting testimony by a witness that he had bought "hot tools" from defendant on a date prior to the date in question and that he had been buying tools from defendant for the previous eight years. Evidence that defendant had sold tools to the witness in the past did not prove a plan to steal tools from the victim in this case. N.C.G.S. 8C-1, Rule 404(b).

2. **Larceny § 8— felonious larceny—failure to instruct on misdemeanor larceny**

The trial court in a felonious larceny case did not err in failing to instruct on the lesser included offense of misdemeanor larceny where all the evidence showed that property was taken pursuant to a breaking or entering of a building. N.C.G.S. 14-54; N.C.G.S. 14-72(b).

3. **Larceny § 9— acquittal of breaking or entering—conviction of felonious larceny**

The trial court properly accepted a verdict convicting defendant of felonious larceny even though he had been acquitted of felonious breaking or entering where the trial court had instructed the jury on guilt based upon the acting in concert theory.

Judge ARNOLD dissenting.

Judge WELLS concurring in the result.

APPEAL by defendant from *Lamm, Judge.* Judgment entered 14 March 1985 in Superior Court, GASTON County. Heard in the Court of Appeals 10 December 1985.

Defendant was tried for felonious breaking or entering, felonious larceny and felonious possession of stolen goods. The State's evidence showed that on 4 November 1984, Buddy Edison discovered that someone had broken into his storage building. The items taken included a chain saw in a red carrying case and a socket set. Later that evening Mr. Edison identified his chain saw and carrying case at the police station.

The police had recovered the chain saw because of information supplied by Carl Rutledge, an informant. On 4 November 1984, Rutledge called the police and told them a person named Alan had called him about selling two chain saws and a drill. The

police then gave Rutledge several marked bills to purchase these items.

Carl Rutledge testified that he then went to defendant's trailer in Bessemer City. The defendant and his brother were at the trailer. When Rutledge arrived defendant left the room and returned with the chain saws and the drill. Rutledge bought the items and gave defendant's brother the marked money. He then took the items to the police. The police obtained warrants and arrested defendant and his brother. A search conducted pursuant to the arrest revealed that both the defendant and his brother had the marked money in their possession. Rutledge also testified that he had purchased "hot tools" from defendant on 29 October 1984 and tools from the defendant on other occasions prior to the occasion in question.

The defendant presented evidence from his brother that it was the brother who had committed the Edison break-in and that the defendant was not involved in any way. The witness also testified that the informant was a dealer in stolen goods and that it was he and not the defendant who had dealt with him on earlier occasions. The brother further testified that he had given defendant $150 on the day of the arrest for baby-sitting for his children. The defendant also presented evidence that Rutledge testified to escape prosecution for other breaking or entering offenses.

The jury found defendant guilty of felonious larceny. From a judgment sentencing him to the maximum term of imprisonment, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Karen E. Long, 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 admission of testimony by Carl Rutledge that he had bought "hot tools" from him on 29 October 1984 and that he had been buying tools from the defendant for the previous eight years. He argues that this evidence should have been excluded under G.S. 8C-1, Rule 404(b) which 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.

The admission of evidence of other crimes or wrongs in criminal trials has been treated in many cases. In *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954) our Supreme Court held it was error in a trial for prostitution to admit evidence that after the assignation the defendant went to the room of the man who had been with her and took money from his wallet. The Supreme Court stated the general rule to be "in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed a distinct, independent, or separate offense." *Id.* at 173, 81 S.E. 2d at 365. It listed eight exceptions to the rule and said the evidence in that case did not fit any of the exceptions.

In H. Brandis, *Brandis on North Carolina Evidence* § 91 (1982) the admission of evidence as to other crimes is discussed. The author says that by using the exceptions approach of *McClain*, cases have been decided which simply ignore the proper rule. He states the rule to be without exceptions as follows:

> Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.

Examples of what may be proved by proof of other crimes are listed in *Brandis* § 92.

We believe that with the passage of Rule 404(b) the General Assembly intended to use the approach suggested in *Brandis*, that is that we have a rule with no exceptions. The State relying on *State v. Williams*, 308 N.C. 357, 302 S.E. 2d 438 (1983) and *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1106, 51 L.Ed. 2d 539 (1977), argues that the evidence that defendant committed other crimes proves a

plan to commit the crime with which he was charged. In *Hunter* our Supreme Court used the exceptions approach and held that evidence of other crimes was admissible under the sixth exception listed in *McClain* which says, "[e]vidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *McClain, supra,* at 176, 81 S.E. 2d at 367. In *Hunter* testimony was admitted that the defendant had organized a group which had committed a series of break-ins. A man had been killed in one of them and the defendant was tried as an accessory before the fact for the murder. The Supreme Court said the evidence "tended to establish a common plan or scheme embracing the commission of a series of larcenies so related to each other that proof of these other crimes tended to prove the crime charged . . . ." *Hunter, supra,* at 573, 227 S.E. 2d at 546.

In *Williams, supra* the defendant was tried for rape. Testimony was received that three days after the offense he was arrested peeping into the window of an occupied dwelling. The Supreme Court used the exceptions approach and quoted from the sixth exception of *McClain.* We do not believe testimony that the defendant was arrested for being a peeping tom three days after the rape for which he was tried tended to show a common plan "embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged . . . ." There was evidence in *Williams* that a screwdriver found at the scene at which defendant was arrested connected him with the rape. We believe this made testimony admissible of the manner in which the screwdriver was found which would include testimony of his arrest. We do not believe that *Williams* is precedent for the admissibility of evidence of a separate crime as part of a plan.

G.S. 8C-1, Rule 404(b) says one purpose for which evidence of other crimes may be admitted is to prove a plan. We do not believe that evidence that the defendant had sold tools to Carl Rutledge in the past proves a plan to steal tools from Buddy Edison. It was error to admit this testimony. We cannot say this testimony did not affect the outcome of the trial. We hold it was prejudicial error requiring a new trial. We believe *Hunter* is

distinguishable. In that case the State proved there was a series of crimes pursuant to agreements between the defendant and other persons.

[2] The defendant next contends the court erred by failing to instruct on the lesser included offense of misdemeanor larceny. G.S. 14-72(b) provides that "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [c]ommitted pursuant to a violation of . . . G.S. 14-54 . . . ." G.S. 14-54 is the statute making it a crime to break or enter a building. All the evidence presented showed that the chain saw was taken pursuant to a breaking or entering, thus, it was not error to refuse to instruct on misdemeanor larceny.

[3] Finally defendant contends the court erred by accepting the felonious larceny verdict because it was inconsistent with his acquittal on the breaking or entering charge. In *State v. Marlowe*, 73 N.C. App. 443, 326 S.E. 2d 351 (1985), this Court held that it was proper to convict a defendant of felonious larceny even though he had been acquitted of felonious breaking or entering when the trial court had instructed the jury on guilt based upon the acting in concert theory. The *Marlowe* decision was based upon the decision in *State v. Curry*, 288 N.C. 312, 218 S.E. 2d 374 (1975), and *State v. Pearcy*, 50 N.C. App. 210, 272 S.E. 2d 610 (1980), *review denied*, 302 N.C. 400, 279 S.E. 2d 355 (1981). The court charged on acting in concert in this case, thus we find no inconsistency in the jury verdicts.

New trial.

Judge ARNOLD dissents.

Judge WELLS concurs in the result.

Judge ARNOLD dissenting.

I dissent. I do not believe the court erred in allowing Carl Rutledge to testify regarding his prior dealings with the defendant. Defendant argues that this evidence should have been excluded pursuant to Rule 404(b) of the Rules of Evidence.

G.S. 8C-1, Rule 404(b) in pertinent part 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.

This is consistent with prior North Carolina practice. *See*, Commentary to Rule 404(b) of the Rules of Evidence. In *State v. McClain*, 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954), our Supreme Court stated that "[e]vidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crimes charged and to connect the accused to its commission." I do not believe that this law was changed by the passage of G.S. 8C-1, Rule 404(b) of the Rules of Evidence. I believe the evidence complained of tended to show that defendant was involved in a scheme or plan to steal tools and sell them to the informant Rutledge. This evidence is especially relevant in view of defendant's contention that it was his brother who was responsible for the larceny of Mr. Edison's chain saw. I believe that the evidence was properly admitted under the law set forth in *McClain* and Rule 404(b) of the Rules of Evidence. Thus, I find no error in defendant's trial.

Judge WELLS concurring in the result.

I concur that at least part of the evidence of defendant's other acts or conduct was inadmissible and was prejudicial. I refer to the informant's testimony that he had been dealing with defendant for eight years.

I am not persuaded that the enactment of N.C. Gen. Stat. § 8C-1, Rule 404(b) of the Rules of Evidence has substantially changed the law of this State as set out in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954) and its progeny. Although *McClain* has certainly not been uniformly applied, *see State v. Streath*, 73 N.C. App. 546, 327 S.E. 2d 240, *disc. rev. denied*, 313 N.C. 513, 329 S.E. 2d 402 (1985), our appellate courts continue to provide helpful guides to its application. For example, on the point of common plan or scheme evidence, our Supreme Court has stated in two re-

cent cases that our trial courts should be cautious in allowing such evidence:

> . . . before this exception can be applied, there must be shown some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes. [Citations omitted.] To allow the admission of evidence of other crimes without such a showing of similarities would defeat the purpose of the general rule of exclusion. [Citations omitted.]

State v. Moore, 309 N.C. 102, 305 S.E. 2d 542 (1983). *See also State v. Hyman*, 312 N.C. 601, 324 S.E. 2d 264 (1985), where the court stated: "Evidence offered to show the existence of a common plan or scheme must be carefully examined to insure that it is relevant to show a common design and not merely to show the defendant's propensity to commit the offense charged."

Since defendant denied that he was the offender in these cases and put the identity of the offender at issue, I would allow the evidence that defendant sold the informant "hot tools" only a few days prior to the commission of the offenses charged in these cases as being relevant to establish the identity of defendant as the offender in these cases. *See Streath, supra.*

For the reasons stated, I concur that defendant should have a new trial.

IN THE MATTER OF REBECCA ANN BADZINSKI

No. 8510DC417

(Filed 4 February 1986)

Infants § 4— neglected child—order that mother submit to psychological evaluation—no authority under N.C.G.S. 7A-650(b1)

The district court did not have authority pursuant to N.C.G.S. 7A-650 to order a mother to submit to a psychological or psychiatric assessment and treatment where her child had previously been adjudicated neglected because N.C.G.S. 7A-650(b1) is ambiguous in that it does not make clear in whose treatment a parent may be ordered to participate. The most reasonable interpretation, given the language of the statute and its context and apparent purpose, is that it authorizes the district court to order the parent of a juvenile ad-

judicated delinquent, undisciplined, abused, neglected, or dependent to participate in medical, psychiatric, psychological or other treatment ordered for the juvenile, but does not authorize the court to order a juvenile's parent to otherwise submit to medical, psychiatric, psychological or other assessment or treatment. N.C.G.S. 7A-647(3).

APPEAL by respondent Mary Spanovich from *Cashwell, Judge*. Judgment entered 21 November 1984 in WAKE County District Court. Heard in the Court of Appeals 29 October 1985.

This juvenile proceeding was instituted in April 1983 when the Wake County Department of Social Services (hereinafter "Department") filed a petition alleging that Rebecca Ann Badzinski was a neglected juvenile as defined in N.C. Gen. Stat. § 7A-517(21) (1981). In the petition, the Department alleged that the care, supervision and living situation provided for the juvenile by her mother, Mary Spanovich, was inadequate. By order dated 17 August 1983, the court adjudged that the juvenile was neglected, placed legal custody of the juvenile with the Department with physical custody remaining with the juvenile's mother and ordered that the matter be reviewed in six months.

When the matter came on for review, evidence was presented which showed that the care and living environment provided for the child by her mother had improved and that the mother had complied with the requirements of the prior court order and the recommendations of the Department regarding the child's care. In accordance with the recommendations of the juvenile's *guardian ad litem* and a social worker with the Department, the court returned legal custody of the juvenile to her mother and ordered the Department to continue protective supervision over the child.

At the review hearing, the social worker informed the court that the Department had requested that the mother submit to evaluation by an agency psychologist but that the mother had refused to do so. The Department believed an evaluation was necessary in order to work effectively with the mother towards a goal of enhancing her abilities in effective parenting and requested that the court order the mother to participate in a psychological evaluation. The *guardian ad litem*, in a report presented to the court, stated that she believed that psychological evaluation and subsequent follow-up would greatly enhance the

mother's ability to deal with the stresses of single parenting and to provide a stable loving environment for her children and recommended that the mother be made to undergo such evaluation. The court concluded that it was in the juvenile's best interests that a special hearing be conducted to determine if the juvenile's mother should be ordered to participate in medical, psychiatric, psychological or other treatment and ordered that a petition be prepared for the court requiring such a hearing.

Subsequently, a juvenile petition was prepared for and signed by the court which, pursuant to N.C. Gen. Stat. § 7A-650 (1981 and Cum. Supp. 1985), called for and gave notice of the special hearing. Based upon the evidence presented at the special hearing, the court made the following pertinent findings of fact in an order entered 21 November 1984:

> 5. That the [juvenile's] mother has failed to comply with the requirement of maintaining a stable, safe home environment in that she was in arrears for two months in the payment of her rent at her present address until said rent was paid by strangers the week before the hearing.
>
> . . . .
>
> 8. That the [juvenile's] mother has failed to budget her income sufficiently to meet her obligations to pay for essentials, although her income coupled with public assistance has been adequate to do so.
>
> 9. That the environment of the [juvenile] continues to be somewhat unsettled as the result of her mother's erratic lifestyle, housing instability, absence of furniture from their home for a period of six months, and financial instability of her mother in the presence of adequate income and public assistance in the form of food stamps.
>
> 10. That the erratic lifestyle, financial instability, housing instability and selling of furniture are symptomatic of a mental illness.
>
> 11. That the assertions by the [juvenile's] mother that several persons were "spying on her," "backstabbers," and "black-mailing," and "framing" her are symptomatic of paranoia.

12. That a failure of the [juvenile's] mother to receive assistance which will eradicate the symptoms depicted in the two preceding paragraphs may result in a situation whereby the [juvenile] must be adjudicated neglected and placed into foster care.

The court concluded:

1. That it is in the best interests of the [juvenile] that her family have stable housing, furniture, consistent child care and realistic expectations which can be met by her mother.

2. That it is in the best interests of the [juvenile] that her mother undergo psychological or psychiatric assessment and follow-up on the recommended treatment, if any, toward the goal of assisting her mother to better function.

Based on these findings and conclusions, the court ordered the juvenile's mother to present herself for psychological or psychiatric assessment at a time and place specified by the Department and to follow through with any treatment recommended by the professional performing the assessment by attending and participating in any counseling or therapeutic sessions scheduled for her benefit and by taking any recommended medications in the proper amounts and frequency. The court directed the Department to pay for the services rendered for the mother's assessment and treatment. From the order entered directing the mother to submit to psychological or psychiatric assessment and treatment, the mother appealed.

While the appeal was pending, the appellant mother failed to appear for the psychological assessment scheduled by the Department. The Department moved for an order requiring the mother to show cause why she should not be held in contempt of the 21 November 1984 order for her failure to appear at the scheduled assessment, which motion was granted. When the mother failed to appear at the show cause hearing on 29 January 1985, the court issued an order for her arrest.

Assistant Wake County Attorney Corinne G. Russell for petitioner Wake County Department of Social Services.

Thomas W. Jordan, Jr. for the juvenile Rebecca Ann Badzinski and for Rebecca Toole, guardian ad litem for the juvenile.

A. Larkin Kirkman for respondent Mary Spanovich.

WELLS, Judge.

The dispositive issue presented by this appeal is whether the court below had authority pursuant to G.S. § 7A-650 to order the appellant mother to submit to psychological or psychiatric assessment and treatment. We conclude the court had no such authority; therefore, the order appealed from must be vacated.

G.S. § 7A-650 provides as follows in relevant part:

> AUTHORITY OVER PARENTS OF JUVENILE ADJUDICATED AS DELINQUENT, UNDISCIPLINED, ABUSED, NEGLECTED, OR DEPENDENT.
>
> (a) If the judge orders medical, surgical, psychiatric, psychological, or other treatment pursuant to G.S. 7A-647(3), the judge may order the parent or other responsible parties to pay the cost of the treatment or care ordered.
>
> (b) The judge may order the parent to provide transportation for a juvenile to keep an appointment with a court counselor.
>
> (b1) In any case where a juvenile has been adjudicated as delinquent, undisciplined, abused, neglected or dependent, the judge may conduct a special hearing to determine if the court should order the parents to participate in medical, psychiatric, psychological or other treatment. The notice of this hearing shall be by special petition and summons to be filed by the court and served upon the parents at the conclusion of the adjudication hearing. If, at this hearing, the court finds it in the best interest of the juvenile for the parent to be directly involved in treatment, the judge may order the parent to participate in medical, psychiatric, psychological or other treatment.
>
> (c) Whenever legal custody of a juvenile is vested in someone other than his parent, . . . the judge may order that

> the parent pay a reasonable sum that will cover in whole or in part the support of the juvenile . . . .

It is clear that the district court purported to act pursuant to G.S. § 7A-650(b1) in calling for the special hearing and in ordering the mother to submit to psychiatric or psychological assessment and treatment. This subdivision was added to G.S. § 7A-650 in 1983 and has not previously been interpreted by our appellate courts. The appellant mother argues that G.S. § 7A-650(b1) is ambiguous in that it does not make clear in whose treatment a parent may be ordered to participate. She contends this subdivision should be interpreted as only empowering the court to order a parent to participate in the treatment of a juvenile and not as authorizing the court to order a parent to submit to evaluation or treatment. The appellees, the Department of Social Services and the juvenile's *guardian ad litem*, argue that the subdivision should not be interpreted so narrowly and that the district court clearly had the authority to order the appellant mother to present herself for psychological or psychiatric assessment and treatment.

We agree that G.S. § 7A-650(b1) is ambiguous. Thus, we must refer to accepted principles of statutory construction to determine the interpretation intended by our legislature. *See Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948). "It is fundamental that legislative intent controls the interpretation of statutes." *In re Brownlee*, 301 N.C. 532, 272 S.E. 2d 861 (1981). In ascertaining and giving effect to the legislative intent, an act must be considered as a whole, *id.*, as must parts of the same statute dealing with the same subject matter. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968). The language of a statute must be read contextually, with reference to the objects and purposes sought to be accomplished and in a sense which harmonizes with the subject matter. *In re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584 (1962). In interpreting a statute, it will be presumed that the legislature comprehended the import of the words employed by it to express its intent. *Sellers v. Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817 (1973). "[W]here the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or definitely indicated by the context." *Id.*

Applying these principles here, we find the following: The statute in question, G.S. § 7A-650, is located in Article 52 of our present Juvenile Code, Chapter 7A, Articles 41-58 (1981 and Cum. Supp. 1985). The statutes contained within Article 52, which is entitled "Dispositions," all concern dispositions in juvenile actions. The dispositional alternatives set forth in the Article all directly affect the individual juvenile, either through his or her placement, supervision, examination, treatment or commitment or by the imposition of certain sanctions upon the juvenile. *See, e.g.*, N.C. Gen. Stat. §§ 7A-647, -648 and -649 (1981). G.S. § 7A-647(3), for example, which is cited in G.S. § 7A-650(a), provides as follows in relevant part:

> (3) In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert . . . to determine the needs of the juvenile. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and . . . order the parent to pay the cost of such care pursuant to G.S. 7A-650. . . .

G.S. § 7A-650 sets forth the authority the court has over the parents of the juvenile with respect to the disposition ordered. Its purpose appears to be to enable the court to order the parents to assist with the care, supervision or treatment ordered for the juvenile by either paying or sharing in the cost of the juvenile's support, paying the cost of the treatment or care ordered pursuant to G.S. § 7A-647(3), participating in the treatment ordered or providing the transportation needed to carry out the court's directive. *See* G.S. § 7A-650(a)-(c).

Though G.S. § 7A-650(b1) does not clearly indicate that the treatment referred to therein is treatment ordered for the juvenile pursuant to G.S. § 7A-647(3) rather than treatment of the parent, such interpretation of that subdivision is the more reasonable one given the apparent purpose of G.S. § 7A-650 and the language and context of the subdivision. The remaining relevant subdivisions of G.S. § 7A-650, *i.e.* G.S. § 7A-650(a)(b) and (c), as well as the other statutes in Article 52, all relate to a disposition

ordered by the court which directly affects the individual juvenile, rather than any other person. All other references in G.S. § 7A-650 and in Article 52 to medical, psychiatric, psychological or other treatment are to such treatment ordered for the juvenile pursuant to G.S. § 7A-647(3). *See* G.S. § 7A-647(3) and G.S. § 7A-650(a). Thus, it would be most consistent with the remaining sections of G.S. § 7A-650 and the other statutes in Article 52 to interpret G.S. § 7A-650(b1) as also referring to a disposition directly affecting the juvenile; that is, treatment ordered for the juvenile pursuant to G.S. § 7A-647(3). Significantly, the phrase "medical, psychiatric, psychological or other treatment" used in G.S. § 7A-650(b1) parallels the phrasing "medical, surgical, psychiatric, psychological or other treatment" used in G.S. § 7A-647(3) and G.S. § 7A-650(a) with reference to treatment ordered for the juvenile, except for the omission of the word "surgical." It follows logically that if the legislature were referring in G.S. § 7A-650(b1) to treatment ordered for the juvenile, that the word "surgical" would be omitted since surgery is not generally a treatment in which a parent could participate. In contrast, a parent could participate in psychiatric or psychological treatment of a juvenile by, for example, participating in family therapy and could even participate in a juvenile's medical treatment, particularly if the treatment were in the form of physical therapy. If, in fact, the legislature were referring to treatment of a parent in G.S. § 7A-650(b1), we see no logical reason for the omission of the word "surgical."

That the legislature, by adding G.S. § 7A-650(b1), intended only to grant courts the authority to order a parent to participate in the juvenile's treatment, rather than the authority to order a parent to submit to examination or treatment, is also indicated by its use of the word "participate" in the subdivision. "Participate" commonly means to have a part or share in something with others. *See Black's Law Dictionary* 1007 (5th ed. 1979); *Webster's New Collegiate Dictionary* 835 (1977). There is no indication that the legislature intended for this word as used in G.S. § 7A-650(b1) to have a contrary meaning. This definition of "participate" is clearly consistent with the interpretation of G.S. § 7A-650(b1) urged by the appellant mother. Had the legislature intended to grant courts the authority to order the juvenile's parent to submit to examination or treatment, it could have clearly indicated

such intent by use of a more appropriate verb or language similar to that used in G.S. § 7A-647(3). Its failure to do so persuades us that this was not the intent.

We conclude that the most reasonable interpretation of G.S. § 7A-650(b1), given the language of that subdivision and its context and the apparent purpose of the statute, is that it only authorizes the district court to order the parent of a juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent to participate in medical, psychiatric, psychological or other treatment ordered for the juvenile pursuant to G.S. § 7A-647(3). G.S. § 7A-650(b1), as we interpret it, does not authorize the court to order a juvenile's parent to otherwise submit to medical, psychiatric, psychological or other assessment or treatment. Accordingly, we hold that the court below erred in ordering the appellant mother pursuant to G.S. § 7A-650(b1) to submit to psychological or psychiatric assessment and treatment and that such order entered 21 November 1984 must be and is hereby vacated. Since the arrest order entered 29 January 1985 is based on the 21 November 1984 order which the court lacked the authority to enter, it must also be and is hereby vacated. *See Hardee v. Hardee*, 59 N.C. App. 465, 297 S.E. 2d 606 (1982).

Because we so hold, we need not address the remaining arguments presented by the appellant mother.

Vacated.

Judges ARNOLD and PARKER concur.

IN THE MATTER OF: APPEAL OF BASSETT FURNITURE INDUSTRIES, INC.

No. 8510PTC418

(Filed 4 February 1986)

Taxation § 25— ad valorem taxes—jet "situated" in North Carolina

A jet aircraft was "situated" or "more or less permanently located" in Rockingham County on 1 January 1984 and was therefore subject to ad valorem taxation by the county where the aircraft was owned by a nonresident corporation having no principal place of business in this State, but the

plane was hangared in this State for approximately one year while provisions were made to extend the runway of the airport nearest the corporation's headquarters; furthermore, the fact that the plane happened to be physically located at the airport nearest the corporation's headquarters on 1 January 1984 did not defeat taxation by Rockingham County.

APPEAL by taxpayer, Bassett Furniture Industries, Inc. from the Department of Revenue North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Final decision filed 26 November 1984. Heard in the Court of Appeals 18 November 1985.

In 1984 the Rockingham County Tax Supervisor discovered and "listed" for tax purposes a 1981 Saberliner Jet airplane owned by Bassett Furniture Industries, Inc. (Bassett), a foreign corporation maintaining its principal offices and place of business in Bassett, Virginia. On 10 May 1984 the Rockingham County Board of Equalization and Review affirmed the "listing" of the plane as 1984 discovery property. Bassett appealed the "listing" to the North Carolina Property Tax Commission which sat as the State Board of Equalization and Review. From an adverse final decision by the North Carolina Property Tax Commission, Bassett gave notice of appeal to this court.

Bassett is a foreign corporation having no principal place of business in North Carolina. It has obtained a Certificate of Authority to do business in this state. The plane, listed as discovery property by Rockingham County, has a fair market value for the 1984 tax year of $3,300,000. Bassett does not dispute the aircraft's valuation. Bassett does, however, dispute the Tax Commission's finding that the plane acquired a tax situs in Rockingham County as of 1 January 1984 thereby subjecting the jet aircraft to ad valorem taxation by Rockingham County for 1984.

Before purchasing the Saberliner Jet plane on 18 May 1983, Bassett owned three propeller-assisted airplanes and used the Blue Ridge airport in Spencer, Virginia, for those airplanes. The Blue Ridge airport is located approximately ten miles from Bassett's corporate headquarters. In 1970 or 1971 Bassett constructed a permanent hangar at the Blue Ridge airport. The hangar's facilities include rest rooms, storage rooms for materials, tools and supplies and fuel tanks. Since 1971 Bassett has made several donations to Blue Ridge for various improvements, ex-

pending a total of $100,000 in its hangar and donations to the airport.

The runway at Blue Ridge airport was not long enough to routinely accommodate the Saberliner Jet and this posed certain safety problems. It therefore became necessary for Bassett to locate another airport for the jet to use. On 18 June 1983 Bassett entered into a month-to-month lease for hangar space with Causey Aviation Service, a fixed base operator at the Shiloh airport in Rockingham County. Bassett began using the Shiloh airport for the jet in July 1983. The Shiloh airport is located approximately 35 miles from Bassett headquarters.

During the summer of 1983 Bassett negotiated with Blue Ridge airport authorities to lengthen the runway at Blue Ridge. In August 1983 a contract was let to lengthen the existing runway from 3600 feet to 5000 feet. The final anticipated date for completion of the extended runway was 27 September 1984.

The jet was hangared at Shiloh from July 1983 to 21 June 1984 when Bassett cancelled its lease with Causey Aviation by letter dated 25 June 1984. During that time, Bassett's jet did occasionally use the Blue Ridge airport when safety factors permitted. Between July 1983 and 1 January 1984 Bassett used the Blue Ridge airport a total of 33 times. Routine maintenance was performed at both airports. Fuel was available at both airports and while Bassett attempted to retain a permanent mechanic at Shiloh, it was unable to do so. On 1 January 1984 the jet was located at the Blue Ridge airport. However, from 4 January 1984 until 21 June 1984 Bassett used the Shiloh airport exclusively.

On appeal to the Property Tax Commission, Bassett contended that the Commission did not have jurisdiction over the subject matter, the Saberliner Jet aircraft, because the aircraft did not acquire a tax situs in North Carolina. The Tax Commission disagreed with Bassett's contentions and held that the jet was "more or less permanently located" at Shiloh airport in Rockingham County as of 1 January 1984 and that therefore the jet aircraft had acquired a tax situs in Rockingham County, North Carolina.

Horton and Michaels, by Walter L. Horton, Jr., for appellant-Bassett.

Harrington & Stultz, by Thomas S. Harrington, for appellee-Rockingham County.

EAGLES, Judge.

In its six assignments of error, Bassett argues that the 1981 Saberliner Jet aircraft was not within the jurisdiction of North Carolina on 1 January 1984 and therefore not subject to ad valorem taxation by Rockingham County. Consequently, Bassett argues, the imposition of the tax constitutes a deprivation of its property and denial of equal protection of the law in violation of the due process and equal protection clauses of the Fourteenth Amendment. We disagree.

G.S. 105-274(a) provides that "[a]ll property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is: [Defined exclusions and exemptions not pertinent to this appeal.]" G.S. 105-274(b) provides that "[n]o provision of this Subchapter shall be construed to exempt from taxation any property *situated* in this State belonging to any foreign corporation unless the context of the provision clearly indicates a legislative intent to grant such an exemption." [Emphasis added.] An annual listing of all property subject to ad valorem taxation is required by G.S. 105-285(a) and with respect to personal property the value, ownership and place of taxation is to be determined annually as of January 1. G.S. 105-285(b). The county tax supervisor is charged with the duty of listing and appraising all property within the county. G.S. 105-296(a).

The place for listing tangible personal property is determined by statute, G.S. 105-304. G.S. 105-304(a), "Listing Instructions," provides: "This section shall apply to all taxable tangible personal property that has a tax situs in this State. . . . The place in this State at which such property is taxable shall be determined according to the rules prescribed in subsections (c) through (h), below." As the statute requires, taxable tangible personal property must have acquired a tax situs in this State, for "[s]itus is an absolute essential for tax exaction." *Billings Transfer Corp. v. County of Davidson*, 276 N.C. 19, 32, 170 S.E. 2d 873, 883 (1969). Further, when personal property belonging to a

nonresident has acquired a taxable situs in this State, this State may tax that nonresident's property without violating the provisions of the Fourteenth Amendment, United States Constitution. *Mecklenburg County v. Sterchi Brothers Stores*, 210 N.C. 79, 185 S.E. 454 (1936).

The situs of personal property for purposes of taxation is determined by the legislature and the legislature may provide different rules for different kinds of property and may change the rules from time to time. *Planters Bank and Trust Co. v. Town of Lumberton*, 179 N.C. 409, 102 S.E. 629 (1920); *In re Freight Carriers, Inc.*, 263 N.C. 345, 139 S.E. 2d 633 (1965). Our legislature has provided the rules for determining the tax situs of personal property owned by foreign corporations with no principal place of business in this State. G.S. 105-304(d)(2) provides that the "[t]angible personal property owned by a domestic or foreign taxpayer (other than an individual person) that has no principal office in this State shall be taxable at the place in this State at which the property is situated." "Situated" is defined in G.S. 105-304(b)(1) to mean "more or less permanently located."

Our decision depends upon whether the stipulated facts and evidence presented establish that this airplane, belonging to a nonresident owner, was "more or less permanently located" in Rockingham County on 1 January 1984. The general use and significance of the phrase "more or less permanently located" was discussed at length by our Supreme Court in *In re Appeal of Finishing Co.*, 285 N.C. 598, 611, 207 S.E. 2d 729, 737 (1974), quoting from 71 Am. Jur. 2d *State and Local Taxation*, Sections 660, 661 (1973):

> Section 660 provides: "Before tangible personal property may be taxed in a state other than the domicil of the owner, it must have acquired a more or less permanent location in that state, and not merely a transient or temporary one. Generally, chattels merely temporarily or transiently within the limits of a state are not subject to its property taxes. Tangible personal property passing through or in the state for temporary purposes only, if it belongs to a nonresident, is not subject to taxation under a statute providing that all real and personal property in the state shall be assessed and taxed. . . . A criterion is whether the property is there for an indef-

> inite time or some considerable definite time, and whether it is used or exists there to be used in much the same manner as other property is used in that community. . . ."
>
> Section 661 provides: "Permanency in the sense of permanency of real estate is not essential to the establishment of a taxable situs for tangible personal property. It means a more or less permanent location for the time being. The ownership and uses for which the property is designed, and the circumstances of its being in the state, are so various that the question is often more a question of fact than of law. In the final analysis, the test perhaps is whether or not property is within the state solely for use and profit there. . . ."

The court held that "the words *more or less* permanently exclude the necessity of establishing unqualified permanency such as actual and continuous presence in the State." *Id.* at 613, 207 S.E. 2d at 739.

> The courts are all agreed that before tangible personal property may be taxed in a state other than its owner's domicil, it must acquire there a location more or less permanent. It is difficult to define the idea of permanency that this rule connotes. It is clear that "permanency," as used in this connection, does not convey the idea of the characteristics of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state, as contrasted with a transient status—viz., likelihood of being in one state today and in another tomorrow.

Id. at 611, 207 S.E. 2d at 737 (quoting Annot., 110 A.L.R. 707, 717 (1937)).

We have considered the decisions cited by Bassett but all are readily distinguishable. Most involve taxpayers domiciled in North Carolina or taxpayers that have offices or a business situs in this State. Some deal with disputes between North Carolina counties competing for ad valorem tax dollars. Others deal with taxpayers' contentions that the subject personal property acquired tax situs in other states and therefore could not be taxed by North Carolina counties.

Bassett cited in their brief *Texas Company v. Elizabeth City*, 210 N.C. 454, 187 S.E. 551 (1936). It involved a Delaware corpora-

tion which owned several motor boats used in the conduct of its business in Elizabeth City. The boats were used to deliver the Texas Company's products to purchasers located on the sounds and rivers of both North Carolina and Virginia. The boats were never removed from Elizabeth City. In upholding the jury verdict in favor of Elizabeth City our Supreme Court held that:

> The *situs* of personal property for purposes of taxation is ordinarily the domicile of the owner. Where, however, the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the *situs* of said property for purposes of taxation is its actual *situs*, and not that of his domicile. The exception to the general rule is now universally recognized by the courts, both Federal and state.

Id. at 456, 187 S.E. at 552.

The facts before us here deal with a nonresident corporation having no principal place of business in this State and owning a jet aircraft hangared in this State for approximately one year. The following evidence considered by the Tax Commission demonstrates the type of "permanency" contemplated by the statute: When Bassett purchased the jet airplane, the Blue Ridge airport was inadequate to handle such aircraft; Bassett could not then acquire adequate hangar facilities in Danville, Virginia; at that time no contract had been let to extend the Blue Ridge runway; Bassett obtained the use of suitable hangar space at Shiloh airport; in June 1983 a month-to-month lease for the Shiloh hangar was entered into; in July 1983 Bassett began using Shiloh airport; in August 1983 a contract was let to extend the runway at Blue Ridge; the earliest possible completion date was April 1984; Virginia law required that a sales tax on the jet be paid when the jet became "based" in Virginia; Bassett did not pay this sales tax until August 1984; Bassett continuously and exclusively used Shiloh airport between July 1983 and 21 June 1984 except for the 33 times Blue Ridge airport was used between July 1983 and January 1984.

We hold that the stipulated facts and evidence presented by Bassett establish that the jet aircraft was "situated" or "more or less permanently located" in Rockingham County on 1 January 1984. Therefore it had a tax situs in Rockingham County on that

date. Because the property acquired a tax situs in this State, imposition of the ad valorem tax does not violate the provisions of the Fourteenth Amendment to the U.S. Constitution. Further, the fact that the airplane happened to be physically located at the Blue Ridge airport on 1 January 1984 does not defeat taxation by Rockingham County. *In re Plushbottom and Peabody, Ltd.*, 51 N.C. App. 285, 276 S.E. 2d 505, *cert. denied*, 303 N.C. 314, 281 S.E. 2d 653 (1981).

For the reasons stated, the final decision of the North Carolina Property Tax Commission sitting as the Board of Equalization and Review is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

MARCUS D. FAUCETTE AND LELIA C. FAUCETTE v. FRANK DAVID ZIMMERMAN AND HELEN KAY ZIMMERMAN

No. 8518SC437

(Filed 4 February 1986)

1. **Rules of Civil Procedure § 53— compulsory reference—right to jury trial**

When a court orders a compulsory reference, a party preserves his right to trial by complying with the procedural steps outlined in Rule 53, N. C. Rules of Civil Procedure, but the party is entitled to trial by jury only if the evidence before the referee was sufficient to raise an issue of fact.

2. **Boundaries § 15.1; Rules of Civil Procedure § 53— processioning proceeding—compulsory reference—no issue of fact—no right to jury trial**

In a processioning proceeding where compulsory reference was ordered, the evidence before the referee regarding the location of the true boundary line was insufficient to raise an issue of fact, and defendants were therefore not entitled to a jury trial, though they properly preserved their right, where the evidence consisted of inconsistent testimony of defendants' witnesses as to what they remembered or had been told about the location of missing stones, but the disputed boundary could be determined by two separate surveys based on calls in two separate deeds.

3. **Rules of Civil Procedure § 53— referee—issue not in pleadings—issue properly considered**

A referee could properly hear evidence on the issue of adverse possession even though the issue was not part of the formal pleadings, since the

referee has authority to resolve issues not contained in the pleadings at any stage of the action.

4. **Adverse Possession § 3; Rules of Civil Procedure § 53— compulsory reference —mistaken possession adverse—question of fact—right to jury trial**

In a processioning proceeding where the court ordered compulsory reference, evidence before the referee was sufficient to raise an issue of fact regarding defendants' claim of adverse possession and defendants were therefore entitled to a jury trial where the referee's conclusion that defendants' possession of the disputed area was by mistake and therefore not adverse was erroneous in light of *Walls v. Grohman*, 315 N.C. 239, holding that mistaken possession is adverse, and that holding applied to this case which was then pending on appeal.

APPEAL by defendants from *Albright, W. Douglas, Judge.* Judgment entered 11 January 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 October 1985.

On 7 January 1983 plaintiffs petitioned the Clerk of Superior Court to establish the boundary line between two adjacent tracts of land located in Guilford County pursuant to G.S. 38-1 to 38-4. On 3 June 1983 defendants filed a response to the special proceeding. Defendants alleged therein a different boundary line as the true boundary line. The Honorable Esther B. Sharpe, Assistant Clerk of Superior Court, entered judgment on 9 August 1983 in favor of the plaintiffs as to the location of the property lines. On 16 August 1983, defendants gave notice of appeal and simultaneously requested a trial by jury. On 1 November 1983 plaintiffs filed a motion requesting an order of compulsory reference pursuant to Rule 53(a)(2), N.C. Rules of Civ. P. On 23 November 1983 defendants filed a motion seeking leave of court to amend their response to include the alternative defense of adverse possession of the disputed area should plaintiffs prevail as to the location of the boundary line. On 5 December 1983 Judge W. Douglas Albright, after a hearing with both parties represented by counsel, entered an order of compulsory reference. On 29 March 1984 Judge Peter W. Hairston entered an order denying without prejudice defendants' motion to amend their response. On 14 November 1984 Referee Ralph A. Walker submitted his report to the Superior Court of Guilford County and recommended therein that the court adopt the report and enter judgment in conformance therewith. On 28 November 1984 plaintiffs filed a motion for confirmation of the referee's report and recommendations. On 14 December 1984 defendants filed exceptions to the referee's re-

port, reasserting their demand for a jury trial on each proposed issue. On 11 January 1985 judgment was entered in favor of plaintiffs, adopting the referee's report and concluding that the issues proposed by defendants were inappropriate based upon the exceptions taken and that plaintiffs were entitled to judgment as a matter of law. Defendants appeal.

Falk, Carruthers & Roth, P.A., by Allen Holt Gwyn, Jr. and Robert A. Ford, for plaintiff appellees.

Luke Wright and James W. Workman, Jr., for defendant appellants.

JOHNSON, Judge.

Plaintiffs initiated a processioning proceeding pursuant to G.S. 38-1 to 38-4. Proper pleadings were filed by both parties and a full evidentiary hearing was conducted by the Clerk of Superior Court. Upon a judgment entered in favor of plaintiffs, defendants made timely appeal to Superior Court, Guilford County.

On 5 December 1983 the court conducted a hearing in the presence of counsel regarding plaintiffs' 1 November motion for a compulsory reference and ordered the appointment of a referee to hear evidence and file a report as to all pending issues. The referee's report, filed 15 November 1984, set forth findings of fact, conclusions of law, and a recommendation to the court. The court subsequently adopted the referee's report in full and, consistent with the report, held in favor of plaintiffs. When the referee's report is adverse to a party, that party may preserve his right to jury trial pursuant to Rule 53(b), N.C. Rules Civ. P. It is undisputed that defendants properly preserved their right to a jury trial.

[1] The main issue on appeal is whether, by properly preserving their right to trial by jury, defendants are actually entitled to a jury trial. The North Carolina Constitution specifically preserves the right to trial by jury with respect to "all controversies at law respecting property." N.C. Const. art. I, sec. 25. When a court orders a compulsory reference, a party preserves his right to trial by complying with the procedural steps outlined in Rule 53. *Bartlett v. Hopkins*, 235 N.C. 165, 69 S.E. 2d 236 (1952). However, "[t]he constitutional right to trial by jury (citation omitted) is not

absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E. 2d 388, 396 (1979) (regarding the granting of a directed verdict as precluding a trial by jury). Precisely this question was decided with regard to a compulsory reference in *Nantahala Power and Light Co. v. Horton*, 249 N.C. 300, 106 S.E. 2d 461 (1959). As here, a party to a compulsory reference preserved his right to jury trial by filing exceptions to the referee's report and tendering issues. The North Carolina Supreme Court held that the party was entitled to trial by jury only if the evidence before the referee was sufficient to raise an issue of fact. *Id.*

[2] Since defendants' entitlement to a jury trial hinges on whether the evidence before the referee regarding the location of the true boundary line was sufficient to raise an issue of fact, we shall review the evidence as to this issue. The adjacent tracts of land in the case *sub judice* can be traced back to the 1800's when there was a common grantor. The defendants' tract lies to the south of plaintiffs' land. Plaintiffs and defendants each have a deed with reciprocal provisions using the same description as the one in the deed from the common grantor. The disputed boundary line is described in the deeds in relation to "a stone on Scott's line" and "a stone on Busick's line." Surveys of the two tracts were conducted for the first time prior to the institution of this action. Horace Faucette, Registered Land Surveyor, surveyed the lines for plaintiffs in 1980. Lacy Quint Tickle, Registered Land Surveyor, surveyed the lines for defendants in 1980. Both surveyors published their surveys. According to the extensive testimony of both surveyors, the two surveys agreed as to the location of the adjoining boundary line. Even though the stones referred to in the deeds could not be located at the time of the surveys, the location of boundary lines could be ascertained based upon the known boundaries of the property due west of the two tracts at issue and consistent with the boundaries of other neighboring properties. The evidence offered to challenge the location of the adjoining boundary as determined by the surveys and testimony of the surveyors consisted of testimony from several friends, family members of defendants and others. Their testimony consisted of statements as to where the witnesses *believed*

the stones, now missing, used to be located. The stones, referred to in both deeds, marked the points common to both tracts, that is, the northwest corner of the Zimmerman tract and the northeast corner of the Zimmerman tract. These beliefs were based on what the witnesses had been told by relatives or what they remembered from years past. There was no consistency among this testimony. When a dividing line between two tracts can be located by calls in a deed, the statements and acts of adjoining landowners are not competent evidence as to the location of the boundary line. *Wadsworth v. Georgia-Pacific Corp.*, 38 N.C. App. 1, 247 S.E. 2d 25 (1978), *vacated on other grounds*, 297 N.C. 172, 253 S.E. 2d 925 (1979). The inconsistent testimony of defendant's witnesses does not raise a genuine issue of fact when a disputed boundary line can be determined by two separate surveys based on calls in two separate deeds. Submission of the case to a jury was unwarranted and inappropriate on this issue.

[3] The referee also heard evidence on the issue of adverse possession even though the issue was not part of the formal pleadings. The referee has authority to resolve issues not contained in the pleadings at any stage of the action. Rule 53(e), N.C. Rules Civ. P. Next we shall inquire whether this evidence raised an issue of fact regarding defendants' claim of adverse possession.

The referee's findings of fact pertinent to the issue of adverse possession are:

> 18. . . . Mr. Zimmerman testified that he claimed the land which had been conveyed to D. E. Zimmerman in 1898, and admitted that he did not claim land he knew to belong to Marcus Faucette.
>
> 19. Various witnesses testified that members of the Zimmerman family had tended two fields partially within the disputed area for more than twenty years, and that one of these fields was located at the northwestern corner of the Zimmerman property and the other (the "Red" field) was located approximately 500 feet west of the northeastern corner of the Zimmerman property. These fields extended to the north of and beyond the surveyed property line between Faucette, on the north, and Zimmerman, on the south, by a distance of between twenty and thirty feet.

These facts are not in dispute. Based on these facts the referee made the following conclusion of law:

> 25. The evidence of the Zimmermans, respondents, does reflect that members of the greater Zimmerman family have exercised some dominion and control over parts of the disputed area, by tending two fields along the Zimmermans' northern property line (Faucettes' southern property line), which cultivation in certain areas went beyond the boundary now marked by the surveys. This dominion and control alone, however, cannot ripen into title by adverse possession, inasmuch as the Zimmermans, respondents, and through whom they claim, mistakenly thought that the northern property line of the Zimmerman tract was located some distance farther to the north than where it is located by the surveys. The occupation of land beyond the boundary called for in the Zimmerman deed under the mistaken belief that the land was covered by the description in the deed was not adverse until 1980, the time the Zimmermans discovered that the disputed area was not included within the description in their deed. *The possession by the Zimmermans, and through whom they claim, of certain portions of the disputed area was therefore by mistake, and was not adverse.* (Emphasis added.)

[4] The trial judge confirmed and adopted the referee's report in its entirety, including the above stated findings and conclusion. Although the presumption is that the court on proper evidence found facts to support its order, the record may clearly reveal that the court erroneously drew legal conclusions from these facts. *H. V. Allen Co. v. Quip-Matic Inc.*, 47 N.C. App. 40, 46, 266 S.E. 2d 768, 770, *disc. rev. denied*, 301 N.C. 85, 273 S.E. 2d 298 (1980). The rule of property upon which the referee and Judge Albright relied, namely that possession by mistake cannot be adverse, is no longer the law in North Carolina. We must decide whether this change of property law renders Conclusion of Law 25 erroneous.

In the recent case, *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E. 2d 556, 567 (1985), our Supreme Court held:

> We have concluded that a rule which requires the adverse possessor to be a thief in order for his possession of the property to be 'adverse' is not reasonable, and we now

> join the overwhelming majority of states . . . and hold that when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse.

The North Carolina Supreme Court announced this rule and overruled case law to the contrary while the case *sub judice* was pending on appeal.

"The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law." *Mason v. Cotton Co.*, 148 N.C. 492, 510, 62 S.E. 625, 632 (1908). A retroactive or retrospective application applies to all of the following situations: (1) the parties and facts of the case in which the new rule is announced; (2) cases in which the factual event, trial and appeal are at an end, but in which a collateral attack is brought; (3) cases pending on appeal when the decision is filed; (4) cases awaiting trial; and (5) cases initiated in the future but arising from earlier occurrences. *State v. Rivens*, 299 N.C. 385, 389, 261 S.E. 2d 867, 870 (1980). A wholly prospective application of a decision applies solely to causes of action arising after the filing date of the opinion. *Id.* Overruling decisions are presumed to operate retroactively, *id.* at 390 (citing *Mason v. Nelson Cotton Co., supra*), absent a compelling reason to operate only prospectively, *id.* (citing *Hill v. Brown*, 144 N.C. 117, 56 S.E. 693 (1907)).

In considering whether a compelling reason exists for prospective application we must look to the purpose and effect of the new rule and whether retrospective operation will further or retard its operation. *Linkletter v. Walker*, 381 U.S. 618, 629, 14 L.Ed. 2d 601, 608, 85 S.Ct. 1731, 1738 (1965). Other criteria appropriate for consideration are the reliance placed upon the old rule and the effect on the administration of justice of a retrospective application. *Id.* at 636, 14 L.Ed. 2d at 612, 85 S.Ct. at 1741. A wholly prospective application would have the effect of retarding the operation of the rule. The purpose of the new rule—to avoid rewarding the thief—and the effect will be furthered by retroactive application. No compelling reasons exist for wholly prospective application.

We shall now apply these rules to the facts before us. The instant case was pending on appeal when the decision of *Walls v. Grohman* was announced. Cases pending on appeal is one of the five situations stated above wherein retroactive application applies, hence *Walls v. Grohman* applies to the case at hand. In *Walls v. Grohman* the Supreme Court held that when one, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own, his possession is adverse. "If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake." *Walls v. Grohman, supra,* at 249, 337 S.E. 2d at 562.

The record in the instant case clearly reveals that the referee found and concluded that defendants took possession of plaintiffs' land under the mistaken belief as to the location of the boundary line. The referee's further conclusion adopted by the court, that such possession cannot be adverse is clearly erroneous in light of *Walls v. Grohman.* In holding that *Walls v. Grohman* does apply to this case, material issues of fact are raised, specifically factual issues regarding whether all requirements of adverse possession have been met and continued for the statutory period.

In conclusion, because material issues of fact do exist and because defendants properly preserved their right to a trial by jury, defendants are entitled to a jury trial to resolve these factual issues. Therefore, we reverse and remand this case to the Superior Court of Guilford County for a jury trial on the question of adverse possession.

Reversed and remanded.

Chief Judge HEDRICK and Judge WHICHARD concur.

State v. McCoy

STATE OF NORTH CAROLINA v. KENNETH LUTHER McCOY, AKA JASON McCOY

No. 858SC192

(Filed 4 February 1986)

1. **Burglary and Unlawful Breakings § 1— second degree burglary—breaking and entering required**

Unlike felonious breaking or entering with intent to commit larceny, second degree burglary requires proof of both a breaking and an entering. N.C.G.S. 14-51.

2. **Burglary and Unlawful Breakings § 5— second degree burglary—insufficient evidence—guilt of felonious breaking or entering**

The evidence was insufficient to support defendant's conviction of second degree burglary where the trial court failed to instruct the jury on acting in concert, and the evidence failed to show that defendant personally committed any act constituting a breaking in that it showed only that the screen on the kitchen window of the victim's apartment was removed, the window was pried open, and defendant and another man were seen carrying items of property from the back door of the apartment, but there was no evidence that defendant, rather than the other man, removed the screen and pried open the window. However, by finding defendant guilty of second degree burglary, the jury necessarily found facts that would support defendant's conviction of felonious breaking or entering, and the case will be remanded for entry of a judgment as upon a conviction of felonious breaking or entering.

3. **Larceny § 4— indictment for larceny by burglary—conviction of larceny by breaking or entering**

An indictment charging defendant with larceny pursuant to a burglary is sufficient to uphold defendant's conviction of larceny pursuant to a breaking or entering.

4. **Larceny § 7.2— identity of stolen property—sufficient evidence**

Evidence that defendant was seen leaving the victim's apartment with goods resembling those later reported stolen was sufficient to support an inference by the jury that defendant took property belonging to the victim.

5. **Larceny § 1; Receiving Stolen Goods § 1— felonious larceny—felonious possession of stolen property—improper conviction of both crimes**

Defendant could not properly be convicted and sentenced for both felonious larceny and felonious possession of the same stolen property, and judgment entered on the verdict of guilty of felonious possession of stolen goods must be vacated.

Judge EAGLES concurring.

State v. McCoy

APPEAL by defendant from *Barefoot, Judge.* Judgments entered 28 November 1984 in Superior Court, WAYNE County. Heard in the Court of Appeals 25 September 1985.

Defendant appeals from judgments of imprisonment entered upon verdicts finding him guilty of second degree burglary, larceny after breaking or entering, and possession of goods stolen pursuant to a breaking or entering.

Attorney General Thornburg, by Associate Attorney J. Allen Jernigan, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying his motion to dismiss the charge of second degree burglary. The court failed to instruct on acting in concert. Accordingly, defendant's conviction may be upheld only if the evidence supports a finding that he personally committed each element of the offense. *State v. Cox*, 303 N.C. 75, 85-87, 277 S.E. 2d 376, 383-84 (1981); *State v. Smith*, 65 N.C. App. 770, 772-73, 310 S.E. 2d 115, 116-17, *modified on another point and affirmed*, 311 N.C. 145, 316 S.E. 2d 75 (1984). Second degree burglary is the unlawful breaking and entering of an unoccupied dwelling in the nighttime with the intent to commit a felony therein. N.C. Gen. Stat. 14-51; *State v. Jones*, 294 N.C. 642, 656, 243 S.E. 2d 118, 127 (1978). Unlike felonious breaking or entering with intent to commit larceny, second degree burglary requires proof of both a breaking and an entering. *E.g., State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E. 2d 1, 5-6 (1979); *State v. Wilson*, 289 N.C. 531, 538, 223 S.E. 2d 311, 315 (1976).

Evidence, whether circumstantial or direct, from which jurors may reasonably infer that defendant committed each element of the offense, is sufficient to withstand a motion to dismiss. *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E. 2d 431, 433-34 (1956). The State's evidence need not exclude every reasonable hypothesis except that of guilt. *Id.*

The evidence, considered in the light most favorable to the State as required, *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E. 2d 649, 652 (1982), tends to establish the following:

Before leaving his apartment on the evening of 28 January 1984, Devon Ward secured his back door with a chain lock and by wedging a chair under the handle. The storm door was closed but would not lock. Ward secured his front door with a dead bolt lock. All windows were closed and locked.

When Ward returned at approximately 9:00 the next morning, the screen to his kitchen window had been removed, the lock on the window had been removed, the window was raised, and the kitchen door was open. Beneath the kitchen window a trash can had been turned upside down and a pillow placed on top of it. A television set and two rifles were missing.

Doris Wellington testified that on 28 January 1984 around 9:30 p.m. she saw defendant and a man she identified as Dwight Edwards come out the back door of Ward's apartment. Defendant was carrying a brown pillowcase containing two shotguns and Edwards was carrying something shaped like a box inside a pillowcase. Later that evening Wellington observed defendant several blocks away attempting to sell a shotgun.

[2] Defendant argues that the jury could only speculate as to whether he personally committed any act which constituted a breaking. We are constrained to agree. Entry through an open window or door does not constitute a breaking. *State v. Chambers*, 218 N.C. 442, 11 S.E. 2d 280 (1940). There was no evidence from which the jury reasonably could conclude that defendant, rather than Edwards, removed the screen and pried open the window. It is just as likely that defendant crawled through the window after Edwards opened it. Since the court failed to instruct the jury on acting in concert, the evidence does not permit a finding that defendant personally committed each element of the offense. *Cox, supra; Smith, supra.*

The conviction, however, need not be reversed. Felonious breaking or entering, N.C. Gen. Stat. 14-54(a), is a lesser included offense of second degree burglary and only requires proof of a breaking *or* entering with the intent to commit any felony or larceny therein. *See State v. Fikes*, 270 N.C. 780, 155 S.E. 2d 277 (1967); *State v. Gaston*, 4 N.C. App. 575, 167 S.E. 2d 510 (1969). By finding defendant guilty of second degree burglary the jury necessarily found facts that would support defendant's conviction of felonious breaking or entering. Thus, the judgment entered on a

verdict of guilty of second degree burglary is vacated, and the case is remanded for entry of a judgment as upon a conviction of felonious breaking or entering. *State v. Corley*, 310 N.C. 40, 55, 311 S.E. 2d 540, 549 (1984). *See also State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. O'Neal*, 77 N.C. App. 600, 335 S.E. 2d 920 (1985).[1]

[3] Defendant contends the court erred in denying his motion to dismiss the charge of felonious larceny. Relying on his first argument, *supra*, he argues that the State's failure to present evidence sufficient to uphold his conviction for second degree burglary creates a fatal variance between the allegations in the indictment, which charged him with larceny committed pursuant to a burglary, and the proof presented at trial. *See State v. Faircloth*, 297 N.C. 100, 106-08, 253 S.E. 2d 890, 894-95 (1979); *State v. Davis*, 253 N.C. 86, 98-99, 116 S.E. 2d 365, 373 (1960), *cert. denied*, 365 U.S. 855 (1961), *rev'd on other grounds*, 384 U.S. 737 (1966).

Defendant correctly asserts that as the State's evidence was insufficient to prove he personally broke into Ward's apartment, the felony aspect of his larceny conviction cannot be based on second degree burglary. *See Faircloth, supra; Davis, supra.* He further argues that the felony aspect of his larceny conviction cannot be based on "breaking or entering" as the indictment failed to allege such a violation. We disagree.

The indictment upon which defendant was convicted of felonious larceny charges that defendant:

> during the nighttime between the hours of 9:00 p.m. and 1:00 a.m., after having unlawfully, wilfully and feloniously broken into and entered a building occupied by Devon Ward used as a dwelling house located at 402 S. William St., Goldsboro, N.C. with the intent to commit the felony of larceny, unlawfully, and wilfully did feloniously steal, take and carry away (1) Panasonic 13″ color T.V. ser no. PJ44T0883; (1) 22 caliber

1. Judges Whichard and Cozort wish to note their agreement that Judge Eagles' concurring opinion presents a valid concern regarding this issue. They believe, however, that the result reached is dictated by precedent. They further note that the State in its brief argues that this Court should reach this result if it finds, as it has, that the conviction of second degree burglary cannot be upheld.

rifle; & (1) 22 caliber bolt action Glenfield Martin rifle, ser no 27458875 the personal property of Devon Ward having a value of $800.00 dollars.

The indictment is clearly sufficient to sustain a felonious larceny conviction under N.C. Gen. Stat. 14-72(b)(2), specifically, a larceny committed pursuant to a second degree burglary, N.C. Gen. Stat. 14-51, or under N.C. Gen. Stat. 14-72(a), *viz*, a larceny of goods with a value of more than four hundred dollars. The State, however, failed to present evidence regarding the value of the goods stolen. The court instructed the jury that it should find defendant guilty of felonious larceny if the State proved beyond a reasonable doubt "that the property was taken from a building during a burglary *or after a breaking or entering.*" Defendant did not object to the court's instructions. The issue of whether defendant committed larceny pursuant to a burglary was not submitted to the jury. The jury found defendant guilty of "larceny after a breaking or entering" and the court entered judgment accordingly.

While it is error for the court to permit the jury to convict based on "some abstract theory not supported by the bill of indictment," *State v. Taylor*, 301 N.C. 164, 170, 270 S.E. 2d 409, 413 (1980), the indictment charging defendant with larceny pursuant to a burglary is sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering. Felonious breaking or entering, N.C. Gen. Stat. 14-54, is a lesser degree of the offense of second degree burglary. *Fikes, supra; Gaston, supra.* N.C. Gen. Stat. 15-170 provides that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime . . . ." Thus, we find no fatal variance.

Portions of defendant's argument could be construed as an exception to the court's failure to instruct the jury regarding the elements of breaking or entering. As defendant failed to object to the charge, this issue was not preserved for consideration on appeal. N.C. R. App. P. 10(b)(2). Further, any failure by the court to set forth fully the elements of breaking or entering was harmless error. The court properly instructed the jury regarding the elements of second degree burglary. By finding defendant guilty of second degree burglary the jury necessarily found that he had

committed each element of the offense of felonious breaking or entering.

[4] Defendant further argues that the State failed to present substantial evidence that he took and carried away "the personal property of another." *See, e.g., State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968). Relying on *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966) and *State v. Evans*, 1 N.C. App. 603, 162 S.E. 2d 97 (1968), he contends the State failed to establish that the shotguns Wellington saw in his possession were those stolen from Ward.

In *Foster* and *Evans* evidence that defendants were in possession of goods which resembled stolen goods, but could not be positively identified as such, was found insufficient to uphold larceny convictions. The facts here differ in that defendant was seen leaving Ward's apartment with goods resembling those later reported stolen. The State presented substantial evidence from which the jury could infer that defendant took property belonging to Ward; accordingly, the court properly denied the motion to dismiss the charge of felonious larceny.

[5] Defendant contends the court erred in entering judgments upon verdicts of guilty of both felonious larceny and felonious possession of stolen property, and consolidating the verdicts for sentencing. We agree. In *State v. Perry*, 305 N.C. 225, 231, 287 S.E. 2d 810, 814 (1982), the Supreme Court held that in enacting N.C. Gen. Stat. 14-71.1 (possessing stolen goods) and N.C. Gen. Stat. 14-72 (larceny of property), the legislature did not intend that an individual be punishable for possession of the same goods that he stole. *Id.* at 234-37, 287 S.E. 2d at 816-17. The State concedes it is unable to distinguish the holding in *Perry* from the facts here. Neither can we. Accordingly, the judgment entered on the verdict of guilty of felonious possession of stolen goods must be vacated. *Id.* Because the possession of stolen goods charge was consolidated for sentencing with the larceny charge, the sentence as to the larceny charge must be vacated and the cause remanded for resentencing. *See State v. Anderson*, 76 N.C. App. 434, 439, 333 S.E. 2d 762, 766 (1985).

The result is:

(1) As to second degree burglary, judgment vacated, remanded for entry of judgment as upon a conviction of felonious breaking or entering.

(2) As to larceny after breaking or entering, no error; sentence vacated, remanded for resentencing.

(3) As to possession of stolen goods, judgment vacated, remanded for entry of judgment of dismissal.

Judges EAGLES and COZORT concur.

Judge EAGLES concurring.

I concur but wish to note my concerns with our disposition of the second degree burglary charge. At the outset I note that the presumptive sentence for second degree burglary is 12 years, while the presumptive for breaking or entering is 3 years.

While there is ample precedent for the disposition ordered (for example, *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984)), I would prefer to defer to the constitutional authority of the elected district attorney to exercise his discretion in the prosecution of the criminal cases of his district. I would prefer not to remand the second degree burglary case for entry of judgment on a conviction of breaking or entering but to order a new trial.

In my judgment, the better rule would be that where the failing on the original charge arises because of deficiencies in the indictment, it is appropriate for remand for entry of a judgment of conviction of the lesser included offense with which defendant was properly charged. However, where a conviction on the charge originally selected by the district attorney is required to be reversed because of prejudicial inadequacies in the jury instructions, the appellate court should defer to the district attorney and remand the matter for a new trial on the original charge or such other charge as the district attorney in his prosecutorial discretion selects.

By our decision we have, consistent with precedent, risked two competing injustices: first, the defendant is denied a fair trial

with proper instructions on the original charge of which he was informed by the indictment, and second, the State may be forced to give a defendant who could be proven guilty of the more serious offense an unwarranted benefit by preventing the district attorney from exercising his discretion to try the defendant on the original charge.

I concur because there is ample case authority for the disposition ordered and because the State's brief seems to encourage this disposition, but the better course of action would be to remand for a new trial to permit the elected district attorney to exercise his constitutional authority.

STATE OF NORTH CAROLINA v. CHARLES LEE ALLEN

No. 8520SC536

(Filed 4 February 1986)

Receiving Stolen Goods § 5.2— possession of stolen VCRs—guilty knowledge—insufficiency of evidence

In a prosecution for possession of stolen goods, evidence was insufficient to establish that defendant had knowledge or reasonable grounds to believe that the property in his car trunk was stolen and he therefore acted with a guilty purpose where the State relied on circumstantial evidence tending to show that two others stole two VCRs from a Roses store; defendant was in Roses at the same time as the thieves; defendant was at a nearby car wash approximately one hour later, again at the same time as the thieves; and as the result of a brief conversation between one thief and defendant, defendant agreed to give them a short ride and allowed them to place the contents of a box in the trunk of his car.

Judge WEBB dissenting.

APPEAL by defendant from *Collier, Robert A., Jr., Judge.* Judgment entered 14 March 1985 in Superior Court, UNION County. Heard in the Court of Appeals 24 October 1985.

Defendant was charged in an indictment with felonious possession of stolen goods consisting of two video cassette recorders, the personal property of Roses Stores, Inc.

The facts, pertinent to the errors assigned on this appeal, may be summarized as follows. Phillip Oxner and Warren Scott

Yarborough stole two VCR's from a display in Roses store in Monroe on 20 October 1984. On 20 October 1984 defendant was seen by a Monroe police officer, Lieutenant Frank Benton, at Roses store in Monroe at about 7:00 p.m. At the time Officer Benton was off-duty and in the store with his wife for a brief period, approximately ten minutes. The defendant approached Officer Benton and exchanged pleasantries. At the same time Officer Benton saw Mr. Yarborough and Mr. Oxner. Oxner also spoke a few seconds with Officer Benton; Yarborough was then some distance away. After leaving Roses, defendant went to a car wash on Stafford Street in Monroe. Meanwhile Oxner and Yarborough removed the two VCR's from a display in Roses, took them out the back door, placed them in a large box from a nearby dumpster, and walked with the box toward New Town, in the direction of the car wash. When Oxner saw defendant vacuuming his car at the car wash, he asked defendant for a ride to Oxner's sister's home, no more than two miles away. Yarborough and Oxner then took the VCR's out of the box and put them into the trunk of defendant's car. Within a block or two of Oxner's sister's house Police Officer Sonny Rogers spotted defendant driving his car in a weaving manner, crossing the center line on several occasions. Rogers stopped defendant, noticed a slight to moderate smell of alcohol on defendant, and asked to search the car, including the trunk. Defendant assented to the search which led to the discovery of the two VCR's. From a verdict of guilty and a sentence in excess of the presumptive term, five years, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, for the State.

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

JOHNSON, Judge.

The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 373, 275 S.E. 2d 491, 493 (1981). *See* G.S. 14-71.1, 14-72. On appeal, defendant assigns as error the

court's finding the evidence sufficient to show that (1) defendant knew or had reasonable grounds to believe the property had been stolen and (2) defendant acted with a dishonest purpose.

In considering a motion for nonsuit on appeal the Court must view all evidence in the light most favorable to the State, *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974), in an effort to determine whether the State met its burden of presenting substantial evidence of each element of the offense charged, *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the Court is what reasonable inference of guilt can be drawn from the circumstances. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). The Court must also consider defendant's evidence rebutting the inference of guilt when it is not inconsistent with the State's evidence. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983); *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). If, when the evidence is so considered, it serves only to raise a suspicion or conjecture that the defendant committed the offense, it is insufficient, even if the suspicion is strong. *State v. Evans*, 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971); *Cutler, supra* at 383, 156 S.E. 2d at 682. These controlling principles of law are more easily stated than applied to the evidence in a particular case. *Cutler, supra* at 383, 156 S.E. 2d at 682. Applying these principles to the evidence introduced in the present case, we reach the conclusion that, while the evidence presented raises a suspicion that defendant knew the property was stolen and therefore acted with a guilty purpose, it does not rise above conjecture.

There is no direct evidence that defendant knew the property in his car trunk was stolen. The State relies entirely upon circumstantial evidence. When the circumstantial evidence is viewed in the light most favorable to the State, the evidence shows that (1) defendant was in Roses at the same time as Yarborough and Oxner, (2) defendant was at a nearby car wash approximately one hour later, again at the same time as Yarborough and Oxner, and (3) as the result of a brief conversation between Oxner and defendant, defendant agreed to give them a short ride and allowed them to place the contents of a box in the trunk of his car. Granted, these facts give rise to a suspicion that defendant possessed the requisite knowledge; however, these facts just as reasonably lead to an inference that defendant had no knowledge

that he was transporting stolen property. Conjecture, not reasonable inference of guilt, is raised.

All the surrounding circumstances indicate that this was not a well-planned venture. Evidence shows Yarborough and Oxner did not decide to steal the merchandise until moments before doing so—after they saw the VCR display. There is no evidence showing that defendant was with Oxner and Yarborough while in Roses. The only evidence tending to link them together in Roses was the statement of off-duty Officer Benton that Oxner came up to him (Benton) at the same time defendant was talking to Officer Benton. Up to that time, Officer Benton said he saw defendant off by himself, not with Oxner and Yarborough. This is consistent with the testimony of both Yarborough and defendant. Officer Benton testified, "whether they were together I didn't know." An inference that defendant was with Oxner and Yarborough or had knowledge of the theft while he was in Roses is not reasonable on the evidence and is highly speculative.

After removing the VCR's from the display, Yarborough and Oxner took them out the back door. Only then did they locate a box from a nearby dumpster in order to conceal the VCR's. Yarborough testified that he did not tell defendant the box contained stolen property. He also testified that he saw Oxner speak with defendant at the car wash, out of his hearing. The conversation lasted only "seconds or minutes." The only remaining evidence supportive of defendant learning of the theft rests upon (1) this brief, unheard conversation between Oxner and defendant and (2) defendant having reasonable grounds to believe stolen property was placed in his car when Yarborough put something from a box into his trunk. On a motion to dismiss, the Court must consider the defendant's evidence which explains or clarifies that offered by the State. *Bates, supra.* According to defendant's undisputed testimony, Oxner did not ask to put something in the trunk until after defendant agreed to give them a ride. Furthermore, defendant gave Oxner the key to his trunk. According to both defendant's and Yarborough's testimony, it was Oxner and Yarborough who put the contents of the box into the trunk while defendant was vacuuming his car. It is reasonable to infer defendant did not even see the contents of the box. This evidence is not sufficient to conclude that defendant had reasonable grounds to believe the property was stolen. Taken together these facts are simply too

tenuous to establish the element of knowledge sufficiently to take the case to the jury.

Previously this Court has faced the difficult question of whether the record showed sufficient evidence to withstand nonsuit on the element of defendant's knowledge when the goods were undisputably in the defendant's possession. In *State v. Bizzell*, 53 N.C. App. 450, 281 S.E. 2d 57 (1981) (Whichard, J., dissenting), the majority reversed the conviction for lack of evidence showing guilty knowledge. In *Bizzell*, the defendant had established a part-time residence with his girlfriend in her mobile home. Several days before the burglary the defendant had visited the home of the victim. On the night of the burglary, the defendant's neighbor came to the mobile home looking for the defendant. When the defendant returned and his girlfriend told him his neighbor was looking for him, the defendant left. When he returned later that night he asked his girlfriend whether he could store some furniture for a friend. With her approval, the defendant and his neighbor stored the stolen property, unboxed in a closet. The defendant did not identify the friend, did not attempt to return the goods in the three days he possessed them and was wearing an item of stolen clothing at the time of his arrest. The majority concluded that "[w]hile the State's evidence in this case may 'beget suspicion in imaginative minds,' (citation omitted), this is not enough to support a conviction for possession of stolen property." *Id.* at 456, 281 S.E. 2d at 61. We find the evidence begetting suspicion in *Bizzell* even greater than in the instant case.

In *State v. Kelly*, 39 N.C. App. 246, 249 S.E. 2d 832 (1978), this Court upheld a possession of stolen property conviction when guilty knowledge was challenged. In that case, the defendant's behavior was sufficiently incriminating to bridge the gap between suspicion and a reasonable inference of guilt. In *Kelly*, police officers went to the home of the defendant to arrest a third party. No one answered. The police came upon property in the backyard, later determined to be stolen. When police returned the next day with a search warrant, defendant was found "hiding in the bushes behind the shed" in the backyard, squatting in a clump of honeysuckle with his face to the ground.

Other cases upholding convictions when knowledge was at issue have contained some evidence of incriminating behavior on the part of the accused. In *State v. Taylor*, 64 N.C. App. 165, 307 S.E. 2d 173 (1983), the defendant took a stolen gun out of his coat and surreptitiously threw it into some bushes when he was approached by a man who simply yelled at him. In *State v. Haskins*, 60 N.C. App. 199, 298 S.E. 2d 188 (1982), the defendant and his companion, when attempting to sell stolen guns for less than their true value, gave inconsistent stories about how the defendant had obtained the guns. The inconsistencies dissuaded the gun shop proprietor from purchasing the guns. In the case *sub judice*, defendant exhibited no such incriminating behavior when Officer Rogers stopped his car. Rather, defendant freely submitted to a thorough search of the passenger compartment and the trunk.

Our holding that defendant had no knowledge or reasonable grounds to believe that the property in his trunk was stolen necessarily leads to a holding that he lacked a guilty purpose. Because the evidence was insufficient to establish two necessary elements of the crime charged, defendant's conviction is reversed.

Reversed.

Judge PHILLIPS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not believe that in passing on the defendant's motion to dismiss the majority has considered the evidence in the light most favorable to the State. The State's evidence showed that an officer of the City of Monroe Police Department saw the defendant, Oxner and Yarborough in a store. The defendant was with Oxner a part of the time they were in the store. A short time after the three men left the store two VCRs were missing from a display case. Within an hour the VCRs were discovered in the trunk of the defendant's automobile. Oxner and Yarborough were with the defendant when his automobile was stopped. I believe this is sufficient evidence for the jury to find the defendant guilty of possession of stolen property.

The majority has used the defendant's evidence in passing on the motion to dismiss. By doing so they have failed to consider the evidence in the light most favorable to the State.

I vote to find no error.

FRED H. POORE AND WIFE, MARIE C. POORE v. SWAN QUARTER FARMS, INC., A. H. VAN DORP AND MARY H. VAN DORP

No. 852SC372

(Filed 4 February 1986)

1. **Rules of Civil Procedure § 12— judgment on the pleadings**

Where the trial court considered only the pleadings in determining defendants' motions for judgment on the pleadings, summary judgment, and dismissal for failure to state a claim, its ruling must be treated as one under N.C.G.S. 1A-1, Rule 12(c) for a judgment on the pleadings and not under Rule 56 for summary judgment.

2. **Quieting Title § 2.1— sufficiency of complaint**

Plaintiffs stated a claim sufficient to defeat a Rule 12(c) motion to dismiss on the pleadings where they alleged that noncompliance with legal formalities voided 16 June 1962 and 25 March 1969 deeds and these deeds constituted a cloud on their title.

3. **Quieting Title § 1— action to remove cloud upon title—no ejectment action—no statute of limitations**

Plaintiffs' action was one to remove a cloud upon title rather than one in ejectment where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of the action, and plaintiffs did not specifically seek to recover possession in their demand for relief but merely prayed for rents and profits and removal of the deeds as a cloud upon their title; therefore, their action was not barred by the statute of limitations, as no such statute exists in this kind of action.

4. **Quieting Title § 2.1— no judgment on pleadings**

In an action to remove cloud upon title, the pleadings failed to disclose sufficient facts and circumstances to permit judgment on the pleadings based on laches, estoppel, or adverse possession.

5. **Judgments § 37.3— action to remove cloud upon title—previous action for fraudulent conveyance—no res judicata**

Res judicata did not apply to bar plaintiffs' claims to quiet title based on noncompliance with legal formalities in the execution of deeds, since plaintiff in an earlier action sought to set aside one of the deeds in question as a fraudulent conveyance, and this action therefore involved a claim separate and distinct from that in the earlier action between the parties.

Poore v. Swan Quarter Farms, Inc.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 13 November 1984 in Superior Court, HYDE County. Heard in the Court of Appeals 23 October 1985.

Plaintiffs brought this action seeking to remove a cloud upon the title to certain real property in which they claim a one-half undivided interest in fee simple. The complaint alleged, in pertinent part, that:

Plaintiffs, together with individual defendants A. H. Van Dorp and Mary Van Dorp, conveyed property to defendant corporation on 16 June 1962. On 25 March 1969 defendant corporation conveyed this property to individual defendant Mary Van Dorp. Since defendant corporation "was never properly constituted to do business, was never a proper corporate entity, and therefore had no legal existence from the time of its purported incorporation until the suspension of its charter," the 16 June 1962 deed "had no legal effect and failed to convey any of the plaintiffs' interest." Likewise, the 25 March 1969 deed to Mary Van Dorp was of no legal effect because "defendant corporation never obtained proper corporate authority approving said conveyance as required by [law]."

Plaintiffs prayed the court to remove the deeds "as a cloud upon the plaintiffs' title to said land and that plaintiffs be declared the owners in fee simple of a one-half undivided interest in said land." They prayed in the alternative that if the court found the 16 June 1962 conveyance valid, it remove the subsequent 25 March 1969 conveyance as a cloud and declare defendant corporation the fee simple owner of the property.

Defendants alleged the following defenses in their answer: failure to state a claim upon which relief can be granted, collateral estoppel, *res judicata,* estoppel, statute of limitations, laches, and adverse possession. They then moved for judgment on the pleadings, summary judgment, and dismissal for failure to state a claim.

Plaintiffs appeal from the granting of summary judgment in favor of defendants.

Wayland J. Sermons, Jr., P.A., by Wayland J. Sermons, Jr., for plaintiff appellant.

McMullan & Knott, by Lee E. Knott, Jr., for defendant appellees.

WHICHARD, Judge.

[1] The parties offered and the court considered only the pleadings in determining defendants' motions for judgment on the pleadings, summary judgment, and dismissal for failure to state a claim. It did not consider any "affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, [or] any other materials which would be admissible in evidence at trial." *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E. 2d 159, 162 (1976). Therefore, we must consider the ruling to have been under N.C. Gen. Stat. 1A-1, Rule 12(c) for a judgment on the pleadings and not under N.C. Gen. Stat. 1A-1, Rule 56 for summary judgment. *Id.*

> Upon a motion for judgment on the pleadings the allegations of the non-movant are taken as true and all contravening assertions of the movant are taken as false. . . . Judgment on the pleadings is not favored by the law, and the non-movant's pleadings will be liberally construed. . . . The trial court is required to view the facts and permissible inferences in the light most favorable to the non-movant. [Citations omitted.]

Id. Under N.C. Gen. Stat. 1A-1, Rule 12(h)(2), defendants' motion for judgment on the pleadings properly included the defense of failure to state a claim upon which relief can be granted. We hold that plaintiffs have stated a claim.

[2] "Actions to quiet title are governed by N.C. Gen. Stat. 41-10 . . . ." *Boyd v. Watts*, 73 N.C. App. 566, 571, 327 S.E. 2d 46, 50, *disc. rev. allowed*, 314 N.C. 114, 332 S.E. 2d 479 (1985). "This statute is remedial in nature, designed to provide a means for determining all adverse claims to land, including those formerly encompassed within the equitable proceedings to remove clouds on title." *Id.* "Ordinarily, any person claiming title to real estate, whether in or out of possession, may maintain an action to remove a cloud from title against one who claims an interest in the

property adverse to the claimant, and is required to allege only that . . . [defendants claim] an interest in the land in controversy." *Ramsey v. Ramsey*, 224 N.C. 110, 113, 29 S.E. 2d 340, 342 (1944). However, while it is not necessary, except in cases of fraud, for plaintiffs to set forth the nature of defendants' claim, " 'the adverse or beclouding character of the claim . . . should appear from the complaint.' " *Id., quoting* 44 Am. Jur., sec. 79, p. 63. In *Lumber Co. v. Pamlico County*, 242 N.C. 728, 729, 89 S.E. 2d 381, 381-82 (1955), plaintiff's complaint in an action to remove certain deeds as a cloud upon its title simply alleged that defendant receiver's deed was void because the receiver lacked legal authority to convey. The Court held that the complaint stated a claim under N.C. Gen. Stat. 41-10 despite "plaintiff's failure to allege specific facts showing the Receiver's want of authority to convey . . . ." *Id.*

Plaintiffs here alleged that non-compliance with legal formalities voids the 16 June 1962 and 25 March 1969 deeds. They have not alleged fraud. Accordingly, despite failure to state specific facts underlying these allegations, the complaint nevertheless, under the liberal theory of notice pleading and in light of *Lumber Co.*, is minimally sufficient to state a claim for relief.

"A judgment on the pleadings in favor of [defendants who assert] the statute of limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted." *Flexolite Electrical v. Gilliam*, 55 N.C. App. 86, 87-88, 284 S.E. 2d 523, 524 (1981). A preliminary question, however, is what statute of limitations, if any, applies to plaintiffs' action. There is no express statute of limitations governing actions to quiet title under N.C. Gen. Stat. 41-10. It thus is necessary to refer to plaintiffs' underlying theory of relief to determine which statute, if any, applies. *See Oates v. Nelson*, 269 C.A. 2d 18, 21, 74 Cal. Rptr. 475, 477 (1969).

[3] Specifically, we must decide whether plaintiffs' action is one to remove a cloud upon title or is essentially an action in ejectment. N.C. Gen. Stats. 1-38 and 1-40 are the applicable statutes of limitation for ejectment actions. *Poultry Co. v. Oil Co.*, 272 N.C. 16, 19, 157 S.E. 2d 693, 696 (1967). These statutes prescribe "the period of time beyond which the owner of land is not privileged to bring an action . . . for the recovery of his land from a person in

possession thereof." 7 *Powell on Real Property*, Sec. 1012[1] at 91-2 (1985 Supp.).

Actions to remove a cloud upon title are in essence ejectment actions and properly reviewed as such " 'where . . . defendants are in actual possession and plaintiffs seek to recover possession . . . .' " *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E. 2d 540, 546 (1956). Plaintiffs did pray the court that "defendants A. H. Van Dorp and Mary H. Van Dorp be required to account to the plaintiffs for the rents and profits derived from said land while in exclusive possession as tenants in common." This prayer clearly implies that the individual defendants have been in actual possession of the subject property at some time. However, plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of this action. Likewise, plaintiffs did not seek specifically to recover possession in their demand for relief but merely prayed for rents and profits and removal of the deeds as a cloud upon their title. Under these circumstances we cannot find that plaintiffs' action is in essence one for ejectment and therefore controlled by N.C. Gen. Stats. 1-38 and 1-40. Rather, we hold that plaintiffs' action is one to remove a cloud upon title.

We further hold that no statute of limitations runs against plaintiffs bringing actions for removal of a cloud upon title. *See Orange & Rockland Util. v. Philwold Estates*, 52 N.Y. 2d 253, 261, 418 N.E. 2d 1310, 1313 (1981); *see also Oates v. Nelson*, 269 C.A. 2d 18, 74 Cal. Rptr. 475 (1969). Such an action " 'is a continuing right which exists as long as there is an occasion for its exercise.' " *Orange*, 52 N.Y. 2d at 261, 418 N.E. 2d at 1313.

> The purpose of a Statute of Limitations is to put an end to stale claims, not to compel resort to the courts to vindicate rights which have not been and might never be called into question. The requirement of prompt action is imposed as a policy matter upon persons who would *challenge* title to property rather than those who seek to quiet title to their land.

Id. Accordingly, we conclude that plaintiffs' action is not barred by any statute of limitations.

[4] We further hold that the doctrine of laches does not bar plaintiffs' action. This doctrine "is more flexible than the statute

of limitations, and may bar an equitable remedy by reason of inexcusable neglect or prejudicial delay . . . ." *Huss*, 31 N.C. App. at 469, 230 S.E. 2d at 163. "Delay which will constitute laches depends upon the facts and circumstances of each case." *Id.* The pleadings here do not "disclose sufficient facts and circumstances to dispose of this case." *Id.* Defendants' allegation in their answer that "substantial improvements and betterments have been made to the land" does not establish this defense at the pleading stage.

The pleadings also fail to disclose sufficient facts and circumstances to permit judgment on the pleadings based on either estoppel or adverse possession. *See Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E. 2d 656, 660 (1984) (party claiming protection under rule of equitable estoppel has burden of establishing facts warranting its application); *Board of Education v. Lamm*, 6 N.C. App. 656, 660, 171 S.E. 2d 48, 51 (1969), *affirmed*, 276 N.C. 487, 173 S.E. 2d 281 (1970) (party claiming title by adverse possession has burden of proof on that issue).

[5] Lastly, defendants' answer raises the companion defenses of *res judicata* and collateral estoppel. *Res judicata* applies

> when there has been a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit.

King v. Grindstaff, 284 N.C. 348, 355, 200 S.E. 2d 799, 805 (1973), *quoting Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962). "Under a companion principle of *res judicata*, collateral estoppel by judgment, parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Id.* at 356, 200 S.E. 2d at 805.

We hold that *res judicata* does not apply to bar plaintiffs' claims because they are unrelated to the earlier action in *Poore v. Swan Quarter Farms*, 57 N.C. App. 97, 290 S.E. 2d 799 (1982). There plaintiff Fred Poore brought an action in fraud against the

defendants here seeking, in part, to set aside the 25 March 1969 deed to Mary Van Dorp as a fraudulent conveyance. The trial court granted summary judgment in favor of defendants, and this Court affirmed.

Plaintiffs' action here, by contrast, is one under N.C. Gen. Stat. 41-10 to quiet title. Plaintiffs have not alleged fraud as grounds for extinguishing the 16 June 1962 and 25 March 1969 deeds. Non-compliance with legal formalities, not fraud, is the alleged basis for this action. Plaintiffs therefore have alleged a claim separate and distinct from that in *Poore, supra,* thereby precluding application of *res judicata.*

Likewise, the issue here as raised by the pleadings, *viz,* whether non-compliance with legal formalities voids the two deeds, was not fully litigated or decided in *Poore* and was not necessary to the determination there. *King* at 356, 200 S.E. 2d at 805. Accordingly, plaintiffs are not collaterally estopped from litigating it in this action.

For the foregoing reasons, we hold that the court erred by granting summary judgment in favor of defendants. The court's order is therefore

Reversed.

Judges EAGLES and COZORT concur.

ANITA DOUGLAS LINEBACK BY HER GUARDIAN *AD LITEM*, SARA L. HUTCHENS v. JUNE DOUGLAS STOUT

No. 8523SC284

(Filed 4 February 1986)

1. Trusts § 6.1— discretionary trust—court order to expend funds improper

The trial court erred in requiring respondent to expend funds from a testamentary trust for the general welfare, support, maintenance and benefit of petitioner since the testator, in granting respondent the power to distribute the trust income or principal, referred to the "sole judgment" or "discretion" of respondent six times, thereby indicating his intent that the trust be discretionary, and testator also used the adjectives "absolute" and "uncontrollable" to describe the discretion vested in respondent, further emphasizing the

discretionary nature of the power granted respondent and evidencing his intent to vest wide discretion in her.

2. Trusts § 6.1— discretionary trust—obligation of trustee to carry out intent of testator

Though the language and terms of a trust clearly indicated that it was discretionary, respondent trustee was under a duty to exercise her judgment reasonably to carry out the intent of the testator.

3. Trusts § 6.1— discretionary trust—testator's intent

In order to effectuate testator's intent that trust funds be used to provide supplemental rather than total support for petitioner and that the trust corpus might not be completely exhausted during petitioner's lifetime, respondent's power to distribute trust funds to petitioner must be interpreted as discretionary, since the trust fund would rapidly be depleted and the testator's intent would be thwarted if respondent's power was interpreted as mandatory.

APPEAL by respondent from *Rousseau, Judge.* Judgment entered 26 October 1984 in WILKES County Superior Court. Heard in the Court of Appeals 5 November 1985.

This is a civil action wherein petitioner seeks to remove respondent as trustee of the trust established under the will of P. E. Douglas for petitioner's maintenance and support or, in the alternative, to require respondent to expend funds from the trust for her maintenance and support. The will, in pertinent part, provides:

ARTICLE IV.

> . . . and One-third of said [residuary] estate to June Douglas Stout, Trustee for Anita Douglas Lineback, in trust for the uses and purposes hereinafter set forth, and I direct that the said trust estate . . . shall be administered and disposed of upon the following terms and provisions . . .:
>
> *Section 1.* I direct that during the lifetime of my daughter, Anita Douglas Lineback, the net income and so much of the principal as shall be necessary for the general welfare, support, maintenance and benefit of my said daughter, in the absolute and uncontrolable [sic] discretion of my said trustee, shall be paid over to my said daughter, Anita Douglas Lineback, or applied to or for her benefit in such amounts and at such times as my trustee in her discretion shall determine. And I further direct that said trustee, in her absolute discretion, may apply so much of the net income or

principal of said trust estate as she shall deem necessary to or for the benefit of the minor children of Anita Douglas Lineback, in the event of extreme medical emergency of said children, the existence of which shall be determined solely by my trustee, and in her sole discretion.

Upon the death of my daughter, Anita Douglas Lineback, so much of the principal of said trust estate as shall remain in the hands of the trustee shall be transferred and delivered, discharged of the trust, to such appointee or appointees as shall be named and appointed by Matthew Ward Poindexter, Jr. in such amounts or proportions and upon such terms and conditions as the said Poindexter shall appoint and direct. . . .

If, in the sole judgment of my trustee, at anytime during the administration of this trust the net income available for payment to the beneficiary of this trust, supplemented by income available to said beneficiary from other sources, shall not be sufficient to meet the reasonable needs of said beneficiary, then and in that event, I authorize my trustee to pay to or apply for the benefit of said beneficiary so much or all of the principal of the trust for said beneficiaries my trustee in its sole discretion shall from time to time deem requisite or desirable under the then existing circumstances.

In her petition filed 14 June 1983, Anita Lineback through her *guardian ad litem* alleged: that she suffers from multiple sclerosis, tic douloureux, diabetes and kidney disease; that she has been living in a nursing home for ten years; that she is totally and permanently disabled and needs constant medical care; that aside from her interest in her trust fund she has exhausted all of her funds and properties; that she began receiving medical assistance from the Department of Social Services in 1968 which was first used to defray her medical expenses while living at home; that when she was moved to a nursing home in 1973, the medical assistance was used to pay her nursing home medical bills; and that the medical assistance which she had been receiving from the Department of Social Services was terminated on 1 June 1983 because she had excess revenues due to the funds in the trust. Petitioner further alleged that respondent had willfully and wantonly refused to pay any sums from the trust fund to the nursing

home on behalf of petitioner, thereby violating her fiduciary duty as trustee.

In her response to the petition, June Stout admitted that petitioner is confined to a nursing home due to her illnesses and that she is unable to pay the resulting bills from her own funds. Respondent also admitted that she had refused to pay these bills but denied that her refusal was willful and wanton or that it constituted a violation of her fiduciary duty. Respondent alleged that the trust created in the will is discretionary, that therefore the court has no authority to require her to exercise her discretion in the manner requested by petitioner and that she has administered her duties as trustee in accordance with the terms of the trust and the instructions given her by the testator prior to his death.

The superior court concluded that respondent as trustee is authorized and required by the terms of the trust to pay the net income from the trust and to disburse any or all of the principal of the trust to petitioner or for her benefit when such payment or disbursement is necessary for the general welfare, support, maintenance and benefit of petitioner and that the cost of the nursing home care is necessary for the general welfare, support, maintenance and benefit of petitioner for so long as she requires such care. The court ordered respondent to pay from the trust assets such sums as shall be necessary and reasonable for the general welfare, support, maintenance and benefit of petitioner, including but not limited to the cost of nursing home care and to prepare for petitioner or her guardian an annual report of the receipts and expenditures of the trust. From the judgment of the superior court, respondent appealed.

Zachary, Zachary & Harding, by Benjamin H. Harding, Jr., for petitioner.

Pettyjohn, Molitoris & Connolly, by H. Glenn Pettyjohn, for respondent.

WELLS, Judge.

Respondent argues that it was the testator's intention in Article IV of his will to create a discretionary trust wherein payments to petitioner were to be in the sole discretion of the

trustee and that the superior court erred in ruling to the contrary. A discretionary trust is a trust wherein the trustee is given the discretion to determine whether and to what extent to pay or apply trust income or principal to or for the benefit of a beneficiary. Bogert, *The Law of Trusts and Trustees* § 228 (rev. 2d ed. 1979); Scott, *The Law of Trusts* §§ 128.3, 155 (3d ed. 1967). *Accord* N.C. Gen. Stat. § 36A-115(b)(1) (1984).[1] Under a true discretionary trust, the trustee may withhold the trust income and principal altogether from the beneficiary and the beneficiary, as well as the creditors and assignees of the beneficiary, cannot compel the trustee to pay over any part of the trust funds. Bogert, *supra;* Scott, *supra,* at § 155. A trust wherein the trustee has discretion only as to the time or method of making payments to or for the benefit of the beneficiary is not a true discretionary trust. Bogert, *supra;* Scott, *supra.*

Whether a trust is a discretionary one naturally depends upon the nature of the powers conferred upon the trustee, that is, whether the powers are mandatory or discretionary, and if discretionary, the extent of the discretion afforded the trustee. In determining the nature of the powers conferred upon a trustee, we are guided by the following:

> The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act . . . . A power is discretionary when the trustee may either exercise it or refrain from exercising it, . . . or when the time, or manner, or extent of its exercise is left to his discretion. [Citations omitted.]

Woodard v. Mordecai, 234 N.C. 463, 67 S.E. 2d 639 (1951). The court further explained:

> The court will always compel the trustee to exercise a mandatory power. . . . It is otherwise, however, with respect to a discretionary power. The court will not undertake to control the trustee with respect to the exercise of a discre-

1. G.S. 36A-115, which defines a discretionary trust, became effective on 1 October 1979 and applies only to trusts created on or after that date. 1979 N.C. Sess. Laws, ch. 180. Since the trust in the present case was created prior to 1 October 1979, it is not subject to the provisions of that statute.

> tionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment. [Citations omitted.]

Id.

Whether a power is mandatory or discretionary depends upon the intent of the settlor as evidenced by the terms of the trust. *See* Bogert, *supra*, at § 552; Scott, *supra*, at § 187. The intent of a settlor is determined by the language he chooses to convey his thoughts, the purposes he seeks to accomplish and the situation of the parties benefitted by the trust. *Davison v. Duke University*, 282 N.C. 676, 194 S.E. 2d 761 (1973). Use by the settlor of words of permission or option, or reference to the discretion of the trustee, in describing the trustee's power, indicates that the settlor intended that the power be discretionary, whereas use of directive or commanding language indicates that a mandatory power was intended. *See* Bogert, *supra*, at § 552. *Compare Woodard v. Mordecai, supra*, and *First National Bank of Catawba County v. Edens*, 55 N.C. App. 697, 286 S.E. 2d 818 (1982) (discretionary power) *with Kuykendall v. Proctor*, 270 N.C. 510, 155 S.E. 2d 293 (1967) (mandatory duty). Where the power is discretionary, the extent of the discretion given the trustee may be enlarged by use of adjectives such as "absolute" and "uncontrolled." *Davison v. Duke University, supra.*

[1] The language of the testamentary trust in the present case clearly indicates that the testator intended for the power given respondent as trustee to be discretionary. The testator, in granting respondent the power to distribute the trust income or principal, referred to the "sole judgment" or "discretion" of respondent *six* times. Such language is used both with reference to the net income and the principal of the trust, thus indicating that the testator intended for respondent to have discretion regarding the distribution of both. This is made particularly clear by the fact the testator referred to respondent's discretion twice in the first sentence of the trust provisions—the first time possibly referring only to the trust principal but the second time

apparently referring to both the net income and the principal of the trust. That respondent's power is discretionary is also shown by the fact the testator authorized respondent to pay the trust income or principal to or for the benefit of petitioner but did not command or require her to do so. Rather, the testator directed respondent to exercise her discretion regarding the distribution of the trust funds. The testator's use of the adjectives "absolute" and "uncontrolable" [sic] to describe the discretion vested in respondent further emphasizes the discretionary nature of the power granted respondent and evidences the testator's intent to vest wide discretion in respondent. To hold that respondent's power to distribute trust income or principal to petitioner is mandatory, as did the superior court in effect, we would have to ignore totally the references made by the testator to respondent's discretion in setting forth that power. This we cannot and will not do.

[2] The language and terms of the trust further show that the discretion vested in respondent extends to whether and to what extent to pay the trust income or principal to or for the benefit of petitioner. The amount of trust income or principal to be expended for petitioner's benefit is to be determined by respondent in her sole discretion. We emphasize, however, respondent's duty to exercise her judgment reasonably to carry out the intent of the testator. *Woodard v. Mordecai, supra.*

[3] The terms of the trust also show that the testator intended for the trust funds to be used to supplement, rather than supplant, the financial assistance which petitioner was receiving from the Department of Social Services. Petitioner was receiving the Department's financial assistance at the time the testator executed his will. The testator was apparently referring to that assistance when he provided for respondent's consideration of "income available to [petitioner] from other sources" in determining whether to distribute trust principal to petitioner. Such provision certainly tends to show that the testator did not intend for the trust funds to be used as a substitute for the public assistance. *Accord Zeoli v. Commissioner of Soc. Serv.*, 179 Conn. 83, 425 A. 2d 553 (1979). The creation of the trust for "the lifetime" of petitioner and the provision for the distribution of the trust corpus remaining upon petitioner's death also reveal the testator's intent that the trust funds be used to provide supplemental, rather than

total, support for petitioner. *Accord Tidrow v. Dir., Mo. State Div. of Fam. Serv.*, 688 S.W. 2d 9 (Mo. App. 1985). These terms of the trust show that the testator intended and anticipated that the trust corpus might not be completely exhausted during petitioner's lifetime. *Id.* In order to effectuate this intent, respondent's power to distribute the trust funds to petitioner must be interpreted as discretionary. If respondent's power is interpreted as mandatory, the trust fund will be rapidly depleted and the testator's intent will be thwarted.

We conclude that the testamentary trust is a discretionary one and that therefore the superior court erred in requiring respondent to expend funds from the trust for the general welfare, support, maintenance and benefit of petitioner. The judgment of the superior court is

Reversed.

Chief Judge HEDRICK and Judge EAGLES concur.

DENNIS P. TURLINGTON v. ROSA D. McLEOD

No. 8511SC450

(Filed 4 February 1986)

Highways and Cartways § 12.3— cartway—no statutory use of land—other reasonable access to property

In an action to establish a cartway, evidence was sufficient to support the trial court's conclusion that petitioner was not legitimately putting his land to a use approved by N.C.G.S. 136-69 but was instead attempting to show a statutory use in order to establish a cartway to further his actual intended commercial use of the land as a recreation center and swimming club; furthermore, evidence was sufficient to support the trial court's conclusion that petitioner failed to establish that he did not have other reasonable means of access to his property.

APPEAL by petitioner from *Bowen, Judge*. Judgment entered 23 November 1984 in Superior Court, HARNETT County. Heard in the Court of Appeals 30 October 1985.

In approximately 1977, petitioner, Dennis Turlington, purchased a 21.29 acre tract of land which does not adjoin any public

road. Respondent, Rosa McLeod, owns a 15 acre tract which has frontage on Rural Paved Road 2009 and adjoins petitioner's land on the west and on the south. She resides upon her land. The distance from Rural Paved Road 2009 across respondent's land to petitioner's boundary is approximately 250 feet. Petitioner's land also adjoins property owned by Fred McLeod on the north and property owned by Lucille Cobb on the north and west. Fred McLeod's property has frontage on Rural Paved Road 2008. Lucille Cobb's property adjoins property owned by Grace Matthews, which also has frontage on Rural Paved Road 2008. The distance from petitioner's land to Rural Paved Road 2008 is approximately one-half mile.

In 1977 or 1978, petitioner sought and obtained permission from respondent's late husband, Harvey McLeod, to cross respondent's land in order to get from Rural Paved Road 2009 to his land in order to tend hogs which petitioner was raising. Thereafter, petitioner built a road over respondent's land, running from Rural Paved Road 2009 to his land. Although he ceased his hog operation in 1980, he continued to use the road for vehicular traffic until 30 June 1984, when respondent terminated petitioner's license to cross her land and closed the road. After petitioner destroyed the barricade, respondent obtained a temporary restraining order restraining petitioner from crossing her land.

Petitioner has also used a road leading from Rural Paved Road 2008 across the lands of Grace Matthews and Lucille Cobb to his land (Matthews-Cobb Road). Grace Matthews has also withdrawn permission for petitioner to cross her land in order to get to Lucille Cobb's land and thence to his own land. Her permission was withdrawn after petitioner began having parties and vehicular traffic across her land increased. At the time this action was tried petitioner had temporary permission to use the road which leads from Rural Paved Road 2008, crosses the lands owned by Fred McLeod and other property owners, and ends about 250 feet from petitioner's northern property line (Fred McLeod Road).

Petitioner instituted a cartway proceeding before the Clerk of Superior Court of Harnett County, seeking a cartway over the lands of respondent, pursuant to G.S. 136-68 and 136-69. The petition was granted by the Clerk and respondent appealed. The Su-

perior Court, trying this matter *de novo* without a jury, concluded that petitioner was not entitled to a cartway because (1) petitioner's use of his land did not meet the statutory requirements for the establishment of a cartway, (2) petitioner had other adequate means of ingress to and egress from his land, and (3) the establishment of a cartway for petitioner was not necessary, reasonable or just. From a judgment denying his petition for a cartway, petitioner appeals.

Stewart and Hayes, P.A., by Gerald W. Hayes, Jr., for petitioner appellant.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for respondent appellee.

MARTIN, Judge.

G.S. 136-69 provides, in pertinent part:

> If any person . . . shall be engaged in the cultivation of any land or the cutting and removing of any standing timber, or the working of any quarries, mines, or minerals, or the operating of any industrial or manufacturing plants, or public or private cemetery, or taking action preparatory to the operation of any such enterprises, to which there is leading no public road or other adequate means of transportation affording necessary and proper means of ingress thereto and egress therefrom, such person . . . may institute a special proceeding . . . and if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road . . . over the lands of other persons, the court shall appoint a jury of view of three disinterested freeholders to view the premises and lay off a cartway . . . .

Thus, a landowner is entitled to condemn a cartway over the lands of another provided that he show (1) he is engaged in, or taking action preparatory to engaging in, an activity enumerated by the statute, (2) there is no public road or other adequate means of transportation allowing him reasonable access to his property, and (3) it is necessary, reasonable, and just that he have a private way. G.S. 136-69; *Taylor v. Paper Co.*, 262 N.C. 452, 137 S.E. 2d 833 (1964). In applying this test, the Court must strictly construe

G.S. 136-68 and 136-69 which "are in derogation of the free and unrestricted use and enjoyment of realty by the owner of the land over which it is sought to establish a cartway." *Candler v. Sluder*, 259 N.C. 62, 65, 130 S.E. 2d 1, 4 (1963). Because of this rule requiring strict construction, the petition to establish a cartway should be denied if the petitioner fails in his burden of proving any one of the elements required by the statute.

With respect to the statutory requirement concerning land usage, the trial court made the following findings of fact:

> 17. Petitioner ceased his livestock operation in 1980, but continued to use the roadway he had built from R.P.R. #2009 across respondent's land to his land for vehicular traffic. In the spring of 1984, petitioner planted approximately two acres of beans on his tract of land, one of the purposes for which was to comply with the statutory requirements for a cartway.
>
> 18. From 1978 until about two weeks before the trial of this proceeding, petitioner, from time to time, cut fire wood and pulp wood from his land for his personal use and for sale and sold a small portion thereof as recently as two weeks before the trial of this proceeding began.
>
> 19. In the spring of 1984, petitioner began using his tract of land on weekends for commercial purposes in that he began having dances in a building located on his land and began playing loud music which could be clearly heard by respondent and other neighbors.
>
> . . .
>
> 21. Petitioner has called his land "The Ponderosa" in the past and has used it as a commercial place for having parties where the public was invited by signs advertising the parties. Petitioner now calls his place "The Thornton Creek Recreational Center" and intends to form a swim club which will utilize the pond petitioner is digging or has dug on his land for swimming and recreational purposes.

The trial court concluded:

> 4. The Court is convinced from the totality of the evidence and by its greater weight that the petitioner seeks to

establish a cartway over respondent's land for the commercialization rather than the cultivation of petitioner's land. The Court recognizes that the operation of "The Ponderosa" or "The Thornton Creek Recreational Center" or the proposed swimming club does not defeat petitioner's right to a cartway, if there are other uses which meet the statutory test for the establishment of a cartway, but the Court concludes that the petitioner has failed to establish that he is using his land or intends to use his land for the purposes for which a cartway may be granted.

Although he excepts and assigns error to the trial court's conclusion of law, petitioner has not excepted to any of the court's findings of fact as to petitioner's use or proposed use of the land. The court's findings, therefore, are binding and our review is limited to the question of whether the facts found support the court's conclusion of law. *Moore v. Wilson*, 62 N.C. App. 746, 303 S.E. 2d 564 (1983).

In support of his argument that the trial court erred in concluding that the usage which petitioner was making, and proposed to make, of his land was not within that prescribed by the statute for establishment of a cartway, petitioner relies upon *Candler v. Sluder, supra.* In *Candler*, the plaintiffs owned land-locked property upon which there was a small apple orchard, producing apples which were either used by plaintiffs or given away to neighbors. In addition, a portion of the land was suitable for pasturing cattle, a use to which plaintiffs desired to put the land. The plaintiffs also desired to cut merchantable timber from the land. There was also a cabin on the property which plaintiffs occasionally leased to hunters. In upholding the establishment of a cartway, our Supreme Court held that even though hunting was not a use specified by the statute, there was sufficient evidence of uses which did comply with the statute to overcome nonsuit. The question of usage was properly one for the fact-finder.

In the present case, the trial court was obviously familiar with the rule of *Candler* that petitioner's commercial use of the land would not defeat his right to a cartway if he could also show a legitimate statutory use of the land. However, the trial court, sitting as fact-finder and weighing conflicting evidence, determined that petitioner was not legitimately putting his land to a

use approved by the statute, but was, instead, attempting to show a statutory use in order to establish a cartway to further his actual intended commercial use of the land as a recreation center and swimming club. The court's findings resolved the issue and support the court's conclusion. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

Petitioner also excepts to the trial court's conclusion that petitioner has other adequate means of reasonable access to his property. The following facts, none of which are excepted to, were found by the court:

> 6. R.P.R. #2008 is a public road which is located about one-half mile north of petitioner's tract of land. There has been in existence for approximately sixty years a road leading in a southerly direction from R.P.R. #2008 and running across the lands of Grace Matthews and Lucille Cobb (hereinafter Matthews-Cobb Road) to the northern line of petitioner's land. The Matthews-Cobb Road is of sandy construction, is approximately 12 ft. in width with well-defined ruts and is suitable for vehicular traffic. There is an electric fence and a permanent barbed-wire fence located on the Matthews-Cobb Road between the petitioner's land and R.P.R. #2008.
>
> 7. There is another road leading in a southerly direction from R.P.R. #2008 across the lands of Fred McLeod and running by the homes of John T. Seymour, Ronnie G. Lee, Maylon Avery, Michael W. Johnson and to the land of Harry Matthews to a point in the Matthews line which is approximately 250 ft. southeast of petitioner's northeastern corner. This road is hereinafter referred to as the Fred McLeod Road. It does not join petitioner's land.
>
> 8. The Fred McLeod Road is of sand construction, is approximately 12 ft. in width, and is suitable for vehicular traffic, but does not touch petitioner's land.
>
> 9. The Fred McLeod Road has been in existence for over sixty years to a point about 250 ft. from petitioner's land.
>
> . . .

11. In 1974, the timber on petitioner's land was cut by Ralph Matthews and access to the timber was had over the Matthews-Cobb Road from R.P.R. #2008.

12. In 1978 or early 1979, petitioner moved a mobile home across the Matthews-Cobb Road to petitioner's tract of land and petitioner now resides in this mobile home.

. . .

27. After July 3, 1984, petitioner built a road from his tract of land to the Fred McLeod Road at the Harry Matthews corner and petitioner is using the road built by him and the Fred McLeod Road to get to and from his property at the time this proceeding was tried.

28. Petitioner has temporary permission from Fred McLeod to use the Fred McLeod Road to gain access to petitioner's land, at least until this matter is settled.

29. Petitioner has permission of Grace Matthews to go over her land as far as it goes to get to and from his land, provided he will not use his land for commercial purposes.

A petition for a cartway will be denied if the petitioner has other reasonable access through a permissive right of way. *Taylor v. Askew*, 17 N.C. App. 620, 195 S.E. 2d 316 (1973). The permissive right of way is a reasonable access if it is "in all respects reasonable and adequate as a proper means of ingress and egress." *Garris v. Byrd*, 229 N.C. 343, 345, 49 S.E. 2d 625, 626 (1948). The question then is whether petitioner is presently entitled to a reasonable permissive right of way. *Pritchard v. Scott*, 254 N.C. 277, 118 S.E. 2d 890 (1961).

Applying the above rules to the facts found, we are of the opinion that the facts found support the judge's conclusion that petitioner has failed to establish that he does not have other reasonable means of access. Petitioner presently has permission to use the Fred McLeod Road which he has been using, along with the road he built over Harry Matthews' land, to get to his land. The fact that such permission may be temporary in nature, and may be withdrawn at some future time, is not relevant to our decision. Petitioner is not entitled to condemn a cartway if he presently has access to a public road. *Pritchard v. Scott, supra.*

We need not consider petitioner's assignment of error related to Finding of Fact No. 30, in which the trial court found that petitioner had "other adequate means of transportation affording necessary and proper means of ingress to and egress from" his property. Accepting as correct petitioner's contention that the finding is in reality a conclusion of law, we simply disregard the finding as unnecessary. *Ludwig v. Walter*, 75 N.C. App. 584, --- S.E. 2d --- (1985). Other facts found by the court, and recited herein, fully support the court's resolution of the issue of access and its judgment.

As we stated at the outset, petitioner was required to prove strict compliance with each of the requirements of G.S. 136-69 in order to be entitled to condemn a cartway across respondent's property. The trial court concluded that petitioner has failed to do so in two respects, i.e., usage and reasonable access, and its conclusions are supported by the facts which it found. Accordingly, we find no error in the trial court's further conclusion that petitioner failed to show that the establishment of a cartway was necessary, reasonable, or just. The judgment denying the petition is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

LONNIE L. BERNARD v. OHIO CASUALTY INSURANCE COMPANY

No. 8513SC547

(Filed 4 February 1986)

Principal and Surety § 2— motor vehicle dealer surety bond—accrual of cause of action—action barred by statute of limitations

Plaintiff's actions against a motor vehicle dealer and defendant, the dealer's surety on a motor vehicle dealer surety bond, arose at the same time, that is, no later than 14 February 1979 when plaintiff filed a complaint against the dealer for breach of contract or fraud; therefore, plaintiff's action against defendant surety, commenced on 1 June 1983 which was more than three years after the action arose, was barred by the statute of limitations.

Bernard v. Ohio Casualty Ins. Co.

APPEAL by plaintiff from *Ellis, Judge.* Judgment entered 21 January 1985 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 19 November 1985.

Earl Whitted, Jr., for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Robert J. Lawing, for defendant appellee.

BECTON, Judge.

Central Carolina Truck Sales, Inc. (Truck Sales) was a motor vehicle dealer, and Ohio Casualty Insurance Company (Ohio Casualty) was Truck Sales' surety on a motor vehicle dealer surety bond. On 14 September 1982, in a case connected to the case at bar, the trial court ruled in favor of plaintiff Lonnie L. Bernard against Truck Sales in an action for damages based on breach of contract and unfair and deceptive trade practices. Truck Sales appealed, and this Court affirmed. *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). On 1 June 1983, before our decision in *Bernard*, Bernard commenced the present action against Ohio Casualty as surety for Truck Sales on the surety bond. Ohio Casualty answered, asserting that the three-year statute of limitations had run on Bernard's claim against Ohio Casualty. Proceedings in this action were delayed pending final disposition of the case against Truck Sales. In May 1984, Bernard sought to execute judgment on Truck Sales, but Truck Sales was no longer in business. After the Supreme Court denied review of the case against Truck Sales and certified the case to the Superior Court on 6 September 1984, Bernard's case against Ohio Casualty proceeded. In January 1985, both sides moved for summary judgment, and on 21 January 1985, the trial court entered summary judgment against Bernard. Bernard appeals.

The only issue on appeal is whether the statute of limitations has run on Bernard's claim against Ohio Casualty as surety for Truck Sales. We hold that it has run and therefore affirm the trial court.

It is not disputed that Ohio Casualty was the surety for Truck Sales, the principal, under a motor vehicle dealer surety bond governed by N.C. Gen. Stat. Sec. 20-288(e) (Cum. Supp. 1985).

The applicable statute of limitations is N.C. Gen. Stat. Sec. 1-52(1) (1983), prescribing a three-year period. Ohio Casualty argues that the statutory period begins to run when the wrong or injury occurs or when the plaintiff discovers the wrong or injury. The wrong or injury in this case occurred when Truck Sales sold to Bernard a tractor with an engine later discovered to be less powerful than Truck Sales represented it to be. The very latest date we can say Bernard discovered the wrongful action of Truck Sales was when Bernard filed a complaint against Truck Sales on 14 February 1979.

Bernard argues that the three-year period did not begin to run against the surety until the principal, Truck Sales, breached the terms of the surety bond and a court of competent jurisdiction entered judgment against the principal, which in this case, occurred on 14 September 1982. Bernard relies on language from the bond to the effect that the surety's obligation will be null and void if the principal holds harmless any person injured by the principal's fraud or other wrongful conduct. We believe this language means simply that if Truck Sales paid for the damage caused by its own fraud, Ohio Casualty would not be liable. In other words, this language demonstrates that a surety under a motor vehicle surety bond is not an insurer; the surety does not reimburse the principal for its loss, it indemnifies persons harmed by the fraud, fraudulent representation, or violations of Article 12, Chapter 20 of the N.C. General Statutes by the principal or its agents.[1]

Bernard also argues that, regardless of when the surety's obligation arose, the statute of limitations in the action against the surety was tolled by the pendency of his action against the principal. In support of this position, Bernard cites several cases. None of them, however, is applicable to the case at bar. Each involves a plaintiff's claim against a single defendant before the Industrial Commission and holds that while the plaintiff's claim for

1. We note, without deciding, that had the surety and principal agreed in their written contract to require an aggrieved purchaser to obtain a judgment against Truck Sales before pursuing an action against the surety, the statutory period might have been delayed. *See* 74 Am. Jur. 2d *Suretyship* Sec. 141 (1974). *But cf.* G.S. Sec. 20-288(e) (1983) (language implying policy of allowing immediate cause of action against dealer *and* surety). There is no language to this effect in the contract in the case at bar.

compensation is pending before the Commission, no statute of limitations runs against the litigant on that claim. *See Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E. 2d 107 (1975); *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E. 2d 588 (1971); *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E. 2d 27 (1960); *Hanks v. Southern Public Utilities Co.*, 210 N.C. 312, 186 S.E. 252 (1936). *Deviney v. Wells*, 26 N.C. 30 (1843), also relied on by Bernard, does not apply here because it involved a specific statute prohibiting actions against a bail until after a judgment had been entered against the principal. *Id.* at 31; *see* N.C. Rev. Stat. ch. 65, Sec. 16 (1837).

"A surety is one who promises to answer for the debt of another." *Colonial Acceptance Corp. v. Northeastern Printcrafters, Inc.*, 75 N.C. App. 177, 179, 330 S.E. 2d 76, 77 (1985) (citations omitted). The obligation of a surety is primary and direct. *Dry v. Reynolds*, 205 N.C. 571, 573, 172 S.E. 351, 352 (1934). The Supreme Court recently discussed the obligation of a surety and contrasted it with the obligation of a guarantor:

> Although contracts of guaranty and suretyship are, to some extent, analogous, and the labels are used interchangeably, there are, nevertheless, important distinctions between the two undertakings. . . . A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance. . . . *A surety is a person who is primarily liable for the payment of the debt or the performance of the obligation of another.* . . . While both kinds of promises are forms of security, they differ in the nature of the promisor's liability. A guarantor's duty of performance is triggered at the time of the default of another. . . . On the other hand, *a surety is primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default.*

Branch Banking & Trust Co. v. Creasy, 301 N.C. 44, 52-53, 269 S.E. 2d 117, 122 (1980) (citations omitted) (emphasis added); *see* 74 Am. Jur. 2d *Suretyship* Sec. 141 (1974). Thus, Ohio Casualty's obligation to pay arose when Truck Sales failed to perform on its

contract with Bernard.[2] *See New Amsterdam Casualty Co. v. Waller*, 233 N.C. 536, 538, 64 S.E. 2d 826, 828 (1951).

Although the surety's obligation depends upon a valid obligation of the principal, the surety may be sued immediately when the principal becomes liable to a third party on an obligation covered by the suretyship contract, unless the suretyship contract or a statute provides otherwise. *New Amsterdam Casualty Co.* In support of this position, we note that it is settled by the weight of authority in other jurisdictions that the creditor of a principal on an obligation covered by a surety bond, absent statutory or contractual provisions to the contrary, may sue either the principal, the surety, or both at the time the principal's liability to the creditor arises. *See United States Industries, Inc. v. Blake Construction Co.*, 671 F. 2d 539, 551-52 (D.C. Cir. 1982) ("[T]he creditor may sue the surety directly without first obtaining a judgment against the principal debtor or even making a demand on it." (citations omitted)); *People v. Transamerica Insurance Co.*, 385 F. 2d 61, 62 (10th Cir. 1967) (A surety's liability arises in Colorado upon the commission of the wrongful act by the principal.); *C & L Rural Electric Coop. Corp. v. American Casualty Co.*, 199 F. Supp. 220, 222 (E.D. Ark. 1961) ("[I]t is not necessary for the principal's obligation to be settled or determined before the obligee can proceed against the surety."); *accord* 74 Am. Jur. 2d *Suretyship* Secs. 68 (A surety is not released by creditor's failure to pursue action against principal.) & 135 (1974) (Separate actions may be maintained against surety and principal.). It is also recognized that "the statute of limitations begins to run in favor of a surety from the time that he is subject to suit." *C & L Rural Electric Coop. Corp.*, 199 F. Supp. at 223.

We hold that Bernard's actions against Ohio Casualty and Truck Sales arose at the same time. This occurred when Bernard

2. It is interesting to note that the language of the motor vehicle surety bond statute suggests that the legislature intended the dealer and the surety both to be subject to suit at the time the purchaser suffers a loss or damage:

> Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article or Article 15 shall have the right to institute an action to recover against such motor vehicle dealer and the surety.

G.S. Sec. 20-288(e).

discovered Truck Sales' breach of contract or fraud and could be no later than 14 February 1979, the time Bernard filed a complaint against Truck Sales in the superior court. Nothing prevented Bernard from joining both defendants in one action or from instituting a separate action against Ohio Casualty while the case against Truck Sales was pending. Because the action against Truck Sales presented no legal obstacle to prevent Bernard from suing Ohio Casualty, the statute of limitations was not tolled. Therefore, the action that Bernard commenced against Ohio Casualty on 1 June 1983, more than three years after the action arose, was barred by the statute of limitations. Summary judgment in favor of Ohio Casualty was proper.

For the reasons set forth above, we

Affirm.

Judges WEBB and COZORT concur.

FRANCES H. ROSI AND HUSBAND, FRED D. ROSI v. MARY SHULL McCOY, GARLAND THOMAS McCOY, AND NAUTILUS HOMES, INC.

No. 851SC613

(Filed 4 February 1986)

Deeds §§ 20.2, 20.6— subdivision restrictions—setback requirements—restrictions personal to developer

In an action for an injunction requiring defendants to move an existing house so that it would comply with certain setback restrictions of a subdivision, the trial court erred in granting summary judgment for plaintiffs, since the developers of the subdivision reserved the right to amend or modify any of the restrictions where, in the sole opinion of the developers, such action was necessary or desirable; the restrictions pertaining to defendants' lot were thus personal to the grantor developers and plaintiffs therefore had neither the right nor the power to bring an action *inter se* to enforce the restrictions; plaintiffs agreed to accept their deed in the subdivision subject to the right of the developers to modify or amend any of the restrictions; this right appeared in the restrictions in unambiguous language; and the developers exercised that right and amended the restrictions on defendants' property.

APPEAL by defendants McCoy from *Watts, Judge*. Order entered 28 January 1985 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 21 November 1985.

Plaintiffs filed this action seeking an injunction requiring defendants to move an existing house so that it would comply with certain restrictions of the Whalehead Club Subdivision in Currituck County, North Carolina. Defendant Nautilus Homes, Inc. constructed the house on Lot 10, Section 7 owned by defendants McCoy. This lot adjoins plaintiffs' Lot 11, Section 7 within the subdivision. Both lots are subject to restrictions contained in Book 116, page 422, Currituck County Registry.

Paragraph "FOURTH" of the restrictions reads:

> No building or structure, including porches, shall be erected on residential lots, sections . . . 7, . . . nearer than 20 (twenty) feet to the front or side street line nor nearer than 15 feet to any interior side lot line, nor nearer than 30 feet to the rear lot line.

Paragraph "FIFTEENTH" of the restrictions provides:

> The Developers, their successors or assigns, reserve the right to amend, modify or vacate any restriction herein contained whenever the circumstances, in the opinion of the Developers, their successors or assigns, warrant such amendment, modification or vacation as being necessary or desirable.

The house on the McCoys' lot is situated approximately 12.5 feet from the interior side boundary of the lot, and does not meet the required 15 foot minimum as indicated in Paragraph "FOURTH" of the restrictions. After suit was filed, defendants McCoy obtained an amendment and modification to the restrictions from the developers of the subdivision. The modification changed the "setback" requirement for the interior side boundary line from a minimum of 15 feet to a minimum of 12 feet for the McCoys' Lot 10.

All parties filed motions for summary judgment and the motions came on for hearing before the trial court. The motion for summary judgment by defendant Nautilus Homes, Inc. was granted and plaintiffs have not appealed. The trial court granted summary judgment for plaintiffs against defendants McCoy.

From the order granting summary judgment in favor of plaintiffs, defendants McCoy appeal to this Court.

Trimpi, Thompson & Nash, by John G. Trimpi and Thomas P. Nash, IV, for plaintiff appellees.

Kellogg, White, Evans, Sharp & Michael, by Robert L. Outten; and John G. Gaw, Jr., for defendant appellants.

ARNOLD, Judge.

Defendant appellants contend that the trial court erred in granting summary judgment in favor of plaintiffs because the restrictions pertaining to defendants' lot within the subdivision were personal to the grantor developers and therefore plaintiffs had neither the right nor the power to bring an action *inter se* to enforce the restrictions. We agree.

The general rule in North Carolina is that

> Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created.

Maples v. Horton, 239 N.C. 394, 398, 80 S.E. 2d 38, 41 (1954). However, in this instance the developers reserved the right to amend or modify any of the restrictions where, in the sole opinion of the developers, such action was necessary or desirable. As stated in *Humphrey v. Beall*, 215 N.C. 15, 200 S.E. 918 (1939), this provision is notice to all grantees within the subdivision that, by gaining the consent of the developers, a grantee may place his building on any lot within the area without right of interference by the owner of any other lot. This right to change the restrictions on lots within the subdivision refutes the idea of a general plan for residential purposes to be exacted alike from all purchasers, and to be for the benefit of each purchaser. *Maples v. Horton*, 239 N.C. 394, 80 S.E. 2d 38 (1954); *Humphrey v. Beall*, 215 N.C. 15, 200 S.E. 918 (1939). *See also* Annot., 4 A.L.R. 3d 570 (1965). As a result, the restrictions are not enforceable except as personal covenants for the benefit of the developers. *Maples, supra.*

Plaintiffs seek to distinguish the case at bar from *Beall* and *Maples* by noting that the developers in this instance did not specifically reserve the right to sell the unsold lots without restrictions as did the grantors in *Beall* and *Maples*. However, we do not find that this reserved right as to unsold lots is essential to the conclusion that restrictions on the property are personal in nature. The fact that the developers may unilaterally act to modify, amend, or vacate any of the restrictions whenever the developers deem such action desirable is sufficient to find that the restrictions are personal to the developers. *See* Annot., 4 A.L.R. 3d 570 (1965). We also note that the developers' power to amend would seem broad enough to allow them to sell any unsold lots without restrictions. *Id.*

Finally, plaintiffs agreed to accept the deed subject to the right of the developers to modify or amend any of the restrictions. This right appeared in the restrictions in unambiguous language. The developers have exercised that right and have amended the restrictions on defendants' property. The rights of the parties must be determined by the agreement they voluntarily made, and plaintiffs cannot now be judicially relieved of an improvident bargain which provided for such amendments.

For the above reasons, we hold that plaintiffs do not have the power to bring an action *inter se* to enforce the property restrictions. The judgment of the trial court is reversed, and the cause is remanded to the Superior Court of Currituck County for entry of summary judgment in defendants' favor.

Reversed and remanded.

Judges WELLS and PARKER concur.

UNITED VIRGINIA BANK v. AIR-LIFT ASSOCIATES, INC.; JOHN T. HOFFMAN; JOHN GOOGE; ARNOL BOWLING, EXECUTRIX OF THE ESTATE OF DOSSITT R. BOWLING; AND HENRY P. PRAMOV, JR.

No. 8510SC271

(Filed 4 February 1986)

1. **Unfair Competition § 1— unfair trade practices statute—applicable to UCC transactions**

The unfair trade practices statute, N.C.G.S. 75-1.1, is applicable to commercial transactions also covered by the Uniform Commercial Code.

2. **Courts § 21.13— unfair trade practice—what law governs**

The law of the state where the last act occurred giving rise to defendants' injury governs defendants' action for an unfair trade practice under N.C.G.S. 75-1.1.

3. **Courts § 21; Unfair Competition § 1— unfair trade practice—applicability of Virginia law—dismissal of claim**

Where the counterclaim of defendant debtors alleged that plaintiff creditors committed an unfair trade practice by representing to defendants that they had a buyer who would pay $150,000 for an airplane which was security for a promissory note upon delivery to Norfolk, Virginia, and that the plane was sold in Richmond, Virginia for only $55,000, the last act giving rise to defendants' counterclaim occurred in Virginia, and the substantive law of Virginia applied to the counterclaim. Because no statutory basis can be found in Virginia law to support an unfair trade practice claim, the counterclaim must be dismissed.

4. **Courts § 21.5— breach of fiduciary duty—what law governs**

Defendants' counterclaim for breach of fiduciary duty was governed by the law of Virginia where the last act giving rise to the claim, the sale of an airplane, occurred in Virginia.

5. **Fiduciaries § 1— debtor-creditor relationship—no fiduciary duty**

The existence of a debtor-creditor relationship between plaintiff bank and defendants did not create a fiduciary relationship, and the trial court properly dismissed defendants' counterclaim for breach of fiduciary duty by plaintiff bank in the sale of the collateral for a promissory note upon default by defendants.

APPEAL by defendants from *Preston, Judge*. Judgment entered 18 December 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 16 October 1985.

Attorney General Lacy Thornburg by Special Deputy Attorney General James C. Gulick and Assistant Attorney General John F. Maddrey, amicus curiae.

Hunton & Williams by Edgar M. Roach, Jr., Stephani W. Humrickhouse and Thomas A. Knoth for plaintiff appellee.

Barringer, Allen and Pinnix by Noel L. Allen, William D. Harazin and Miriam J. Baer for defendant appellants.

COZORT, Judge.

Plaintiff brought this action seeking a deficiency judgment against defendants on a promissory note executed by defendant Air-Lift Associates, Inc., and guaranteed by the individual defendants. Defendants counterclaimed alleging unfair trade practices and breach of fiduciary duty. The plaintiff filed for a partial judgment on the pleadings seeking dismissal of defendants' counterclaims. The trial court granted the plaintiff's motion. The defendants appealed. We affirm the trial court's dismissal of the counterclaims.

On 27 August 1980, plaintiff United Virginia Bank, a Virginia corporation (hereinafter called "UVB"), entered into an aircraft security agreement and promissory note with defendant Air-Lift, a Virginia corporation. In exchange for UVB's agreement to lend defendant Air-Lift $150,000.00 for the purchase of a 1974 Piper aircraft, the defendant Air-Lift granted plaintiff a security interest in the aircraft. Defendants Hoffman, Googe, Pramov, and Bowling, who is now deceased, guaranteed payment of the promissory note by the corporate defendant.

The bank refinanced the obligation in 1981 with Air-Lift executing a second promissory note and security agreement on 30 June 1981 to reschedule the payment of the $137,000.00 debt still owing from Air-Lift to plaintiff. Air-Lift made the required payments through March of 1982 and then stopped making payments. In September of 1982, UVB filed a claim and delivery action against defendants. The defendants agreed to voluntarily allow UVB to take possession of the airplane, and UVB dropped the claim and delivery action. Defendant Googe offered to pay $100,000.00 for the aircraft, but UVB refused to sell the plane to Googe because he was a guarantor. UVB had the plane flown

from the Raleigh-Durham Airport in North Carolina to an airport in Richmond, Virginia, where it was sold at a public sale for $55,000.00.

On 22 December 1982, UVB brought this action against defendants, jointly and severally, for an alleged deficiency of $93,634.99 owing to UVB after the public sale of the aircraft. Defendants answered the complaint denying liability and brought three counterclaims against plaintiff. Plaintiff replied to the counterclaims. One counterclaim was voluntarily dismissed by the defendants, leaving a claim pursuant to G.S. 75-1.1 alleging unfair and deceptive trade practices and one alleging breach of fiduciary duty. The defendants' counterclaim under G.S. 75-1.1 alleges that UVB's refusal to sell the aircraft to defendant Googe, UVB's inducements to gain possession of the aircraft, and its commercially unreasonable sale of the aircraft and other wrongful acts constituted unfair and deceptive acts or practices. The breach of fiduciary duty claim asserted that the refusal to sell the aircraft to defendant Googe and its subsequent sale constituted "UVB's breach of its fiduciary duty to the Defendants as their attorneys-in-fact." On 9 October 1984, UVB moved for partial judgment on the pleadings with regard to defendants' two remaining counterclaims. After hearing arguments on plaintiff UVB's motion on 14 November 1984, the trial court entered an order dated 18 December 1984 granting plaintiff's motion and dismissing both defendants' counterclaim alleging unfair trade practices and defendants' counterclaim alleging breach of fiduciary duty. In the 18 December Order the trial court made findings of fact and conclusions of law, including the following conclusions of law.

> 1. The Commonwealth of Virginia has the most significant relationship to the dispute between the parties, and therefore Virginia law controls. [Citations omitted.]
>
> 2. The last event necessary to render Plaintiff United Virginia Bank liable under Defendants' Counterclaim for unfair trade practices, the consummation of the public sale, occurred in Virginia, and therefore Virginia law controls. [Citations omitted.]
>
> 3. The contractual relationship between the parties was created and was centered in Virginia, and therefore Virginia law controls. [Citation omitted.]

4. Chapter 75 of the North Carolina General Statutes has no application to Virginia transactions and Defendants' Counterclaim brought pursuant to N.C. Gen. Stat. Secs. 75-1.1 and 75-16 should accordingly be dismissed. [Citation omitted.]

5. N.C. Gen. Stat. Secs. 75-1.1 and 75-16 are punitive in nature. [Citation omitted.]

6. The language of N.C. Gen. Stat. Sec. 75-1.1 is so vague that men of common intelligence must guess as to its meaning and differ as to its application, and the language is not sufficiently definite to give notice of the required conduct to one who would avoid its penalties. [Citations omitted.]

7. Unlike section 5 of the Federal Trade Commission Act, 15 USC Sec. 45, upon which the North Carolina statute is modeled, N.C. Gen. Stat. Sec. 75-1.1 imposes a punitive remedy of treble damages without providing procedures for adequate notice or hearing. [Citation omitted.]

8. No federal or North Carolina judicial interpretations or administrative guidelines concerning N.C. Gen. Stat. Sec. 75-1.1 or similar federal statutes exist which would have given United Virginia Bank or other potential offenders adequate notice of what constitutes a violation of N.C. Gen. Stat. Sec. 75-1.1. [Citations omitted.]

9. N.C. Gen. Stat. Sec. 75-1.1 imposes a punitive remedy of treble damages without adequate notice and hearing, without adequate procedures for obtaining notice, and without adequate judicial interpretation or administrative guidelines prior to imposition of the penalty, and therefore deprives an alleged offender of due process of law in violation of the Fourteenth Amendment of the United States Constitution and Article I, Sec. 19 of the Constitution of North Carolina. Accordingly, Defendants' Counterclaim for unfair trade practices should be dismissed. [Citations omitted.]

10. Application of Sec. 75-1.1 in this action would deprive United Virginia Bank of due process of law in violation of the Fourteenth Amendment of the United States Constitution and Article I, Sec. 19 of the Constitution of North Carolina, and the Defendants' Counterclaim for unfair trade practices should be dismissed. [Citations omitted.]

11. No fiduciary duty exists between a creditor and a debtor, or a creditor and a guarantor, and therefore Defendants' Counterclaim for breach of fiduciary duty should be dismissed. [Citation omitted.]

It is from this Order defendants have appealed.

Defendants argue three assignments of error on appeal: (1) that the trial court erred in finding that Virginia law controls defendants' counterclaim pursuant to G.S. 75-1.1; (2) that the trial court erred in finding that G.S. 75-1.1 is unconstitutional because it deprives the offender of due process; and (3) the trial court erred in finding no fiduciary duty existed, as a matter of law, between plaintiff and defendants.

First, we note that this appeal is interlocutory because it does not resolve all claims against all parties, and the trial court made no determination authorizing immediate appeal under Rule 54(b) of the Rules of Civil Procedure. We treat the appeal as a petition for a writ of certiorari and allow the writ in order to dispose of the issues presented on their merits. *Stone v. Martin*, 53 N.C. App. 600, 602, 281 S.E. 2d 402, 403 (1981).

[1] The initial question for our determination is whether Virginia or North Carolina law applies to defendants' counterclaim and more particularly what choice of law standard applies to the defendants' counterclaim brought under G.S. 75-1.1. Plaintiff argues that the provisions of Chapter 25 of the North Carolina General Statutes, the Uniform Commercial Code (hereinafter "U.C.C."), are exclusive and prevent the application of G.S. 75-1.1 to any conduct regulated by the U.C.C. Because both the U.C.C. and G.S. 75-1.1 have their own choice of laws provision, we must first determine whether the provisions of the U.C.C. are, in fact, exclusive so as to prevent application of Sec. 75-1.1 to any transaction covered by the U.C.C.

A review of the purposes of the U.C.C. and G.S. 75-1.1 clearly reveals that the provisions of the U.C.C. are not exclusive and do not preclude an action for unfair and deceptive trade practices. The purpose of the U.C.C. is to simplify, clarify and modernize the law governing commercial transactions. G.S. 25-1-102. The U.C.C. was not specifically designed to regulate the alleged unethical conduct or oppressive practices of banks. The purpose

of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce. *Buie v. Daniel International*, 56 N.C. App. 445, 448, 289 S.E. 2d 118, 119, *cert. denied*, 305 N.C. 759, 292 S.E. 2d 574 (1982). G.S. 75, *et seq.*, was enacted because other legal remedies were inadequate or ineffective. *Id.* Thus, an action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty.

If we were to find, as the plaintiff argues, that the U.C.C. is the exclusive regulator of commercial transactions, Chapter 75 would be eviscerated. Almost all commercial transactions, including sales to consumers of commercial goods, would be protected from the regulation of Chapter 75. Such a result was certainly not in the minds of the Legislature when it enacted Chapter 75. We hold that Chapter 75 is applicable to commercial transactions which are also regulated by the U.C.C.

This Court has reached a similar result in regard to the regulation of the insurance industry. *Phillips v. Integon Corp.*, 70 N.C. App. 440, 319 S.E. 2d 673 (1984). In *Phillips*, the defendant contended that insurance regulation by Chapter 58 was exclusive; and, therefore, an action under Chapter 75 was precluded. This Court noted that the purpose behind Chapter 58 was to regulate insurance rates and Chapter 58 was not designed to regulate immoral, unethical or oppressive behavior on the part of insurance companies. *Id.* This Court held that Chapter 58 was not exclusive; therefore, an action could be brought under Chapter 75. *Id.*

Having determined that the defendants' counterclaim under G.S. 75-1.1 is not precluded by the regulations of the U.C.C., we now apply the conflict of law standard of Sec. 75-1.1 as recently set forth in *Lloyd v. Carnation*, 61 N.C. App. 381, 388, 301 S.E. 2d 414, 418 (1983), and interpreted in *ITCO Corp. v. Michelin Tire Corp.*, 722 F. 2d 42, 49-50, n. 11 (4th Cir. 1983), *cert. denied*, 473 U.S. ---, 84 L.Ed. 2d 337, 105 S.Ct. 1191 (1985), to decide whether Virginia or North Carolina law applies to this case. Although not binding, the Fourth Circuit Court of Appeals' analysis of *Lloyd* is persuasive:

> We are satisfied that North Carolina's courts would apply N.C. Gen. Stat. 75-1.1 to the facts presented here without regard to the presence of the contractual choice of law provision. The nature of the liability allegedly to be imposed by the statute is *ex delicto*, not *ex contractu*. . . .
>
> The contractual provision thus set aside, we are left with the recent decision of *Lloyd v. Carnation Co.*, 61 N.C. App. 381, 387, 301 S.E. 2d 414, 418 (1983), wherein the North Carolina Court of Appeals indicated that the law of the state where the injuries are sustained should govern. In *Lloyd*, plaintiff's claim under Sec. 75-1.1 was denied on choice of law grounds, the court holding that Virginia law should apply. The court cited for that proposition the case of *Shaw v. Lee*, 258 N.C. 609, 129 S.E. 2d 288 (1963), wherein it was observed that "claimant's right to recover and the amount which may be recovered for personal injuries must be determined by the law of the state where the injuries were sustained; if no right of action exists there, the injured party has none which can be enforced elsewhere."

ITCO, supra, at 50, n. 11.

[2, 3] G.S. 75-1.1 is separate and distinct from any contractual relationship between plaintiff and defendants. The law of the State where the last act occurred giving rise to defendants' injury governs defendants' Sec. 75-1.1 action. *Lloyd v. Carnation, supra*, at 388, 301 S.E. 2d at 418. In substance the defendants argue that the plaintiff committed an unfair trade practice by representing to the defendants that they had a buyer who would pay $150,000.00 for the plane upon delivery to Norfolk, Virginia. The plane was sold in Richmond, Virginia, for the sum of $55,000.00, not $150,000.00. Taking the defendants' pleadings as true, we find that the last act giving rise to the defendants' claim under G.S. 75-1.1 occurred in Virginia. The defendants suffered no actionable injury until the plane was sold below the promised price. Because the last act occurred in Virginia, the substantive law of Virginia applies to defendants' counterclaim.

It appears from our research that Virginia has not adopted an unfair or deceptive trade practices act comparable to G.S. 75-1.1, *et seq.*, *cf.* 9 Va. Code Sec. 59.1-196, *et seq.* Because a statutory basis for defendants' injury cannot be found in Virginia

law, the defendants' claim must fail. *Id.*; *Home Ins. Co. v. Dick*, 281 U.S. 397, 74 L.Ed 926, 50 S.Ct. 338 (1930). We find that the trial court correctly dismissed defendants' counterclaim which alleged an unfair trade practice.

We note that other cases have applied the "most significant relationship" test to determine what State's law governs an action based on G.S. 75-1.1. *See Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 314 S.E. 2d 797 (1984); *Michael v. Greene*, 63 N.C. App. 713, 306 S.E. 2d 144 (1983). We find that the better rule is the "where the injuries are sustained" standard set forth by Judge Braswell in *Lloyd, supra.* However, even if we applied the "most significant relationship" test to this case, the result would be the same.

[4] Defendants also assign error to the trial court's dismissal of defendants' counterclaim for breach of fiduciary duty. The trial court found as a matter of law that no fiduciary relationship existed between plaintiff and defendants. Applying conflict of law principles, we find that the last act giving rise to the alleged breach of fiduciary relationship, the sale of the plane, occurred in Virginia; and we thus hold that Virginia law applies to defendants' counterclaim for breach of fiduciary duty.

[5] A fiduciary relationship exists " 'when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.' " *Allen Realty Corp. v. Holbert*, 227 Va. 441, 446, 318 S.E. 2d 592, 595 (1984), *quoting H-B Partnership v. Wimmer*, 220 Va. 176, 179, 257 S.E. 2d 770, 773 (1979). Defendants' counterclaim reveals only a debtor-creditor relationship between the parties. The plaintiff held a security interest in the defendants' plane and was entitled to possession of the plane upon default on the promissory note. Our research reveals no Virginia cases directly on this point; however, applying the existing Virginia law to this case as we think the Virginia courts would, we find, taking all the defendants' allegations as true, that no fiduciary duty existed between plaintiff and defendants. UVB, the creditor, owed no special duties to the defendants beyond those contained in the parties' contractual agreement and defined by the U.C.C. The mere existence of a debtor-creditor relationship between UVB and defendants did not create a fiduciary relationship.

The defendants contend that plaintiff was acting as an "attorney in fact" because the defendants were induced to relinquish the plane by plaintiff's representations that a buyer existed for the plane. First, we note that under its contractual agreement UVB was entitled to possession of the aircraft upon default on the promissory note; and, second, defendants' counterclaim reveals that defendants voluntarily relinquished the plane after the plaintiff dismissed its claim and delivery action. Thus, the defendants' pleadings show that it relinquished the plane as a *quid pro quo* for the dismissal of UVB's claim and delivery action. As a matter of law no fiduciary duty existed and the trial court properly dismissed defendants' counterclaim.

While we affirm the trial court's decision to grant plaintiff's motion for judgment on the pleadings as to defendants' counterclaims, we find it necessary to discuss that portion of the trial court's order purporting to make findings of fact and conclusions of law holding G.S. 75-1.1 to be unconstitutional because of vagueness and inadequate notice and hearing procedures. The trial court's ruling came pursuant to plaintiff's motion for judgment on the pleadings under Rule 12(c) of the Rules of Civil Procedure. G.S. 1A-1, Rule 12. "The court is not required to find facts in a judgment on the pleadings since the facts determining disposition are those alleged in the pleadings . . . ." *J. F. Wilkerson Contracting Co. v. Rowland*, 29 N.C. App. 722, 725, 225 S.E. 2d 840, 842, *cert. denied*, 290 N.C. 660, 228 S.E. 2d 452 (1976). In other instances where findings of fact or conclusions of law are not required, they are disregarded on appeal. "[W]e note that either on a motion to dismiss or a motion for summary judgment, it is not necessary or required for the trial court to enter conclusions of law, and that if such are entered, they are disregarded on appeal." *City of Charlotte v. Little-McMahan Properties, Inc.*, 52 N.C. App. 464, 469, 279 S.E. 2d 104, 108 (1981). This rule is especially appropriate in the instant case because it was unnecessary for the trial court or this Court to reach the issue of the constitutionality of G.S. 75-1.1 because the case was decided on Virginia law. Therefore, we modify the trial court's order by striking its findings of fact and conclusions of law as surplusage and of no legal effect.

Modified and affirmed.

Judges WHICHARD and EAGLES concur.

ROBERT F. GAY, EMPLOYEE, PLAINTIFF v. J. P. STEVENS & CO., INC., EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC442

(Filed 18 February 1986)

1. **Master and Servant § 68— workers' compensation—employment in dye house—respiratory illness—sufficiency of evidence of occupational disease**

Evidence was sufficient to support the Industrial Commission's conclusion that plaintiff suffered from an occupational disease compensable under N.C.G.S. 97-53(13) where it tended to show that plaintiff worked for approximately 22 years in a textile dye house; the substances used in the dye house and their potentially harmful effects on the respiratory system were well documented; and an expert medical witness's testimony established that the conditions of plaintiff's employment possibly caused and probably aggravated his condition and that nothing in plaintiff's history other than his occupation could account for the severity of his obstructive lung disease.

2. **Master and Servant § 68— workers' compensation—occupational disease—levels of toxic fumes and dust—evidence not required**

In a workers' compensation claim where plaintiff alleged that he had an occupational disease caused by exposure to fumes and dust in the workplace, there was no merit to defendants' contention that the fact that levels of toxic substances in the dye houses and the concentration of dust in the warehouse where plaintiff worked were never actually measured rendered an expert medical witness's testimony regarding the effect of these substances mere speculation, since both of the dye houses in which plaintiff worked no longer operated and it would thus be impossible for plaintiff to obtain measurements of the levels of toxic substances therein; and the evidence on dye operations—in particular, the fact that the dyes were mixed in open containers—and plaintiff's health records sufficiently demonstrated plaintiff's occupational exposure to harmful levels of respiratory irritants.

3. **Master and Servant § 94.1— workers' compensation—last injurious exposure—insufficient findings**

Though evidence in a workers' compensation case was sufficient to support a finding that plaintiff was last injuriously exposed while in defendant's employment, the Industrial Commission failed to make adequate findings of fact and conclusions of law regarding plaintiff's last injurious exposure to the hazards of chronic obstructive lung disease.

Gay v. J. P. Stevens & Co.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 16 August 1984. Heard in the Court of Appeals 30 October 1985.

Plaintiff filed this workers' compensation claim on 5 September 1979, alleging that he had an occupational disease caused by exposure to dust and fumes in the workplace. The hearing commissioner concluded that plaintiff's total disability was "caused by and results from a disease that was aggravated by causes and conditions characteristic of and peculiar to plaintiff's employment" and awarded compensation under N.C. Gen. Stat. 97-53(13). The Full Commission adopted the decision of the hearing commissioner.

Defendants appeal.

Charles R. Hassell, Jr., for plaintiff appellee.

James W. Mason and Williamson, Dean, Brown & Williamson, by Andrew G. Williamson, Jr., for defendant appellants.

WHICHARD, Judge.

Defendants contend the Commission erred in concluding that plaintiff suffers from an occupational disease compensable under N.C. Gen. Stat. 97-53(13). Alternatively, they contend that plaintiff was not injuriously exposed while in defendant-employer's employment and that the Commission erred in failing so to determine. We find sufficient evidence from which the Commission could conclude that plaintiff suffers from an occupational disease. We also find sufficient evidence from which the Commission could have concluded that plaintiff was last injuriously exposed to the causes of that disease while in defendant-employer's employment; however, we find the Commission's findings of fact and conclusions of law insufficient to support such a determination.

Appellate review of decisions of the Industrial Commission is limited to a determination of "whether there was competent evidence before the Commission to support its findings and . . . whether such findings support its legal conclusions." *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E. 2d 456, 458 (1982). This Court cannot substitute its judgment for that of the Commission. Thus, when supported by competent evidence, findings of fact made by the Commission are conclusive on appeal. *Id.; see*

also Morrison v. Burlington Industries, 304 N.C. 1, 6, 282 S.E. 2d 458, 463 (1981).

The evidence before the Commission tended to establish the following:

In 1947 plaintiff was employed by Old Scotland Mills. For approximately two years he worked in Scotland Mills' dye house operating a dryer which dried bedspreads that were wet from the dyeing process.

Plaintiff was next employed in the textile industry by Dixianna Rug Company in 1953. He worked in its warehouse for approximately five years "shipping rolled goods out of the warehouse."

In July 1958 plaintiff was again employed by Scotland Mills to work in the dye house located at its airbase facility. Spring Mills later purchased Scotland Mills. Plaintiff, however, continued to work in the dye house at the airbase facility. While there plaintiff worked for an unspecified period as a dryer, mixing dry or paste dye with water and adding it by hand to open dye tubs.

In January 1973 plaintiff was transferred to Spring Mills' Crandall plant. There he initially worked as a tub dumper, dumping wet bedspreads into an extractor which forced the water from the bedspread. Later he worked as a dye mixer, combining powdered dyes with liquids and heating the mixture. The dyes emitted visible dust as they were poured into open containers.

Plaintiff next worked as a tub operator. He loaded bedspreads into machines which functioned much like washers but were used to treat bedspreads with chemicals and heat to prepare them for the dyeing process. Plaintiff was exposed to the steam which emerged as the tub lids were opened.

From June 1974 until August 1974 plaintiff operated the machines in which finished bedspreads were dried. He was again exposed to steam when the dryers were opened.

On 4 August 1974 defendant-employer purchased the Crandall plant and began phasing out dyeing operations. Plaintiff continued to work in the dye house until 28 August 1974, when operations ceased. From then until he was "laid off" in December 1974, he worked as a yard man. On perhaps three occasions plain-

tiff transported barrels of old chemicals and dyes to a landfill and dumped them.

Ralph Askill, superintendent of dyes for defendant-employer, described the Crandall dye house as follows:

> The approximate area of the bedspread area in the dye house is 72,000 square feet and is one continuous open area with the exception of a mezzanine. The extractors were located directly under the mezzanine. The dye tubs were located on the one side of the mezzanine and the dryers were located on the opposite side of the dye tubs. The dryers were on the ground floor. The extractors were also on the ground floor. The tubs were on the ground floor with a raised platform behind them where they did all the loading and the dye tubs began. The mixing was done above the ground floor in the dye room. It is located on the mezzanine probably 10 to 12 feet above the top of the extractors. It was over the dye tubs and about the same distance above the dye tubs that the extractors were from the dye tubs. This would be about 10 or 12 feet above the dye tubs. The extractors were probably 10 to 15 feet from the dye tubs, with the dryers being located about the same distance from the extractors. The platform I have described was approximately 12 feet above the ground floor. . . .
>
> The mezzanine is approximately in the center of the room. The extractor and the dryer are underneath. The distance between the mezzanine and the dryer was about 12 to 15 feet. The mezzanine was approximately 100 feet long. On the mezzanine was an enclosed drug room for the weighing of dye stuff. The remainder of it was opened with a wall approximately 5 to 6 feet high.

This evidence tends to indicate that someone working in the dye house would be exposed to the hazards of all phases of the dyeing process.

Plaintiff returned to work for defendant-employer in April 1975. From then until his retirement in July 1978 he worked in a warehouse handling finished products. The area was dusty due to the movement of products and boxes which had been stored for several months.

Many of the chemicals used by plaintiff's employers in the dyeing process are identified as respiratory irritants in Material Safety Data Sheets which were introduced into evidence. Although wearing a mask or other respiratory protective device when working with many of the chemicals in the dye house is recommended, plaintiff never wore such a device.

The following chemicals were used by plaintiff's employers in the dye houses: sodium hypochlorite, peroxide, sodium hydrosulfite (in powder form), acetic acid, soap flake, sodium carbonate, Cassofic FRW 3000, caustic soda, and chlorine. The evidence showed the following regarding these chemicals: Sodium hypochlorite was used in approximately twenty-five percent of the dye batches. When sodium hypochlorite is heated or comes in contact with acid, it emits toxic chlorine fumes. Hypochlorite solutions can be corrosive to the skin and mucous membranes. Vapors from peroxide are highly irritating to skin, eyes and respiratory passages. Respiratory protection is recommended with its use. Sodium hydrosulfite powder was used in the dyeing process and in cleaning machines. It is recommended that a dust mask be worn when handling hydrosulfite powder. Inhalation of the vapors emitted by acetic acid can cause coughing, chest pain and irritation of the nose and throat. Soap flake, sodium carbonate and Cassofic FRW 3000 are mild irritants to skin, eyes and mucous membranes. Inhalation of dust from these granular solids should be avoided. Overexposure to caustic soda is hazardous to skin, eyes and respiratory passages. The use of a safety mask is recommended to protect against the inhalation of the toxic dust and fumes caustic soda emits.

Health records maintained by plaintiff's employers indicate that in January 1967 he was burned when he opened a valve on a tank and caustic soda splashed in his nose. In 1973 plaintiff suffered a second caustic soda burn under his left eye.

Other incidents documented in plaintiff's health records further indicate the extent to which he came in direct contact with the chemicals used in the dyeing process. In 1967 plaintiff injured his finger attempting to untangle a bedspread caught in a dye tub. In 1968 he slipped and sprained his shoulder when a dye tub overflowed. In 1969 plaintiff was treated for chlorine in his ear. In 1971 all employees were evacuated due to a chlorine gas leak.

Plaintiff was treated for inhalation of chlorine gas. He was given oxygen, an eyewash, and medication. Defendant-employer's superintendent did not recall the evacuation of employees due to a gas leak, but did "recall *occasions* in which chlorine gas . . . escape[d]."

Three physicians testified concerning plaintiff's condition. Each diagnosed plaintiff as suffering from chronic obstructive lung disease. In their opinions his condition is permanent and totally disabling. Two of the physicians, Drs. Woolfolk and Hayes, were under the mistaken impression that plaintiff had worked in a cotton mill and had been exposed to cotton dust for an extended period of time. Thus, they were not prepared to testify concerning the existence of a causal link between plaintiff's actual work environment and his obstructive lung disease. After being informed of the nature of plaintiff's employment and the chemicals involved, however, Dr. Woolfolk testified:

> If [plaintiff] were exposed to anything that contained chlorine, which is a toxic substance to the lungs, I think it would be extremely significant. It would be significant as causing pulmonary disease, breaking down various lung tissues. . . . It is my opinion that an individual exposed to chlorine or other substances in the dye house would be at an increased risk than individuals not exposed.

The third physician, Dr. Khodaparst, testified that in his opinion plaintiff's work environment was a "possible . . . causative agent" and that "it is probable that [it] aggravated his disease." Dr. Khodaparst particularized as follows:

> Well, its chlorine gas. . . . [C]hlorine could cause severe airway inflammation and destruction and I'm not putting chlorine as the causative agent, but I would say it is possible one of these gases . . . initially caused airway disease and continuous exposure has aggravated and continuous destruction, thereon, went on and caused this disease.

Dr. Khodaparst explained that while it is possible that claimant's occupational exposure was the "[i]nitial factor which produced inflammation of the lung and destruction and changes . . . [,] as he worked it is probable . . . that . . . other fume[s] and gases or dust he was exposed to aggravated" the disease. When asked

whether plaintiff's occupational exposure "placed him at an increased risk of aggravation of obstructive lung disease . . . beyond members of the general public not so exposed," Dr. Khodaparst responded, "[p]robably, yes."

Plaintiff is a nonsmoker. Except for his occupation, Dr. Khodaparst found no "other factors present in [plaintiff's] history which could account for his obstructive lung disease as severe as it is." Dr. Khodaparst testified as follows regarding plaintiff's occupational exposure while in defendant's employment:

> My opinion as to whether it is probable that [plaintiff's] exposure in his employment aggravated his obstructive lung disease up until the date he last worked in 1979 is . . . when he came to the hospital and was told to go back to his work, what he used to do. He clearly told me that "Doc, I can't go to work, it makes my breathing worse and it causes my symptoms—my shortness of breath to be worse. I can't go back to that same job." . . .
>
> * * *
>
> If someone has lung disease, asthma or chronic bronchitis, exposure to dust, it could aggravate the disease if one was working in a warehouse, depending on what kind of warehouse it was. It is probable that certain warehouses aggravate the patient's illness. . . .

A disease is an occupational disease compensable under N.C. Gen. Stat. 97-53(13) if claimant's employment exposed him "to a greater risk of contracting this disease than members of the public generally . . ." and such exposure "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). Ultimately, the Commission must determine "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 102, 301 S.E. 2d at 370. In determining the role claimant's occupational exposure played in the development of the disease, the Commission may consider, in addition to expert medical testimony, factual circumstances which bear on the question of causa-

tion. *Id.* at 105, 301 S.E. 2d at 370. Thus, the Commission may consider (1) the nature and extent of claimant's occupational exposure, (2) the presence or absence of other non-work-related exposures and components which contributed to the disease's development, and (3) correlations between claimant's work history and the development of the disease. *Id.* The claimant carries the burden of proving the existence of a compensable claim. *Davis v. Raleigh Rental Center,* 58 N.C. App. 113, 117, 292 S.E. 2d 763, 766 (1982).

N.C. Gen. Stat. 97-57 provides that

> [i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

If the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. *Rutledge,* 308 N.C. at 89, 301 S.E. 2d at 362. In addition, the substance to which plaintiff was last injuriously exposed need not be a substance known to cause the disease. *Caulder v. Waverly Mills,* 314 N.C. 70, 74, 331 S.E. 2d 646, 649 (1985).

[1] The evidence, considered in light of the foregoing legal principles, is sufficient to support the conclusion that plaintiff suffers from an occupational disease compensable under N.C. Gen. Stat. 97-53(13).[1] There is ample evidence from which the Commission

1. The Commission concluded that claimant's "disability is caused by and results from a disease aggravated by causes and conditions characteristic of and peculiar to plaintiff's employment." The Commission cited and adopted the language of *Walston v. Burlington Industries,* 304 N.C. 670, 679-80, 285 S.E. 2d 822, 828 *as amended by Order,* 305 N.C. 296, 297 (1982) ("Disability caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment.").

While it is difficult to reconcile the *Rutledge* test with the test articulated in *Walston* and relied upon by the Commission, *see Mills v. Fieldcrest Mills,* 68 N.C. App. 151, 155-56, 314 S.E. 2d 833, 836-37 (1984), by finding that "[t]here are no other explanations or factors known that can account for the severe nature of plaintiff's lung disease other than his exposure to dust and fumes in the dye house and warehouse," the Commission essentially found that "the occupational exposure was

could conclude that plaintiff's work exposed him to a greater risk of contracting chronic pulmonary lung disease than members of the public generally and that occupational exposure substantially contributed to the disease's development. *Rutledge, supra.* The substances used in the dye houses and their potentially harmful effects on the respiratory system were well-documented. Dr. Khodaparst's testimony established that the conditions of plaintiff's employment possibly caused and probably aggravated his condition, and that nothing in plaintiff's history other than his occupation could account for the severeness of his obstructive lung disease.

[2] Defendants contend, however, that the fact that the levels of toxic substances in the dye houses and the concentration of dust in the warehouse were never actually measured renders Dr. Khodaparst's testimony regarding the effect of these substances mere speculation. In particular, they refer to the following testimony:

> Q. [A]nd without actually knowing what type of dust or the concentration of the dust, its effect on [plaintiff] would be mere speculation on your part, wouldn't it, Doctor?
>
> A. Yeah, you see, I don't know the normal dust speculation.
>
> Q. And that's true, too, while [plaintiff] was working in the warehouse, you would, excuse me, in the dye house, as to whether or not any dyes or fumes would have any effect upon him you would first have to know the concentration of the fumes, the amount of the fumes, would you not, the kind of fumes, would you not?
>
> A. The kind of fumes?
>
> Q. Kind of fumes.
>
> A. It was some kind of fumes—it is kind of fumes.

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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." *Rutledge*, 308 N.C. at 102, 301 S.E. 2d at 370. Thus the Commission's conclusion that plaintiff suffers from an occupational disease compensable under N.C. Gen. Stat. 97-53(13) can be upheld under *Rutledge. Cf. Adkins v. Fieldcrest Mills*, 71 N.C. App. 621, 322 S.E. 2d 642 (1984) (findings insufficient under the *Rutledge* test).

Q. And also you would have to know the amount of the concentration, wouldn't you?

A. Sometimes, not all the time.

Q. And for you to say that while [plaintiff] worked in a dye house, you could not accurately state that the fumes from any dyes had any effect upon him without first knowing the concentration and the type and the amount of dyes, could you doctor?

A. Yes, that's true, but as you noted, sir, that the name of the fume now is like chlorine and carbon tetrachloride . . .

Q. Doctor, you would first still have to know the amount of concentration of the chlorine, would you not?

A. That's for sure. You'd have to know how much.

Q. And so any statement that you make here today, as to its effect upon [plaintiff] is mere speculation, isn't it?

A. Yes, that's why I said possible.

Q. It's possible.

A. Yes.

Q. Cause you don't know the concentration, do you? You don't know how much he inhaled or if he inhaled any, do you?

A. I don't.

Q. And without those figures, it's mere guess work, isn't it?

A. A possibility.

Our Supreme Court has rejected a similar contention under N.C. Gen. Stat. 97-53(28), which restricts an employee's recovery for loss of hearing to that resulting from sound of an intensity of more than 90 decibels. The Court responded to an employer's contention that the employee must introduce evidence that the noise level to which he was exposed exceeded ninety decibels by stating:

It is unreasonable to assume that the legislature intended an employee to bear the burden of making noise-level measure-

> ments during his employment in order to lay the groundwork for a worker's compensation claim. Such an interpretation of the statute would make it virtually impossible for an employee to successfully bring suit for compensation for a hearing loss, due to the difficulty he would encounter in attempting to make measurements of sound on his employer's premises. A construction of the statute which defeats its purpose—to provide a means by which employees can recover for injury due to harmful workplace noise—would be irrational and will not be adopted by this Court.

McCuiston v. Addressograph-Multigraph Corp., 308 N.C. 665, 668, 303 S.E. 2d 795, 797 (1983).

Here, both of the dye houses in which plaintiff worked no longer operate. It thus would be impossible for plaintiff to obtain measurements of the levels of toxic substances therein. The evidence on dye house operations—in particular, the fact that the dyes were mixed in open containers—and plaintiff's health records sufficiently demonstrate plaintiff's occupational exposure to harmful levels of respiratory irritants. We thus reject defendants' contention. *McCuiston, supra.*

[3] We also find sufficient evidence to support a finding that plaintiff was last injuriously exposed while in defendant's employment. The Commission, however, failed to make adequate findings of fact and conclusions of law regarding claimant's last injurious exposure to the hazards of chronic obstructive lung disease. The Commission's findings and conclusions refer simply to "plaintiff's exposure" and "plaintiff's employment," and at no time refer singularly to plaintiff's exposure while in defendant-employer's employment.

The Commission must make specific findings of fact as to each material fact upon which the rights of the parties depend. *Wood v. Stevens & Co.*, 297 N.C. 636, 640, 256 S.E. 2d 692, 695 (1979); *Moore v. Stevens & Co.*, 47 N.C. App. 744, 749, 269 S.E. 2d 159, 162 (1980), *disc. rev. denied*, 301 N.C. 401, 274 S.E. 2d 226 (1980). In the absence of findings of fact sufficient to enable this Court to determine the rights of the parties, the cause must be remanded to the Commission for proper findings. *Young v. Whitehall Co.*, 229 N.C. 360, 369, 49 S.E. 2d 797, 803 (1948); *Moore*, 47 N.C. App. at 749, 269 S.E. 2d at 162.

While in defendant-employer's employment, plaintiff worked in the dye house for only twenty-two and a half days, during which the dyeing operations were winding down. Plaintiff's only other exposure to the chemicals used in the dye house was while transporting and dumping old dyes on possibly three occasions. While there was sufficient evidence from which the Commission could conclude that dusty warehouse conditions aggravated plaintiff's disease while in defendant-employer's employment, the Commission need not have reached this result. The cause thus must be remanded for a determination as to last injurious exposure.

The opinion and award is affirmed insofar as it determines that plaintiff has an occupational disease. The cause is remanded for a determination, based on proper findings of fact, *Moore, supra*, as to whether plaintiff was "last injuriously exposed" while in the employment of defendant-employer. The Commission may receive additional evidence for that purpose and enter new findings and conclusions as appropriate. *See Parrish v. Burlington Industries, Inc.*, 71 N.C. App. 196, 199, 321 S.E. 2d 492, 495 (1984).

Affirmed in part, and remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

RAINBOW SPRINGS PARTNERSHIP v. COUNTY OF MACON

No. 8510PTC474

(Filed 18 February 1986)

1. Taxation § 25.7— highest and best use of property—hunting and fishing club—use after granting of conservation easements

The State Property Tax Commission did not err in determining that the highest and best use of property, owned by petitioner and upon which it had granted conservation easements, was for hunting, fishing, and other recreational activities, though petitioner's expert witnesses testified that the highest and best use prior to the easements was as investment property to be developed in the future, since respondent's expert witness testified that the property, both before and after granting of the easements, was used for a hunting and fishing club, and this was the highest and best use for it; the property was in an area where no development was taking place; the property subject to the easement was the more steeply sloped land, less accessible than

other land in the entire tract; and some years earlier, development of a large tract of adjoining land failed, and the property was sold to the U. S. Government to be a part of the National Forest.

2. **Taxation § 25.5— valuation—experts' testimony—date of valuation immaterial**

Even if the State Property Tax Commission erred in finding that petitioner's expert witnesses gave opinions of the value of the land in question for some date other than 1 January 1983, the date on which property taxes were assessed, such error would not entitle petitioner to relief since that finding was not the basis for rejection of petitioner's contended valuation.

3. **Taxation § 25.7— value of property—findings proper**

The State Property Tax Commission did not err in failing to make an explicit finding that The Nature Conservancy had affirmative rights to use petitioner's property pursuant to conservation easements.

APPEAL by petitioner from the North Carolina Property Tax Commission. Final Decision entered 15 November 1984. Heard in the Court of Appeals on 31 October 1985.

Van Winkle, Buck, Wall, Starnes and Davis by Larry McDevitt and Marla Tugwell for petitioner appellant, Rainbow Springs Partnership.

Jones, Key, Melvin & Patton by R. S. Jones, Jr., for respondent appellee, Macon County.

COZORT, Judge.

Rainbow Springs Partnership (hereinafter "Partnership") appeals from a ruling of the State Property Tax Commission (hereinafter "Commission") assessing the value of a 2,252-acre tract upon which the Partnership granted conservation easements. The Commission determined that the highest and best use of the property, both before and after the granting of the easements was, and is, "for hunting, fishing, and other recreational activities"; found the granting of the easements reduced the value of the encumbered property by 45%; and concluded that the true value of the encumbered acreage is $500.00 per acre. Having reviewed the whole record in accordance with G.S. 105-345.2, we affirm, finding the Commission's decision to be supported by substantial evidence.

The facts and procedures necessary for an understanding of the issues considered on appeal are as follows:

As of 1 January 1983, the Partnership was the owner of 2,252.2 acres, with certain improvements, in Macon County. The County assessed property taxes based on an acreage of 2,546.46 acres, which it valued at $2,566,180.00. The Partnership appealed the County's assessment to the Macon County Board of Equalization and Review which upheld the County's valuation. The Partnership appealed to the State Property Tax Commission sitting as the State Board of Equalization and Review. At the hearing before the Commission, the parties stipulated that the acreage to be taxed was 2,252 acres and that, at a minimum, the County would reduce the valuation accordingly, regardless of the final decision by the Commission.

The Partnership contended it was entitled to a reduction in fair market value due to certain conservation easements it had granted to The Nature Conservancy. The County contended that the conservation easements had no effect on the fair market value of the property. At the hearing before the Commission on 23 August 1984, the parties stipulated the issue to be tried was: What was the fair market value of the Partnership's real property located in Macon County as of 1 January 1983?

The evidence showed that the Partnership is the owner of 258.20 acres known as the Carpenter tract, against which no conservation easement has been granted. It owns a non-contiguous tract, the Slagle tract, containing 1,998.63 acres. By deeds executed in 1980 and 1982, it granted to The Nature Conservancy conservation easements encumbering 1,838 acres in the Slagle tract. There are several improvements, including a lodge, on the Slagle tract.

The easements were granted in perpetuity by two deeds. The Commission found, without objection, that both deeds contained essentially the same covenants by the Partnership:

> 1. There shall be no hunting of bear or non-game animals; no commercial trapping; no construction or placing of buildings, camping accomodations [sic], mobile homes, fences, signs, billboards, other advertising material, or other structures;
>
> 2. There shall be no filling; excavating; dredging; mining or drilling; removal of topsoil, sand, gravel, rock, or minerals; nor construction of roads, except as provided herein;

3. There shall be no removal, intentional destruction, or cutting of trees or plants, planting of trees or plants, spraying of biocides, grazing of domestic animals, or disturbance or change in the natural habitat in any manner, except as provided herein;

4. There shall be no dumping of ashes, trash, garbage, or other unsightly or offensive material, and no changing of topography through the placing of soil or other substance or material such as landfill or dredging spoils. There shall be no manipulation or alternation [sic] of natural water courses, lake shores, marshes, or other water bodies. There shall be no activities or uses conducted on the Protected Property which are detrimental to water purity; and

5. There shall be no operation of snowmobiles, dune buggies, motorcycles, all terrain vehicles, or other types of motorized vehicles, except on roads unless necessary either for purposes of security and enforcement of these Covenants, or for uses not restricted by this grant, provided that any off-road use be in a manner consistent with the preservation of the Protected Property and its plant and animal populations and their habitat.

While fee simple title to the property remains in the Partnership, the covenants contained in the easements run with the land in perpetuity.

Both deeds reserve for the Partnership the right to use the property subject to the easements for all purposes not inconsistent with the granting of the easements. Subsequent to the granting of the easements, however, the Partnership cannot use the property for developmental purposes or timbering. Prior to the granting of the easements, the property under appeal was used exclusively for hunting and fishing by the Partnership.

In the early 1970's the Partnership was approached with a proposal to sell portions of its property for development. Some large tracts of land bordering on the Partnership's property were purchased several years ago for development, but the project was unsuccessful. The Partnership's property is surrounded by heavily forested woodland, the majority of which is owned by the United States Forest Service. The closest residential development is three to five miles from the property.

The County valued the Carpenter tract at $1,440.00 per acre for 1983 and valued the Slagle tract at $972.00 per acre for 1983. The County valued the improvements on the Slagle tract at $104,330.00 for 1983. In appraising the Slagle tract, the County did not consider the effect on value of the conservation easements.

The Commission determined that the highest and best use of the property, both before and after the granting of the easements, was, and is, "for hunting, fishing and other recreational activities." It also concluded that "[t]here has been a reduction in value of most of the acreage under appeal as a result of the granting of the conservation easements, although there has been no change in the highest and best use of the property as a result of the easements." The Commission rejected the County's position that there was no reduction in value of the Partnership's property as a result of the granting of the easements. It concluded that the reduction in value of the acreage encumbered by the easements was 45%. Accordingly, the Commission concluded that the true value of the acreage in the Slagle tract encumbered by conservation easements, as of 1 January 1983, was $500.00 per acre, for a total of $919,000.00. The Partnership excepted to this conclusion. The true value of the improvements under appeal, as of 1 January 1983, was found to be $118,000.00. The Partnership took no exception to the values placed on the unencumbered acreage of the Slagle tract, the unencumbered Carpenter tract, and the improvements on the property under appeal. It excepted to the Commission's conclusion that the true value of all the real property under appeal as of 1 January 1983 was $1,579,820.00.

On appeal the Partnership contends:

(1) The Commission committed prejudicial error in concluding that the highest and best use of the land before the Partnership granted the conservation easements was for hunting, fishing, and other recreational activities;

(2) The Commission erred in failing to adopt the valuations of William Cantrell, the Partnership's expert witness "in the field of conservation easements," the only expert in that specific category;

(3) The Commission erred in finding that Cantrell and another of the Partnership's experts, Robert York, gave opinions of the value of the land for a date other than 1 January 1983; and,

(4) The Commission erred in failing to find that The Nature Conservancy has affirmative rights to use the property pursuant to the conservation easements and in finding that the use of the property by the Partnership is exclusive.

[1] We have elected to consolidate the first two issues listed above because both present the same issue, *i.e.*, whether the Commission's conclusion on the highest and best use of the property before the granting of the easements is erroneous and not supported by substantial evidence because the Commission, in effect, adopted the opinion of the County's expert, Sam Pipkin, rather than the opinion of the Partnership's expert, William Cantrell.

The scope of appellate review of cases from the Property Tax Commission is set by G.S. 105-345.2, which provides, in pertinent part, that:

> (b) . . . The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> * * * *
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

This standard of review is known as the "whole record" test. In *Thompson v. Wake County Board of Education*, Justice Copeland explained the "whole record" test:

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed.

456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C. L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C. L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, *Universal Camera Corp., supra.* On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera Corp., supra.*

292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). The whole record test is not "a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E. 2d 912, 922 (1979).

After "all the competent evidence in the record has been examined, the reviewing court must decide if it is substantial. 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' [Citations omitted.] 'Substantial evidence is more than a scintilla or a permissible inference.' [Citations omitted.]" *Thompson v. Wake County Board of Education, supra*, 292 N.C. at 414-15, 233 S.E. 2d at 544.

In the instant case, the issue is whether the Commission's finding of "true value" is supported by substantial evidence, as previously defined. The property's "true value" is its "market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is

capable of being used." G.S. 105-283. G.S. 105-317(a)(1) (1981) sets forth various factors to consider in determining the true value of the land. The Historic Preservation and Conservation Agreements Act, G.S. 121-34, *et seq.*, recognizes and provides for the entering into and enforcement of "conservation agreements." With respect to taxation, "land and improvements subject to a conservation or preservation agreement shall be assessed on the basis of the true value of the land and improvement less any reduction in value caused by the [conservation] agreement." G.S. 121-40. The parties do not dispute that the easements granted by the Partnership to The Nature Conservancy fall within the purview of G.S. 121-34, *et seq.* To find the true value of the property, the Commission had to determine the market value prior to the granting of the easements and then reduce that value by applying a damage factor caused by the granting of the conservation easements. Determining the highest and best use of the property prior to the granting of the easement was a critical part of the appraisal process.

The evidence of the highest and best use of the property prior to the granting of the easement was in conflict. The Partnership offered an expert, William Cantrell, who testified that the highest and best use prior to the easement was as investment property to be developed in the future. Based on that opinion, Cantrell applied an 85% damage factor to the encumbered property, arriving at a per acre value of $150.00. The Partnership offered a second expert, A. Robert York, who also testified that the highest and best use prior to the easement was for "potential future development and investment holding." He also appraised the property in its encumbered state at $150.00 per acre. The County's expert, Sam Pipkin, testified that the highest and best use of the property prior to the easements was the use to which it had been put, a "Hunting and Fishing Club." He assigned a damage factor of 45% to the property and valued the property in its encumbered state at about $500.00 an acre. Pipkin testified that the encumbered property was in an area where no development was taking place. The evidence showed that the property subject to the easement was the more steeply sloped land, less accessible than other land in the entire tract. Some years earlier, development of a large tract of adjoining land failed, and the property was sold to the United States Government to be a part of the National Forest.

The Commission's decision indicates it rejected the testimony of the Partnership's experts and essentially adopted the opinion of the County's expert, Pipkin. We find no error in the Commission's decision. The Commission was not required to accept the opinion of Cantrell, even though he was, in the Partnership's view, the "most qualified" expert because he was the only expert witness in the field of conservation easements. Resolving conflicts in the evidence and weighing the credibility of the witnesses is for the fact-finder, in this case, the Commission. *See In re Appeals of the Greensboro Office Partnership*, 72 N.C. App. 635, 325 S.E. 2d 24, *disc. rev. denied*, 313 N.C. 602, 330 S.E. 2d 610 (1985). A review of the whole record fully supports the Commission's decision. The Commission's judgment "as between two reasonably conflicting views" is supported by substantial evidence, which does not permit this Court to overturn the Commission's decision. *Thompson v. Wake County Board of Education, supra*, 292 N.C. at 410, 233 S.E. 2d at 541.

[2] Next, we consider the Partnership's contention that the Commission erred in finding that the Partnership's experts, Cantrell and York, gave opinions of the value of the land for some date other than 1 January 1983.

In its Findings of Fact Nos. 27 and 34 (to which the Partnership took exception), the Commission found:

> (27) William Cantrell, a witness for the Partnership, appraised the property under appeal as of two dates: November 11, 1980, and August 20, 1982.
>
> * * * *
>
> (34) Robert York, a witness for the Partnership, appraised the property under appeal as of December 12, 1982.

The Partnership argues that these findings are erroneous because Cantrell testified that he updated his opinion as of 1 January 1983, and York testified that his opinion on the value of the land was as of 1 January 1983.

The appraisal reports introduced into evidence by the Partnership affirmatively support the findings made by the Commission. While Cantrell's testimony indicates that he did update his opinion of value to 1 January 1983, York's testimony indicates

that he updated his opinion only as to the value of the three tracts which were excluded from the easement. Regardless of whether these witnesses did update their opinions to 1 January 1983, it affirmatively appears from the record that neither of these witnesses made any change in their valuations from the respective dates thereof, up to 1 January 1983.

More importantly, however, even if the Commission erred in finding that the valuation dates in question were other than 1 January 1983, it is evident from the Commission's decision that the valuation dates reported were not the reason for the Commission's rejecting the Partnership's position. Rather, the Commission rejected the Partnership's valuation because it was not persuaded that the highest and best use of the property, prior to the granting of the easements, was for future development and investment purposes. Also, since the Commission found no significant change between the highest and best use of the property before and after the easements, the Commission rejected the 85% damage factor utilized by Cantrell.

When the findings that are supported by competent evidence are sufficient to support a judgment, the decision will not be disturbed because another finding, which does not affect the conclusion, is erroneous. *Dawson Industries, Inc. v. Godley Construction Co., Inc.*, 29 N.C. App. 270, 275, 224 S.E. 2d 266, 269, *disc. rev. denied*, 290 N.C. 551, 226 S.E. 2d 509 (1976). That principle of law is applicable here. The assignment of error is overruled.

[3] Finally, the Partnership contends the Commission erred in failing to find that The Nature Conservancy has affirmative rights to use the property pursuant to the conservation easements and in finding that the use of the property by the Partnership is exclusive.

By its Findings of Fact Nos. 16 and 17 the Commission found:

(16) Subsequent to the granting of the easements, the property has been used for private purposes, almost exclusively for hunting and fishing, by the Partnership.

(17) Only the eleven members of the Partnership and their guests can use the property for these purposes.

The Partnership claims these findings are erroneous, alleging the Commission failed to find that the "Nature Conservancy can take

groups to the Partnership's property by giving thirty (30) days' notice, permission not to be unreasonably withheld." The Partnership interprets Findings of Fact Nos. 16 and 17 to constitute a finding that the use of the property by the Partnership is exclusive. A careful reading shows that the Commission found that after the granting of the easements, the property had been used for private purposes by the Partnership and that the Partnership's use was almost exclusively for hunting and fishing. This does not impart that no other use can be made of the property.

There is no question that the terms of the easement give certain rights to The Nature Conservancy. These rights are personal, however, to The Nature Conservancy and its staff members. The Commission did include within its findings of fact that "the Partnership granted a conservation easement in perpetuity over certain portions of the property under appeal," referring to the deed books and pages where the easements were recorded. The easements were a part of the record before the Commission. The Commission's failure to explicitly make the finding as stated by the Partnership is not prejudicial error.

In sum, a review of the whole record shows that the Commission's decision is supported by competent, material, and substantial evidence. Since we have determined that the decision has a rational basis in the evidence, the Commission's decision is

Affirmed.

Judges WEBB and BECTON concur.

CLYDE C. BAILEY, JR. v. THOMAS LEBEAU AND PIONEER COACH MANUFACTURING COMPANY

No. 8518DC813

(Filed 18 February 1986)

1. Uniform Commercial Code § 10— sale of car—sufficiency of evidence of warranties

Evidence was sufficient to support a finding that the corporate defendant made warranties to plaintiff where it tended to show that defendant advertised the sale of the car in question in a magazine under its name and logo and

that, at the time plaintiff purchased it, the car displayed defendant's license tags and was titled in defendant's name; plaintiff negotiated the sale with the individual defendant on the corporate defendant's lot; defendant submitted a credit application for plaintiff to a finance company which routinely handled credit applications from defendant; after loan approval, the finance company issued a check jointly payable to plaintiff, his wife and the corporate defendant; and this evidence was sufficient to support a finding that the corporate defendant owned the car and that the individual defendant acted as its agent in negotiating the sale so that any warranties made by the individual defendant during negotiations were attributable to the corporate defendant.

2. Uniform Commercial Code § 14— sale of car—implied warranty of fitness for particular purpose—insufficiency of evidence

The trial court erred in submitting to the jury an issue as to breach of an implied warranty of fitness for a particular purpose where the evidence tended to show that plaintiff indicated during negotiations for the purchase of a car that he needed one for extensive traveling in his business; the individual defendant represented that the car in question got excellent gas mileage and had had the pistons, rings and valves replaced within six months; within two weeks the car became inoperable; but no evidence was introduced to show that the breakdown was caused by any defect which existed at the time of the sale. N.C.G.S. 25-2-315.

3. Uniform Commercial Code § 11— sale of car—breach of express warranty—sufficiency of evidence

Evidence was sufficient to support a finding by the jury that defendants breached an express warranty in the sale of a car where plaintiff testified that the individual defendant told him that certain engine parts had been replaced within six months, while an employee of the corporate defendant gave uncontroverted testimony that he had replaced the parts a year and a half before the sale; furthermore, evidence that plaintiff examined the engine prior to the purchase did not discharge defendants from the express warranty because plaintiff's testimony indicated that he relied on defendant's assurance rather than on his own judgment as to the condition of the engine, and the defect was one which he could not have readily discovered.

4. Uniform Commercial Code § 26— sale of car—breach of express warranty—award of damages improper

The trial court erred in awarding damages for breach of express warranty in the amount of $2,200, since there was no evidence as to the value of the vehicle as warranted (with parts replaced within six months) compared to its actual value at the time of acceptance (with parts replaced within one and a half years). N.C.G.S. 25-2-714(2).

5. Unfair Competition § 1— sale of car—misrepresentations—failure to show injury

The trial court erred in finding and concluding that defendants violated N.C.G.S. 75-1.1 and in awarding plaintiff treble damages and attorney's fees where there was evidence that defendants misrepresented the engine parts had been replaced within six months prior to the sale of an automobile, but

there was no evidence that plaintiff suffered an "injury" because of such representation.

Judge PHILLIPS dissenting.

APPEAL by defendants from *Lowe, Judge.* Judgment entered 5 March 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 13 January 1986.

This is a civil action wherein plaintiff seeks to recover $2,500.00 in damages for breach of express and implied warranties and treble damages and attorney's fees for unfair and deceptive trade practices. In his complaint, plaintiff alleged that he purchased a Honda Civic automobile from Pioneer Coach Manufacturing Company (Pioneer Coach) through its agent, Thomas LeBeau. He further alleged that he relied on representations made during negotiations by LeBeau about the condition of the automobile's engine and its fitness for the purposes of extensive travel, and that fifteen days after the purchase "the engine in the automobile blew, causing the automobile to be inoperable." In their answer, defendants denied that Thomas LeBeau acted as the agent for Pioneer Coach when he sold the car, that he had made any misrepresentations during negotiations, and that problems with the engine had rendered the car inoperable.

The evidence at trial tended to show that Pioneer Coach is engaged in the business of selling campers, trailers and automobiles. Thomas LeBeau is the son of Clarence LeBeau, the sole proprietor of Pioneer Coach, and an employee of the company. In March of 1984, Pioneer Coach listed a Honda Civic in its advertisement in *Wheels and Deals* magazine. Plaintiff telephoned Pioneer Coach in response to the advertisement and arranged to see the automobile. The following Saturday, plaintiff went to Pioneer Coach's lot, looked at the car, and discussed the car with Thomas and Clarence LeBeau. During his meeting with Thomas LeBeau, plaintiff indicated that he needed a car with good gas mileage for extensive traveling in his business. Plaintiff testified that Thomas told him that "he was getting . . . between 50 and 52 miles to the gallon." He also told plaintiff that the pistons, rings and valves had been replaced within six months. Although these parts had been replaced, uncontroverted evidence tended to show that they had not been replaced within six months prior to plaintiff's conversation with LeBeau.

Plaintiff purchased the car on 6 March 1984. At the time of the sale, the automobile had a Pioneer Coach dealer license plate on it and was titled in the company's name. On 21 March 1984, the car lost all power. Plaintiff returned it to Pioneer Coach's lot. Clarence and Thomas LeBeau told plaintiff that the car would be repaired.

At the close of the evidence the court submitted issues to the jury which were answered as follows:

1. Did the defendant, Pioneer Coach, expressly warrant that the engine block, including the pistons, rings and valves, had been replaced or rebuilt on the car within 6 months from the date of sale?

ANSWER: Yes.

2. Did the defendant Thomas LeBeau, in his individual capacity, expressly warrant that the engine block, including the pistons, rings and valves, had been replaced or rebuilt on the car within 6 months from the date of sale?

ANSWER: Yes.

3. Did the defendant, Pioneer Coach, impliedly warrant that the car was fit for the particular purpose of driving this car extensively for business purposes?

ANSWER: Yes.

4. Did the defendant, Thomas LeBeau, impliedly warrant that the car was fit for the particular purpose of driving this car extensively for business purposes?

ANSWER: Yes.

5. Was either the express or implied warranty breached by defendant, Pioneer Coach?

ANSWER: Yes.

6. Was either the express or implied warranty breached by defendant, Thomas LeBeau?

ANSWER: Yes.

7. What amount, if any, has plaintiff been damaged by the defendants?

ANSWER: $2,200.00.

8. Did the defendants tell plaintiff that certain portions of the car had been rebuilt or replaced within 6 months?

ANSWER: Yes.

9. Was defendants' conduct in commerce or did it affect commerce?

ANSWER: Yes.

10. By what amount, if any, has plaintiff been damaged?

ANSWER: $2,200.00.

The trial court further found that the conduct of Pioneer Coach, as set forth in issue eight, constituted an unfair and deceptive trade practice. From a judgment that plaintiff recover $2,200.00 from defendants, jointly and severally, and that Pioneer Coach pay treble damages and attorney's fees of $2,340.00, defendants appealed.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto and B. Danforth Morton, for plaintiff, appellee.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for defendants, appellants.

HEDRICK, Chief Judge.

To prevent a manifest injustice, we, ex mero motu, suspend the rules of appellate procedure to review all aspects of this case and reverse portions of the judgment and remand the case for a new trial on plaintiff's claim for breach of express warranty. Rule 2, N.C. Rules of Appellate Procedure.

[1] Defendants first contend that the evidence in this record is insufficient to support a finding that defendant Pioneer Coach made any warranty to plaintiff. We disagree. The evidence in the record tends to show that Pioneer Coach advertised the sale of the automobile in a magazine under its name and logo and that at the time of purchase the automobile displayed Pioneer Coach license tags and was titled in the company's name. Plaintiff

negotiated the sale with Thomas LeBeau on Pioneer Coach's lot. Pioneer Coach submitted a credit application for plaintiff to a finance company which routinely handled credit applications from Pioneer Coach. After loan approval, the finance company issued a check jointly payable to plaintiff, his wife and Pioneer Coach. This evidence was sufficient to support a finding that Pioneer Coach owned the automobile and that Thomas LeBeau acted as its agent in negotiating the sale. *See, Vickery v. Construction Co.*, 47 N.C. App. 98, 266 S.E. 2d 711, *disc. rev. denied*, 301 N.C. 106 (1980). Therefore, any warranties made by Thomas LeBeau during negotiations are attributable to Pioneer Coach. *Hunsucker v. Corbitt*, 187 N.C. 496, 122 S.E. 378 (1924).

[2] In our opinion, the evidence in the record is not sufficient to raise an inference that defendants breached an implied warranty. Under G.S. 25-2-315, there is a warranty of fitness for a particular purpose "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. . . ." The seller's warranty, however, is not his personal guarantee regarding the continuous and future operation of the goods which he has sold. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E. 2d 588 (1982). To establish a breach of warranty, there must be evidence sufficient to show that a defect existed at the time of the sale. *Id.*, *Cooper v. Mason*, 14 N.C. App. 472, 188 S.E. 2d 653 (1972).

In the present case, we need not decide whether defendants made an implied warranty that the automobile was fit for the particular purpose of long distance driving, because no evidence was introduced to show that the breakdown was caused by any defect that existed at the time of the sale. In the absence of such evidence, the issue of breach of an implied warranty of fitness for a particular purpose should not have been submitted to the jury.

[3] We cannot tell whether the jury found that defendants breached an express warranty because of the form of issues five and six as submitted to the jury. There is, however, in our opinion, evidence to support a finding by the jury that defendants breached an express warranty. Plaintiff testified at trial that Thomas LeBeau told him that certain engine parts had been replaced within six months. The testimony of Bernard Smith, an

employee of Pioneer Coach, that he had replaced these parts approximately "a year and a half" before the sale was uncontroverted. This evidence is clearly sufficient for the jury to find that defendant Thomas LeBeau made and breached an express warranty regarding the recency of the repairs. Evidence that plaintiff examined the engine prior to the purchase does not discharge defendants from the express warranty because plaintiff's testimony indicates that he relied on defendants' assurance rather than on his own judgment as to the condition of the engine and the defect was one which he could not have readily discovered. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E. 2d 588 (1982).

[4] While there is evidence in this record of a breach of an express warranty regarding the time when engine parts were replaced, there is no evidence to support the award of damages for breach of express warranty in the amount of $2,200.00. There is no evidence as to the value of the vehicle as warranted (with parts replaced within six months) compared to its actual value at the time of acceptance (with parts replaced within one and a half years). G.S. 25-2-714(2); *Williams v. Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 269 S.E. 2d 184, *disc. rev. denied*, 301 N.C. 406, 273 S.E. 2d 451 (1980). Thus, there must be a new trial with respect to plaintiff's claim for express warranty.

[5] Defendants contend that the trial court erred in finding and concluding that defendants violated G.S. 75-1.1, and in awarding plaintiff treble damages and attorney's fees. G.S. 75-1.1(a) provides that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." G.S. 75-16 further provides, in pertinent part, as follows:

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

Pursuant to G.S. 75-16.1, upon a finding that the party charged with a violation of G.S. 75-1.1 willfully engaged in the act or practice and that there was an unwarranted refusal to resolve

the matter, the trial court may, in its discretion, award reasonable attorney's fees.

A practice is unfair and violates the statute "when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Lee v. Payton*, 67 N.C. App. 480, 482, 313 S.E. 2d 247, 249 (1984) (citation omitted). An act is deceptive if it has the capacity or tendency to deceive, but proof of actual deception is not required. *Id.* As an essential element of a cause of action under G.S. 75-16, plaintiff must prove not only that defendants violated G.S. 75-1.1, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980).

While there is evidence in this record that defendants misrepresented that the engine parts had been replaced within six months prior to the sale of the automobile, there is no evidence that plaintiff suffered an "injury" because of such representation. The record contains no evidence which tends to show that the automobile broke down because the parts had not been replaced within six months. Thus, the court erred in trebling any damages and awarding attorney's fees.

For the reasons stated, the judgment ordering that defendants, jointly and severally, pay plaintiff damages in the amount of $2,200.00, trebling such damages against defendant Pioneer Coach, and awarding plaintiff attorney's fees in the amount of $2,340.00, must be reversed, and the cause is remanded to the district court for a new trial on plaintiff's claim for breach of express warranty.

Reversed in part, and remanded for a new trial on the issue of breach of express warranty.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion, error prejudicial to the defendants has neither been shown nor is manifest from the record and the judgment appealed from should not be disturbed. In their brief defendants make but four contentions, one of which is repetitious—that the evidence does not show that defendant Pioneer Coach made any warranty whatever to Bailey; that the evidence does not show that either defendant committed an unfair or deceptive trade practice; that the evidence does not support a breach of warranty claim; and that the trial judge abused his discretion in permitting leading questions to be asked the plaintiff—and none of which have merit. And the reasons given by the majority for depriving plaintiff of his verdict and requiring that the case be retried is supported neither by evidence nor any principle of justice that I am aware of. Their impression that no evidence was introduced to show that the breakdown of the car was caused by any defect that existed at the time of sale—the apparent basis for eliminating the implied warranty claim and ordering a new trial on the express warranty claim—and that the evidence does not support the damages awarded and, indeed, does not show that plaintiff even suffered an injury at all as a consequence of the defendants' deceitful trade practice is, to say the least, mistaken.

The record contains evidence tending to show that: Defendants were told, in effect, that the car purchased had to be suitable for effective and economical long distance driving and they impliedly represented that the car sold to plaintiff was suitable for that purpose. Defendant LeBeau told plaintiff he knew it was a good car and would give him good service and explicitly represented that the rings, the valves, the pistons, and the engine block of the car had been completely overhauled within the previous six months and that the front brakes had just been redone and the rear brakes checked and found to be in good condition. These representations reasonably implied, it seems to me, that the overhaul job was properly done, that the engine still functioned accordingly, and it was capable of continuing to function as a recently overhauled engine; which was not the case, as the use of the car soon revealed. Almost immediately the brakes failed to function properly and it was found that the transmission had no fluid and for that matter would not hold fluid, as much of the two quarts put in it leaked out on the ground, a clear indication that

the transmission was both defective and expensive to operate. When told of these problems LeBeau said that they should not exist and tried to explain them away, maintaining that the car was in good shape. But just two or three weeks after the sale, on the way back to Greensboro from Danville, the car completely ceased to function; though the motor would run it had no compression and would not pull, so plaintiff had to leave the car in Reidsville and catch a ride back home to Greensboro. A few days later, as soon as he could arrange to do so, plaintiff rented a towing cradle at a cost of $25.50, got a friend with a car to accompany and help him, went to Reidsville and towed the car to defendants' garage in Lexington. When defendants were told about the car's failings LeBeau said defendants would correct them "in a couple of days" and plaintiff left the car there. After two weeks went by without hearing from the defendants plaintiff called defendants' garage and Tom LeBeau told him their mechanic was still checking the car and they didn't know whether it was a blown motor, or what. A week or so later, plaintiff telephoned defendants again and LeBeau told him that the main bearing and the block would have to be replaced and that they would put a rebuilt engine block in the car as soon as they could find one at a reasonable price. After several more weeks went by without hearing from defendants plaintiff had the finance company contact them, but to no avail. Plaintiff then called defendants still again and was told that the motor had been taken out of the car and they were waiting for a rebuilt block. Two weeks after that, still having received no information from defendants, plaintiff telephoned again and was told that their mechanic had quit and nothing could be done until they found and hired another one. Plaintiff then employed a lawyer, who demanded that defendants either fix the car at once or return plaintiff's money and when they failed to do either suit was filed. At trial, nearly a year after the car was drug into defendants' garage, it was still there incapable of running; and according to defendant's mechanic—(who allegedly quit earlier and thereby prevented the car's repair, but was then working for them part time, as he had done at all times involved)—the motor had not been torn "apart yet," and thus he did not know what is wrong with it, since you cannot tell what is wrong with a car motor that will not function without tearing it apart.

This and the other evidence, in my opinion, not only indicates that the engine was defective when defendants sold the car to

plaintiff, but that they knew it was defective and that their promise to repair it was not made in good faith, but for the purpose of delaying plaintiff in the use of his car and the recovery of his money. As is commonly known, automobile engines that have been completely overhauled in a proper manner do not usually lose all power and have to be replaced within six months. Knowing the car, its history and their misrepresentations about it, as they certainly did, the defendants' acceptance of the broken down car with a promise to promptly make it whole, without demanding as the majority now does that plaintiff show just what caused the motor to fail, and their retention of the car for a year without bothering to tear the motor apart and verify what its trouble was, was an implied admission that they knew that the engine was defective when they sold the car to plaintiff, that the car failed because of these defects, and they were obligated to correct them. 2 Brandis N.C. Evidence Sec. 178 (1982). A party to a lawsuit does not have to prove what his adversary admits. Certainly, nothing in the evidence suggests that defendants' recognition of their liability to repair or replace the defective motor was an act of philanthropy. And as to the damages, in addition to showing that plaintiff paid defendants $1,400 for a car that will not run and does not even have junk value to him, since defendants still have both the car and the title, the evidence shows that he suffered some out-of-pocket expenses, and much inconvenience and lost time. Among other things, he had to leave his stranded car in Reidsville and get back to Greensboro the best way he could; he had to get someone to take him back to Reidsville and help tow the car to Lexington and go back to Greensboro, a trip of some 120 miles that was not accomplished without cost; he had to telephone defendants many times because they never called him and continuously delayed the day of reckoning by one evasion or pretense or another for upwards of a year; he was deprived of the use of his car and left up in the air about getting it back for the same period.

If justice requires that any legal requirements, appellate or otherwise, be waived in this case, it plainly requires that they be waived in favor of the one who has been deceived and victimized; it certainly does not require that they be waived in favor of those who did the deceiving and have enjoyed the fruits of their deception ever since as the majority would do. But there is no reason

to waive anything; it is only necessary to follow the law, which requires that the judgment appealed from be upheld in all respects.

STATE OF NORTH CAROLINA v. CALVIN MERLE MUNCY

No. 8518SC693

(Filed 18 February 1986)

1. **Criminal Law §§ 21, 22— waiver of probable cause hearing—agreement between defendant and State—no plea bargain**

Defendant was not entitled to dismissal of three charges against him on the ground that he entered into an agreement with the State whereby those charges would be voluntarily dismissed if he waived his right to a probable cause hearing where it appears that the agreement was never intended as a final disposition of the cases covered by the agreement, but was entered into for the purpose of moving the cases from district court to the superior court division; the agreement did not amount to a plea bargain, as there was no participation by any trial judge; and defendant did not show that he relied on the agreement to his detriment.

2. **Narcotics § 4— manufacturing cocaine—repackaging and cutting—intent to distribute not an element—sufficiency of evidence**

There was no merit to defendant's contention that the trial court erred in denying his motion to dismiss the charge of manufacturing cocaine for lack of substantial evidence that he was processing or preparing cocaine with the intent to distribute it, since the indictment alleged that defendant's acts of manufacturing were "repackaging, cutting and diluting"; intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding; and evidence that defendant had in his apartment clear plates with cocaine traces, a spoon with cocaine residue, a box containing marijuana, a butane bottle and torch, a flask, a razor blade assembly, screens, a clip, a glass straw, a black tray with a spout on the end, a chemical buffer solution, plastic baggies, a bottle of Inositol, a substance used to dilute cocaine, a bottle of cocaine, and a bottle with a mixture containing cocaine weighing 45.8 grams was sufficient to show that defendant was engaged in the conversion and processing of cocaine, acts of manufacturing which did not require that the State present evidence of intent to distribute. N.C.G.S. § 90-87(15); N.C.G.S. § 90-95(a)(1).

3. **Narcotics § 4— trafficking in cocaine—sufficiency of evidence**

Defendant could properly be convicted of trafficking in cocaine pursuant to N.C.G.S. § 90-95(h)(3) where the evidence tended to show that 45.8 grams of a mixture containing cocaine were found in defendant's refrigerator.

State v. Muncy

APPEAL by defendant from *DeRamus, Jr., Judge.* Judgment entered 26 October 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 November 1985.

Defendant was tried and convicted of the following: (1) possession of marijuana with intent to sell or deliver; (2) possession of cocaine with intent to sell or deliver; (3) felonious trafficking cocaine; (4) possession of drug paraphernalia; and (5) manufacture of cocaine.

On 23 December 1983, acting upon information from a confidential informant, the Guilford County Sheriff Department Vice and Narcotics Unit began surveillance at 5515 West Market Street, Apartment 1111, Greensboro, North Carolina. The purpose of this surveillance was to identify defendant, the location of his residence and obtain other information to establish probable cause for a narcotics search warrant. Surveillance was closed off on that day but surveillance was resumed in the evening hours of 27 December 1983. Due to a lack of noteworthy activity surveillance was again terminated.

Surveillance was again conducted on 29 December 1983. During this day of surveillance a 1984 Firebird automobile was observed parked at the residence under surveillance. Based on information about the automobile obtained from a confidential informant, the North Carolina Information Center and the Wilmington Police Department, a search warrant was issued to search the residence under surveillance. Three Guilford County deputy sheriffs knocked on the door of the apartment under surveillance and identified themselves. Defendant, dressed in black shorts, answered the door and sought to deny them entrance into the apartment. The deputy sheriffs made a forcible entry into the apartment and discovered David Wright, Phyllis Smith, and defendant. Mr. Wright and Ms. Smith were seated in two chairs near the kitchen table. Defendant's coat was draped over a third chair near the table. The deputy sheriffs observed what they believed to be drug paraphernalia and controlled substances on the kitchen table. The deputies made warrantless arrests of defendant, Mr. Wright, and Ms. Smith.

Detectives executed their search warrant and seized numerous items which were sent to the S.B.I. laboratory for analysis. A search of the bedroom resulted in the officers finding

a travel bag containing, *inter alia*, an appointment book with a series of notations relating to the sale of hashish, marijuana, and "shots" of cocaine. When defendant noticed the officers emerging from the bedroom with the book, defendant stated "what are you doing with my black book." The officer made inquiry into the ownership of the Firebird parked in the parking lot and defendant responded that he had driven the automobile to the apartment, but it was leased by someone named Michael Mahan. Defendant requested that he be allowed to retrieve his personal belongings from the automobile. Officers seized the automobile and searched it. A "cocaine spoon" was found in the console of the automobile.

On 30 December 1983, while defendant was in custody, a magistrate's order was issued upon information furnished by the arresting officer. The magistrate found that there was probable cause to believe that defendant was in felonious possession with the intent to sell and deliver a controlled substance, to wit: a half pound of marijuana. G.S. 90-95(a)(1). On 7 February 1984, defendant with the consent of his attorney waived his right to a probable-cause hearing and was bound over to Guilford County Superior Court.

On 7 May 1984, three indictments naming defendant were filed. Defendant was charged in a proper bill of indictment with possession of drug paraphernalia in violation of G.S. 90-113.22, to wit: scales, butane burning equipment, water pipes, and syringes to introduce into the body marijuana and cocaine, which are controlled under the North Carolina Controlled Substance Act. Defendant was also charged in a separate bill of indictment with felonious trafficking in drugs in violation of G.S. 90-95(h), and possession with intent to sell and or deliver a controlled substance in violation of G.S. 90-95(a)(1), to wit: cocaine, a controlled substance, which is included in Schedule II of the North Carolina Controlled Substance Act. A third indictment charged defendant with felonious manufacture of a controlled substance in violation of G.S. 90-95(a)(1), to wit: cocaine. A fourth indictment returned against defendant was for felonious possession with intent to sell and or deliver a controlled substance, to wit: marijuana.

Defendant pleaded not guilty to all charges and was tried before a jury. Defendant presented his defense through cross-

examination of the State's witnesses. At the close of the State's evidence defendant made a motion to dismiss which the court denied. The jury returned verdicts of guilty on all charges against defendant. From the imposition of a twenty-one year active prison sentence defendant appeals.

Attorney General Lacy H. Thornburg, by Steven F. Bryant, Assistant Attorney General, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David Dorey, for defendant appellant.

JOHNSON, Judge.

[1] Defendant's first Assignment of Error is that the trial court erred in denying defendant's motion to dismiss the charge of possession of paraphernalia and the charges of manufacturing and possession of cocaine with intent to sell or deliver. The contention made by defendant is that in reliance upon a purported agreement entered into with the State to dismiss those charges defendant waived his right to a probable-cause hearing as defined in G.S. 15A-606. Defendant argues that he relinquished such a substantial right pursuant to this purported agreement that this Court should vacate his convictions for possession of drug paraphernalia, possession of cocaine with intent to sell or deliver and manufacturing of cocaine. We disagree.

By statute defendant was entitled to a probable-cause hearing. G.S. 15A-606 provides in pertinent part the following:

> (a) The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing. A defendant represented by counsel, or who desires to be represented by counsel, may not before the date of the scheduled hearing waive his right to a probable-cause hearing without the written consent of the defendant and his counsel.

The written waiver, signed by defendant and his counsel, appears in the Record on Appeal. However, the purported agreement entered into by the State and defendant does not appear in the Record on Appeal. The State does not categorically deny the existence of an agreement. It goes without saying that the State and defendant differ as to the nature of the purported agreement.

The trial transcript does reveal that the trial judge did have written documentation of the agreement when the court denied defendant's pre-trial motion to dismiss the three charges (possession of paraphernalia, manufacturing cocaine, and trafficking in cocaine) which were the subject of the purported agreement. During a pre-trial conference the following colloquy took place between the court and defendant's counsel.

> Your Honor, I have, if I may approach the bench, a copy of the document that we used on that occasion and you will note that the document sets out which cases are being waived or are to be waived at that moment and which cases the District Attorney was to take a *voluntary dismissal* on, and that documentation, if Your Honor please, bears the signature of Mr. Panosh, the Assistant District Attorney in this case.

(Emphasis ours.) Defendant's counsel admitted to the court that the State had agreed to a voluntary dismissal in exchange for defendant's waiver of a probable-cause hearing. A voluntary dismissal taken by the State, pursuant to G.S. 15A-931, does not preclude the State from instituting a subsequent prosecution for the same offense if jeopardy has not attached. *See generally State v. Coffer*, 54 N.C. App. 78, 282 S.E. 2d 492 (1981). District Attorney Panosh stated to the court that the agreement was never intended as a final disposition of the cases covered by the agreement.

> [Mr. Panosh] We spoke about this matter, Your Honor. I spoke to Mr. Ray [defense counsel] yesterday and I wrote down his comments, and he said in reference to the dismissals, 'We were just talking about getting the cases from down there,' referring to the District Court, 'up here. We were not talking about a final disposition of the cases.'
>
> Mr. Ray, is that correct?
>
> MR. RAY: That is correct, if you want to lend your own interpretation to that, the final disposition of the cases, the final disposition of the cases meaning the ones that we waived up. In other words, you were asking me whether or not we were talking plea bargain, and I said, *'No, we did not consider a final disposition of the cases at that point.' We were only trying to move the cases from District Court to the Superior Court Division.* That is correct.

(Emphasis ours.) It appears from the transcript that defendant got nothing less than was agreed upon. Defendant urges this Court to accept his assertion that the court's denial of the motion to dismiss is contrary to notions of prosecutorial and procedural fairness regarding bargains struck between an accused and the State. *See Santabedo v. New York*, 404 U.S. 257, 30 L.Ed. 2d 427, 92 S.Ct. 495 (1971). Defendant also urges this Court to analogize his agreement with a plea bargain. Our State through an intricate statutory scheme allows the trial judge to be involved with and understand the nature of any plea bargain that the State and defendant agree upon. G.S. 15A-1021. The procedural safeguards set forth in the General Statutes are more than adequate to protect a defendant's rights. However, the agreement entered into by defendant with the State falls outside those protections. While we do not address ourselves to the propriety of any such alleged agreements, we note that the General Statutes provide for and require at a certain point that the trial judge be apprised of agreements between the State and defendant whereupon the judge determines whether the plea is a product of informed choice. G.S. 15A-1022. According to the transcript of the proceedings defendant's counsel acknowledged that the only signature on the document in question approving the agreement was that of the district attorney. There was no participation by any trial judge. Moreover, we find that defendant has not shown that he relied on the agreement to his detriment. Defendant's first Assignment of Error is without merit.

[2] Defendant's second Assignment of Error is that the trial court erred in denying his motion to dismiss the charge of manufacturing cocaine for lack of substantial evidence that he was processing or preparing cocaine with the intent to distribute it. We disagree.

Defendant was convicted, *inter alia*, of a violation of G.S. 90-95(a)(1) which states that it is unlawful "[t]o *manufacture*, sell or deliver, or possess, or possess with intent to *manufacture*, sell or deliver a controlled substance. . . ." (Emphasis ours.) G.S. 90-87(15) defines manufacture as the following:

> 'Manufacture' means the production, preparation, propagation, compounding, *conversion, or processing of a controlled substance by any means*, whether directly or indirectly, ar-

> tificially or naturally or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; 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. . . .*

(Emphasis ours.) Defendant contends that the State did not produce substantial evidence that he manufactured cocaine for the purpose of distributing to another.

Defendant's bill of indictment (84CRS15188) alleged that his acts of manufacturing were "repackaging, *cutting* and *diluting* with Inositol Powder, or other cutting agents." (Emphasis ours.) By his appeal defendant contends that manufacturing for personal use does not constitute a violation of G.S. 90-95(a)(1). The authority cited by defendant for this interpretation of G.S. 90-95(a)(1) is *State v. Baxter*, 21 N.C. App. 81, 203 S.E. 2d 93, *rev'd*, 285 N.C. 735, 208 S.E. 2d 696 (1974). However, *Baxter, supra,* was specifically overruled on this very point by this Court 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), with Chief Judge Morris and Judge Hedrick (now Chief Judge) concurring specially in that opinion.

In *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984), our Supreme Court concluded that there are only limited exceptions where the intent to distribute is required as an element of the offense of manufacturing a controlled substance. *Id.* at 568, 313 S.E. 2d at 588. The Court agreed with the analysis of G.S. 90-87(15), articulated by this Court in *Childers, supra,* that intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding. *Brown, supra; see generally Childers, supra.* In the case *sub judice* defendant was not charged with the preparation or compounding of a controlled substance. Defendant was indicted for the cutting (dilution of a controlled substance) cocaine. This Court in *Childers, supra,* held that the intent to distribute was not necessary for a violation of G.S. 90-87(15), if a defendant is engaged in the activity of conversion or processing a controlled substance. *Childers, supra.*

We now turn to the basis for defendant's convictions to ascertain whether it comports with our interpretation of G.S. 90-87(15). When passing on a defendant's motion to dismiss at the close of the State's evidence, the court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference of fact and intendment therefrom. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). The evidence presented by the State in the case *sub judice* tends to show the following: When the officers arrived with a search warrant defendant answered the door in his undergarments. Two persons were seated at a kitchen table near a third chair with defendant's coat draped over the back. On the table was cocaine, two clear plates with cocaine traces, a spoon with cocaine residue, a tube with cocaine residue and a box containing marijuana, a butane bottle and torch, a flask, a razor blade assembly, screens, a clip, a glass straw, a black tray with a spout on the end, a chemical buffer solution and two plastic baggies. In defendant's jacket a bottle of Inositol was found. Inositol is a substance added to cocaine to dilute the strength of cocaine. A bottle of cocaine was found on the kitchen counter and a bottle with a mixture containing cocaine weighing 45.8 grams was found in the refrigerator.

The reasonable inference from the evidence produced at trial was that defendant was engaged in the conversion and processing of cocaine. These types of manufacturing a controlled substance do not require that the State present substantial evidence of intent to distribute. "Processing" is to subject the controlled substance to a particular method, system, technique of preparation or treatment to bring about a desired result. *Childers, supra.* "[I]n those cases where production, propagation, *conversion* or *processing* of a controlled substance are involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense." *Childers*, at 732, 255 S.E. 2d at 656-57 (emphasis ours). We conclude the trial court was correct in denying defendant's motion to dismiss.

[3] Defendant has assigned error to the trial court's denial of his motion to dismiss the charge of trafficking in cocaine. The basis for this assignment of error is that the 45.8 grams of mixture containing cocaine should not have been considered in his conviction for trafficking in cocaine. We disagree.

G.S. 90-95(h)(3) sets forth the offense for which defendant was convicted. In pertinent part the statute defines his offense as follows:

> (3). Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) *or any mixture containing such substance* shall be guilty of a felony which felony shall be known as 'trafficking in cocaine' and if the quantity of such substance *or mixture* involved:
>
> a. Is 28 grams or more but less than 200 grams. . . .

G.S. 90-95(h)(3) (emphasis ours). The mixture introduced into evidence for the purpose of convicting defendant for a violation of G.S. 90-95(h) is clearly within the plain meaning of the statute. With respect to the amount of the controlled substance in the mixture this Court has held that the quantity of the entire mixture containing cocaine may be sufficient to constitute a violation of G.S. 90-95(h)(3). *State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981); *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420, *modified*, 309 N.C. 451, 306 S.E. 2d 779 (1983). In *Tyndall, supra*, and *Willis, supra*, this Court acknowledged the legislative intent for the harsh penalties prescribed in the North Carolina Controlled Substance Act, G.S. Chap. 90-86, to wit: "to deter large scale distribution of drugs and thereby to decrease the number of people potentially harmed by drug use." *Willis*, at 42, 300 S.E. 2d at 431. The dilution of cocaine as in the case *sub judice* enhances the probability that more persons will partake of the proscribed controlled substance. Defendant's Assignment of Error is overruled.

The final question presented by defendant is whether his convictions and punishment for possession of cocaine with intent to sell or deliver and trafficking in cocaine violated his constitutional right against being placed in double jeopardy. Defendant did not raise this question in the trial court. It is well established that appellate courts will not ordinarily pass on a constitutional question unless the question was raised in and passed upon by the trial court. *State v. Cumber*, 280 N.C. 127, 185 S.E. 2d 141 (1971); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955). In conformity with

that well established rule we will not pass upon the constitutional question defendant seeks to raise on appeal, which does not affirmatively appear in the Record on Appeal.

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

GOVERNMENT EMPLOYEES INSURANCE COMPANY v. SUSAN HERNDON, INDIVIDUALLY AND AS ADMINISTRATOR/PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIA ELIZABETH GUNTHER, DECEASED, AND WILLIAM F. HERNDON

No. 8518SC644

(Filed 18 February 1986)

Insurance § 69— two policies providing uninsured motorist coverage—other insurance clause—amount of recovery

Uninsured motorist coverages contained in two policies issued to the same insured, each providing coverage in excess of the amount required by statute, could not be "stacked" or aggregated in light of "other insurance" clauses in each policy which limited the maximum coverage under all policies to a single limit of liability.

APPEAL by defendants from *Ross, Judge*. Judgment entered 11 January 1985 in GUILFORD County Superior Court. Heard in the Court of Appeals 2 December 1985.

Plaintiff, Government Employees Insurance Company (GEICO), commenced this action seeking a declaratory judgment as to the extent of its liability under insurance coverage issued to William F. Herndon. The pertinent facts are stipulated. On 17 July, 1983, Maria Elizabeth Gunther died as a result of injuries sustained in an automobile collision in Florida. At the time of the collision, Miss Gunther was a passenger in an automobile owned and driven by a friend, which was struck by an automobile driven by Michael Ecord and owned by Larry Ecord. The Ecord vehicle was an "uninsured motor vehicle" within the meaning of N.C. Gen. Stat. § 20-279.21(b)(3).

On the date of the accident, GEICO provided insurance coverage to William F. Herndon, Maria Gunther's stepfather,

under two policies of insurance: Policy No. 919-49-80, providing coverage for a 1980 Cadillac automobile; and Policy No. 919-49-80-1, providing coverage for a 1980 Plymouth automobile. Each policy provided uninsured motorist coverage in the amount of $100,000.00 for each person and $100,000.00 for each accident; a separate premium of $4.00 was paid for the uninsured motorist coverage of each policy. Maria Gunther was an insured within the terms of each policy. Each of the policies contained the following provision:

> OTHER INSURANCE
>
> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy.

The trial court concluded that the uninsured motorist coverage provided by each of the policies complied with, and was in excess of, the requirements of the North Carolina Motor Vehicle Safety and Financial Responsibility Act and that under the terms of the policies, the maximum limit of GEICO's liability with respect to Maria Gunther's death is $100,000.00. Defendants appeal.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and William Sam Byassee, for plaintiff appellee.

Mike Krasny and Chester E. Whittle, Jr., for defendant appellants.

MARTIN, Judge.

The sole issue on appeal is whether uninsured motorist coverages contained in two policies issued to the same insured, each providing coverage in excess of the amount required by statute, may be "stacked" or aggregated despite the existence of "other insurance" clauses in each policy that limit the maximum coverage under all policies to a single limit of liability. We hold that because of the coverages provided and the language of the policies, the coverages may not be "stacked."

Uninsured motorist liability insurance coverage is compulsory in North Carolina. N.C. Gen. Stat. § 20-279.21(b)(3). Coverage is required in the minimum amount of $25,000.00 for

bodily injury to or death of one person in any one accident, with higher limits applicable to accidents resulting in injury to or death of more than one person. N.C. Gen. Stat. § 20-279.21(b)(3). To the extent required by the statute, this coverage is written into every motor vehicle liability insurance policy issued in North Carolina, and when the terms of the policy conflict with the provisions of the statute, the statute controls. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977).

With respect to "stacking" or aggregating coverages under North Carolina's compulsory uninsured motorist coverage requirement, our Supreme Court has held that "other insurance" clauses contained in the policy, which are contrary to the minimum coverage mandated by the statute, are not permitted. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967). Therefore, in *Moore*, the plaintiff was not limited to recovery under the statutory minimum coverage of one policy where the loss was greater than the minimum coverage and the decedent was insured under another policy issued pursuant to N.C. Gen. Stat. § 20-279.21(b)(3). Thus, "stacking" may occur where coverage is provided by two or more policies, each providing the mandatory minimum coverage.

However, to the extent the coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by the statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract. *Nationwide Mut. Ins. Co. v. Aetna Life and Cas. Co.*, 283 N.C. 87, 194 S.E. 2d 834 (1973). N.C. Gen. Stat. § 20-279.21(g) provides:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

In the present case, each of the GEICO policies issued to William Herndon provided uninsured motorist coverage in the

amount of $100,000.00. To the extent that the coverage exceeds the $25,000.00 limits required by N.C. Gen. Stat. § 20-279.5, the provisions of the policies, including those relating to aggregating coverages, are controlling. In the absence of any ambiguity in the language used in the policies, the court must apply the plain meaning thereof and enforce the policies as written. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). No ambiguity "exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to" differing interpretations by the parties. *Id.* at 354, 172 S.E. 2d at 522.

There is no ambiguity in the language used in GEICO's policies. Recovery under both policies is clearly limited to "the highest applicable limit of liability under any one policy." Since the highest limit of liability under either of the policies exceeds the aggregate amount of statutorily required uninsured motorist coverage provided by both policies, neither the Financial Responsibility Act nor the holding in *Moore* applies. Defendants are not entitled to "stack" the $100,000.00 uninsured motorist coverages. The judgment appealed from is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 FEBRUARY 1986

ABE v. BOWEN No. 8530SC549	Haywood (82CVS644)	New Trial
BROOKS v. HOLLY No. 854SC1135	Onslow (83SP296)	Affirmed
BUXTON v. N.C. STATE BD. OF CHIROPRACTIC EXAMINERS No. 8510SC837	Wake (84CVS5157)	Reversed & Remanded
DURING v. SERVICE SYSTEMS CORP. No. 8521SC522	Forsyth (83CVS4492)	Partial summary judgment is affirmed; no error in the trial.
FIRST AMERICAN FS&L v. VECCHIO No. 858SC607	Lenoir (84CVS602)	Affirmed
FREEMAN v. N.C. STATE BD. OF CHIROPRACTIC EXAMINERS No. 8510SC838	Wake (84CVS4812)	Reversed & Remanded
HANNAH v. U.P.S., INC. No. 8530SC752	Haywood (82CVS210)	Affirmed
HILL v. MATTHEWS No. 8529SC885	Henderson (85CVS163)	Affirmed
IN RE DILWORTH No. 8518DC947	Guilford (78J742)	Affirmed
IN RE FORECLOSURE OF DEEDS OF TRUST EXECUTED BY MYRL PHILYAW No. 854SC1057	Jones (85SP5)	Affirmed
IN RE JONES No. 858DC394	Lenoir (82J27) (82J28) (82J29)	Affirmed
IN RE SALMONS No. 8523DC980	Ashe (79-J-6) (79-J-7) (79-J-8)	Affirmed
KLUTTZ v. BROWN No. 8519DC927	Rowan (84CVD0461)	Affirmed

MARKLE v. L. P. COX GEN. CONTR. No. 8510IC963	Ind. Comm. (999960)	Affirmed
MERRITT v. KEWAUNEE SCIENTIFIC EQUIP. No. 8510IC925	Ind. Comm. (H-2274)	Affirmed
NEWTON v. BURLINGTON INDUSTRIES No. 8529SC1048	Rutherford (83CVS446)	Affirmed
SCOTLAND MANOR APARTMENT v. MANNING No. 8516DC934	Scotland (85CVD7)	Affirmed
SHORT v. SHORT No. 8521DC926	Forsyth (85CVD254)	Affirmed
STATE v. BLACKWELL No. 8522SC989	Iredell (85CRS3340) (85CRS3341) (85CRS3342)	Affirmed in part, reversed in part.
STATE v. CARR No. 854SC1019	Sampson (85CRS1128)	No Error
STATE v. CLAYTON No. 8519SC618	Cabarrus (84CRS18519)	No Error
STATE v. FOSTER No. 8511SC868	Johnston (85CRS00564)	Dismissed
STATE v. HATCHETT No. 8517SC983	Caswell (84CRS2972)	No Error
STATE v. HODGES No. 858SC961	Wayne (84CRS17367)	The defendant received a fair trial, free from prejudicial error.
STATE v. HODGES No. 8511SC1087	Johnston (82CRS9296)	Affirmed
STATE v. INMAN No. 8526SC970	Mecklenburg (84CRS44409)	No Error
STATE v. JENNINGS No. 8516SC1153	Robeson (85CRS1342) (85CRS744)	No Error
STATE v. KIRKPATRICK No. 8526SC972	Mecklenburg (82CRS21246) (84CRS56674)	No Error

STATE v. LUTHER No. 852SC1042	Buncombe (84CRS5937) (84CRS5933) (84CRS4988)	No Error
STATE v. McALLISTER No. 8526SC1000	Mecklenburg (84CRS41262-01) (84CRS41262-02)	No Error
STATE v. McCOY No. 8521SC974	Forsyth (85CRS7410) (McCoy) (85CRS7412) (Shepherd)	No Error
STATE v. MATHIS No. 8522SC676	Iredell (84CRS6670)	No Error
STATE v. PITT No. 857SC1032	Nash (84CRS14784) (84CRS14956)	No Error
STATE v. SMITH No. 8516SC981	Robeson (85CRS0228)	No Error
STATE v. SPELLER No. 8518SC913	Guilford (85CRS20261) (85CRS20298)	No Error
STATE v. SWYGERT No. 8514SC950	Durham (84CRS43090)	No Error
STATE v. WADE No. 859SC1102	Person (84CRS1468)	No Error
STATE v. WILLIAMS No. 855SC998	New Hanover (83CRS17003)	Remanded for Resentencing
WALLACE v. TOWN OF SMITHFIELD No. 8510IC1013	Ind. Comm. (I.C. 915925)	Affirmed
WILLIAMSON v. WILLIAMSON No. 8518SC1071	Guilford (83SP984)	Affirmed
YOUNG v. FOOD LION, INC. No. 8512SC1099	Cumberland (84CVS4269)	Affirmed

EDDIE RAY CRUMP v. BOARD OF EDUCATION, HICKORY ADMINISTRATIVE SCHOOL UNIT, WILLIAM PITTS, LOIS YOUNG, BARBARA A. GARLITZ, RUEBELLE A. NEWTON, C. JOHN WATTS, III AND LARRY O. ISENHOUR

No. 8525SC388

(Filed 18 February 1986)

Schools § 13.2— driver's education teacher—dismissal for insubordination—sufficiency of evidence

Evidence was sufficient to support defendant's dismissal of plaintiff driver's education teacher on the ground of insubordination where it tended to show that plaintiff twice drove alone with a female student, thereby willfully disregarding and refusing to obey the principal's written, reasonable directive given over a year earlier; and the uncontradicted evidence showed that rather than going to the principal to find out if the directive had been lifted and what to do when one of his two students was absent, plaintiff disregarded the reasonable instructions given him.

APPEAL by plaintiff from *Sitton, Judge*. Judgment entered 29 November 1984, in Superior Court, CATAWBA County. Heard in the Court of Appeals 5 November 1985.

Ferguson, Watt, Wallas & Adkins by John W. Gresham for plaintiff appellant.

Mitchell, Teele, Blackwell, Mitchell & Smith by Thomas G. Smith and W. Harold Mitchell; and A. Terry Wood for defendant appellees.

COZORT, Judge.

Plaintiff appeals the superior court's entry of judgment affirming the Hickory Board of Education's dismissal of him on the grounds of immorality and insubordination. Plaintiff contends the Board of Education's findings, inferences and conclusions are not supported by substantial evidence in the whole record. Plaintiff also assigns as error the superior court's taxing cost against him. We affirm.

As of the 1983-84 school year, plaintiff Eddie Ray Crump was a public schoolteacher employed by the Board of Education, Hickory Administrative School Unit. Mr. Crump, who was primarily a driver's education instructor and coach, had been employed for

nine years and had attained career status, making applicable the statutory protections for career teachers contained in G.S. 115C-325.

On 16 March 1984 the Superintendent, Dr. Stuart Thompson, notified plaintiff in writing of his intent to seek dismissal of Mr. Crump pursuant to the provision of G.S. 115C-325. Subsequently, on 4 June 1984 Superintendent Thompson submitted to the Board of Education his recommendation that plaintiff be dismissed on the grounds of immorality and insubordination, among others.

By stipulation, the hearing of the matter commenced on 6 June 1984 and continued into the early morning hours of the next day. At the conclusion of the hearing the Board of Education set out on the record a resolution containing certain findings of fact and conclusions of law and voted to dismiss plaintiff on the grounds of immorality and insubordination. On 11 June 1984 plaintiff received from the Board of Education its resolution entitled "Findings of Fact, Conclusions of Law and Order" notifying plaintiff that he was dismissed.

Pursuant to G.S. 115C-325(n) plaintiff filed a Complaint and Petition for Judicial Review on 9 July 1984. The Board of Education subsequently filed a transcript of the hearing along with the exhibits offered into evidence. The case was heard by Superior Court Judge Claude S. Sitton on 5 November 1984. On 29 November 1984 Judgment was entered upholding the Board of Education's dismissal of plaintiff.

The primary issue presented by this appeal is whether the decision of the Board of Education dismissing plaintiff is supported by substantial evidence in view of the entire record. G.S. 150A-51(5); *Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 317, 283 S.E. 2d 495, 498 (1981). Therefore, our review is limited to determining whether the superior court correctly decided that the Board's decision to dismiss plaintiff on the grounds of immorality and insubordination was supported by substantial evidence in light of the whole record. *Overton, supra.*

The standard of review set forth in G.S. 150A-51(5), which is known as the "whole record" test, is explained in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977):

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C. L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C. L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, *Universal Camera Corp., supra.* On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera Corp., supra.*

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* at 414, 233 S.E. 2d at 544.

It is not necessary that we find that *all* of the grounds for dismissal are supported by substantial evidence. A finding that there is substantial evidence, looking at the record as a whole, of any one of the two grounds listed under G.S. 115C-325(e)(1) which formed the basis of the dismissal is sufficient, where, as here, the teacher was notified that dismissal was based on that ground. *Baxter v. Poe*, 42 N.C. App. 404, 416, 257 S.E. 2d 71, 78, *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 298 (1979).

We turn first to the charge of insubordination. G.S. 115C-325(e)(1)(c) provides that a career teacher may be dismissed for insubordination. The term insubordination " 'imports a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders.' *School District v. Superior*

Court, 102 Ariz. 478, 480, 433 P. 2d 28, 30 (1967)." *Thompson v. Wake County Board of Education*, 31 N.C. App. 401, 424-25, 230 S.E. 2d 164, 177-78 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

With respect to the insubordination charge, the Board of Education made the following findings and conclusions:

FINDINGS OF FACT

* * * *

7. On April 9, 1981, as a result of the incident with Elizabeth Davis on April 6, 1981, Eddie Ray Crump was instructed in writing by the Principal of the High School that "there shall be a third person in the car during the road work phase of the driver education of female students" and the "failure to cooperate with these instructions could be interpreted as insubordination."

8. On April 2, 1982, the suggestion was made to Eddie Ray Crump by the Principal of the High School on his 1981-82 Teacher's Performance Appraisal Instrument that he "must make an effort to follow established rules and guidelines."

9. During the summer of 1982, while instructing Ursula "Hope" Bolick, a female high school student in driver education, the teacher, Eddie Ray Crump, grabbed her leg unnecessarily. The incident occurred while the two were in the driver education vehicle alone, in contravention of the Principal's instructions to the teacher. The teacher also drove with Ursula Bolick alone during driver training on two other occasions.

* * * *

12. On one or more occasions, Eddie Ray Crump instructed the following female students during the times specified, in the road work phase of their driver education while no third person was in the vehicle. These acts were in disobedience of the Principal's instructions, were knowingly and wilfully done and were admitted by the teacher, Eddie Ray Crump.

a. Ursula "Hope" Bolick in the summer of 1982,

b. Sheree Raker in the fall of 1983.

CONCLUSIONS

* * * *

2. At all times pertinent to the matters testified to in this hearing, it has been the duty of principals to give suggestions to teachers for the improvement of instruction. [Former N.C. Gen. Stat. Sec. 115-150, now Sec. 115C-288(c).]

3. A teacher must follow the reasonable orders, suggestions and instructions of his principal.

4. The instructions given to the teacher, Eddie Ray Crump, by his principal, which were to the effect that he was to have a third person in the vehicle during the driving phase of driver education, were reasonable and should have been followed by the teacher.

* * * *

8. The actions of Eddie Ray Crump in providing instruction to two female students in the road work phase of their driver education vehicle while no third person was in the vehicle has been admitted by the teacher and was done in disregard of the express written directions of his Principal. This was a wilful refusal by the teacher, Eddie Ray Crump, to obey the reasonable directions of his Principal and constitute insubordination under the provisions of N.C. Gen. Stat. Sec. 115C-325(e)(1)(c).

These findings and conclusions are amply supported by substantial evidence in the record. It is uncontested that in early April 1981, student Elizabeth Davis complained to Principal Henry Williamson about plaintiff's conduct while instructing her during her first day of the road work phase of driver's education, 6 April 1981. In a letter Ms. Davis wrote and submitted to Mr. Williamson on 7 April 1981, she complained of the following:

> He was asking personal questions such as: Are you dating anyone steady? Do you play the field? Are you getting a new bathing suit this summer? Are you just going to go skinny-dipping?

He also said words that didn't pertain to driving, such as "crotch." He said holding your arm straight and he tried to use my crotch as a place for my elbow to point to and he pointed to my crotch and said, "That's your crotch." He also called me babe and honey.

He also touched me where I didn't think it was necessary, such as way up high on my leg, while holding my arm pressing against my breast. He was messing with my hair.

These are the reasons I have for my complaint.

Mr. Williamson showed the letter to Mr. Crump and talked with him about it. According to Mr. Williamson, Mr. Crump stated there was no truth to the letter. Mr. Williamson told Mr. Crump he needed to take action to see that this type of situation did not arise again.

Mr. Williamson instructed Mr. Crump to make sure that at least two students were in the car any time a female was taking the road work phase of driver's education. In a letter to Mr. Crump dated 9 April 1981, Mr. Williamson wrote the following:

Mr. Eddie R. Crump, Hickory High School.

Dear Mr. Crump:

This is to follow up on on our conversation on April 7, 1981, and to reemphasize the instructions given to you on that date.

The instructions were as follows:

There shall be a third person in the car during the road work phase of the driver education instruction of female students.

Your cooperation in this matter would be greatly appreciated.

Your failure to cooperate with these instructions could be interpreted as insubordination and neglect of duty.

In accordance with G.S. 115-142(b) the complaint, commendation, or suggestion shall be signed by the person who makes it and shall be placed in the teacher's file only after 5 days' notice to the teacher. Any denial or explanation relating to

such complaint, commendation, or suggestion that the teacher desires to make shall be placed in the file.

If I can answer any question or be of any help, please let me know.

Henry Williamson.

The letter had no expiration date. Ms. Davis was assigned to another instructor.

Plaintiff admitted that he subsequently drove alone with Hope Bolick and Sheree Raker. He testified that he drove with only one female student on these occasions because of absenteeism. Mr. Williamson admitted that he made no special arrangements for Mr. Crump on how to deal with a situation when there was only one student to drive.

Plaintiff testified that his driving alone with Ms. Bolick in the summer of 1982 was the first time since the Davis incident that he had driven alone with a female student. When asked if Principal Williamson's directive on driving with one female student was still in effect in 1982 and whether he was still obligated to follow it, plaintiff responded:

> Well, it had been a year or year and a half after the letter and doing no wrong and everything going along smoothly as far as I know, you know, and I just assumed that everybody was driving. And Coach Barger had one in the car and Coach Craft had one in the car. And we would go on and pick up other drivers from their homes.

When asked why he did not go to Mr. Williamson and inquire about the restriction when one student was absent, plaintiff replied: "We don't tell him what to do. We don't set guidelines for him to tell me. We got a chain of command. Coach Barger is my chain of command." Plaintiff testified, however, that he was unsure whether Coach Barger knew of the two-student requirement. In any event, he never asked Coach Barger or Mr. Williamson if the restriction had been lifted. There is no evidence that the directive was changed.

Based on an examination of the whole record, we conclude that the Board's dismissal of plaintiff on the ground of insubordination is supported by substantial evidence. There is sub-

stantial evidence to support the Board's conclusion that by twice driving alone with a female student, plaintiff willfully disregarded and refused to obey Principal Williamson's 9 April 1981 reasonable directive. While plaintiff seeks to explain his conduct on the grounds of passage of time and the unprovided for situation of one student being absent, these events do not prevent his conduct from being a willful refusal to obey a reasonable directive. The uncontradicted evidence shows that rather than going to Mr. Williamson to find out if the directive had been lifted and what to do when one of his two students was absent, he disregarded the reasonable instructions given him.

Having found substantial evidence in light of the whole record to support the Board's dismissal of plaintiff on the grounds of insubordination, we need not pass on the question whether the evidence of the other ground, immorality, was substantial. *Baxter v. Poe, supra*, 42 N.C. App. at 416, 257 S.E. 2d at 78.

We find plaintiff's second assignment of error, concerning the superior court's assessment of costs, to be without merit.

The judgment of the superior court affirming the Board of Education's dismissal of plaintiff is

Affirmed.

Judges ARNOLD and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM EUGENE STANLEY

No. 8515SC669

(Filed 18 February 1986)

Constitutional Law § 83; Criminal Law § 142.3— restitution as condition of probation—no violation of equal protection

The trial court erred in holding that N.C.G.S. 15A-1343(d) providing for restitution as a condition of probation violated the equal protection clause of the Fourteenth Amendment to the U. S. Constitution and Article I, § 19 of the N. C. Constitution and the exclusive emoluments clause contained in Article I, § 32 of the N. C. Constitution, since the legislature, in enacting the statute, sought to promote the rehabilitation of criminal defendants and to provide restitution and reparation to victims or "aggrieved parties" who *directly* suf-

fered damage or loss as a consequence of criminal misconduct; the legislature could rationally conclude that third party indemnitors should be precluded from receiving restitution or reparation from criminal defendants since they are most often insurance companies in the business of insuring against anticipated risks and deriving profit by assuming such risks; an indemnitor's right to pursue civil remedies against the criminal defendant, or against the insured to recover funds paid by the criminal defendant to the insured, remains intact; and the statute makes no distinction between insured and uninsured victims.

APPEAL by defendant from *Brannon, Judge*. Judgment and order entered 7 February 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 18 November 1985.

Attorney General Thornburg, by Assistant Attorney General Henry T. Rosser, for the State.

Patterson, Packer & White, by C. Craig White, for defendant appellant.

WHICHARD, Judge.

On 13 October 1984 defendant and a co-defendant, Gregory Lyn Shore, stole a new 1984 Dodge van from an automobile dealership. Later that day law enforcement officers observed the van, and a high-speed chase ensued. Shore lost control of the vehicle, and it left the road and rolled several times. The van, valued at $18,500, was totally destroyed.

Pursuant to a plea agreement, defendant pled guilty to one count of felonious larceny of a motor vehicle, N.C. Gen. Stat. 14-72(a). The court sentenced him to eight years imprisonment as a regular youthful offender. It suspended the sentence and placed him on supervised probation for five years. As a regular condition of probation, N.C. Gen. Stat. 15A-1343, the court ordered defendant to pay as restitution $18,400 to Universal Underwriters for payments it made to the dealership which owned the van, and $100 to the dealership itself, representing that portion of its loss not covered by insurance.

In its order the court acknowledged that N.C. Gen. Stat. 15A-1343(d) provides "that no third party shall benefit by way of restitution or reparation as a result of liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant." The court, however, declared that por-

tion of N.C. Gen. Stat. 15A-1343(d) unconstitutional. It reasoned that the provision

> [o]ffends the Equal Protection Clause of the 14th Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution, and also favors irrationally certain classes of criminal defendants by distinguishing between criminals who, by sheer happenstance, commit crimes against persons who had the foresight or whatever to pay out of their pockets for insurance, . . . and those who for whatever reason, did not happen to carry said insurance coverage; thus creating a special Emolument and Privilege in violation of Article I, Section 32 of the North Carolina Constitution.

In an addendum to its order the court stated: "In entering this Order the Court considered carefully and attempted to follow the law of this State as recently dealt with in all of the opinions (majority and dissent) of our State Supreme Court in *Powe v. Odell*, 312 N.C. 410 and *Lowe v. Tarble*, 312 N.C. 467."

Both the defendant and the State contend that the court erred in holding that the above-quoted portion of N.C. Gen. Stat. 15A-1343(d) violates the equal protection clause of the fourteenth amendment to the United States Constitution, article I, section 19 of the North Carolina Constitution and the exclusive emoluments clause contained in article I, section 32 of the North Carolina Constitution. We agree.

In the area of economics and social welfare, a statute containing a legislative classification which is rationally related to a legitimate state objective does not violate the equal protection clause of the fourteenth amendment to the United States Constitution or article I, section 19 of the North Carolina Constitution. *Powe v. Odell*, 312 N.C. 410, 412-13, 322 S.E. 2d 762, 763-64 (1984). "The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality." *Glusman v. Trustees and Lamb v. Board of Trustees*, 281 N.C. 629, 638, 190 S.E. 2d 213, 219 (1972), *vacated on other grounds*, 412 U.S. 947 (1973).

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.

McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1105, 6 L.Ed. 2d 393, 399 (1961).

A statute passed by the legislature is presumed constitutional. *State v. Warren*, 252 N.C. 690, 696, 114 S.E. 2d 660, 666 (1960). At the time the court entered its judgment and order N.C. Gen. Stat. 15A-1343(d) provided, in pertinent part:

> (d) Restitution as a Condition of Probation.—As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. . . . An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. . . . As used herein, "aggrieved party" shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local. Provided, that no government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs. . . . Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed

to be a fine or other punishment as provided for in the Constitution and laws of this State.

The goals of the legislature in enacting N.C. Gen. Stat. 15A-1343(d), as expressed therein, are without question legitimate State objectives. Further, the distinction the statute draws between "aggrieved parties" and third-party indemnitors is rationally related to the attainment of the State's goals. It is clear that in enacting N.C. Gen. Stat. 15A-1343(d) the legislature sought to promote the rehabilitation of criminal defendants and to provide restitution and reparation to victims or "aggrieved parties" who *directly* suffered damage or loss as a consequence of criminal misconduct. The legislature could rationally conclude that third-party indemnitors should be precluded from receiving restitution or reparation from criminal defendants. More often than not third-party indemnitors are insurance companies. They are in the business of insuring against anticipated risks, and they derive profit by assuming such risks. Insurers, unlike victims of crime, have voluntarily contracted to assume liability for damage or loss arising out of criminal misconduct.

In addition, provisions in probation judgments requiring restitution "must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt." *State v. Bass*, 53 N.C. App. 40, 42, 280 S.E. 2d 7, 9 (1981); N.C. Const. art. I, sec. 28; *see also State v. Caudle*, 276 N.C. 550, 555, 173 S.E. 2d 778, 782 (1970). Thus, mindful of defendants' constitutional rights, the legislature limited the recipients of restitution and reparation to those persons and institutions whose loss was a *direct* consequence of defendants' criminal misconduct. Further, we note that N.C. Gen. Stat. 15A-1343(d) merely precludes an indemnitor from receiving court-ordered restitution as a condition of a criminal defendant's probation. An indemnitor's right to pursue civil remedies against the criminal defendant, or against the insured to recover funds paid by the criminal defendant to the insured, remains intact. *See Insurance Co. v. Greer*, 54 N.C. App. 170, 282 S.E. 2d 553 (1981).

The legislative classification contained in N.C. Gen. Stat. 15A-1343(d) is rationally related to legitimate state goals and attains that "minimum level of rationality" our national and state con-

stitutions require. The court thus erred in holding that N.C. Gen. Stat. 15A-1343(d) violates the equal protection clause of the fourteenth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution.

The court also erred in holding that N.C. Gen. Stat. 15A-1343(d) grants "exclusive or separate emoluments or privileges" in violation of article I, section 32 of the North Carolina Constitution, which provides: "Exclusive Emoluments. No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." The court reasoned that the statute "favors irrationally certain classes of criminal defendants by distinguishing between criminals who, by sheer happenstance, commit crimes against persons who had the foresight or whatever to pay out of their pockets for insurance, . . . and those who for whatever reason, did not happen to carry said insurance coverage." The court incorrectly interpreted N.C. Gen. Stat. 15A-1343(d) as favoring certain classes of defendants. The statute makes no distinction between insured and uninsured victims. A court may order restitution or reparation without regard to the amount the victim has or may recover through a third-party indemnitor. *State v. Maynard*, -- N.C. App. ---, --- S.E. 2d --- (1986) (filed simultaneously herewith).[1] The statute thus in no way favors a single class of defendants. While it prefers "aggrieved parties" to indemnitors, such a distinction is not precluded by the exclusive emoluments clause of our Constitution. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 439, 302 S.E. 2d 868, 879 (1983). As discussed above, the legislature

1. The pertinent part of N.C. Gen. Stat. 15A-1343(d) has been amended to read as follows:

> Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant, *but the liability of a third party to pay indemnity to an aggrieved party or any payment of indemnity actually made by a third party to an aggrieved party does not prohibit or limit in any way the power of the court to require the defendant to make complete or full restitution or reparation to the aggrieved party for the total amount of the damage or loss caused by the defendant.*

1985 N.C. Sess. Laws, ch. 474 (language added by amendment emphasized by the Court). In *Maynard, supra*, this Court interpreted the amendment as clarification of the original legislative intent to allow restitution or reparation to an aggrieved party irrespective of a third party's liability to indemnify that aggrieved party.

could reasonably conclude that the public welfare would be served best by the classification it chose to make. *Id.*

In holding N.C. Gen. Stat. 15A-1343(d) unconstitutional the court relied on the "majority and dissent[ing]" opinions of the Supreme Court in *Powe*, 312 N.C. 410, 322 S.E. 2d 762 and *Lowe v. Tarble*, 312 N.C. 467, 323 S.E. 2d 19 (1984). In *Powe* and *Lowe* the Supreme Court considered whether N.C. Gen. Stat. 24-5 (Cum. Supp. 1983) violated the equal protection clause of the fourteenth amendment to the United States Constitution, article I, section 19 of the North Carolina Constitution or the exclusive emoluments clause of the North Carolina Constitution. N.C. Gen. Stat. 24-5 required liability insurers, but no other class of defendants, to pay prejudgment interest on compensatory damage awards. In 4-3 decisions the Supreme Court upheld the constitutionality of the statute. If *Powe* and *Lowe* were dispositive of the constitutionality of N.C. Gen. Stat. 15A-1343(d), which they are not, they would more readily compel a court to uphold the statute than to strike it down as unconstitutional.

The court erred in finding N.C. Gen. Stat. 15A-1343(d) unconstitutional. The condition of defendant's probation which requires him to pay $18,400 as restitution to Universal Underwriters, a third party prohibited by N.C. Gen. Stat. 15A-1343(d) from receiving restitution, thus must be vacated. The cause is remanded for entry of an appropriate condition consistent with the provisions of that statute as interpreted in *Maynard, supra.*

Since the restitution condition of defendant's probation is vacated, we need not reach defendant's contention that the court did not make adequate findings of fact regarding his ability to earn and to make restitution. We note, however, that such findings are not required. *See State v. Hunter*, --- N.C. ---, ---, 338 S.E. 2d 99, 103 (1986).

Condition of probation vacated; remanded for entry of an appropriate condition.

Chief Judge HEDRICK and Judge JOHNSON concur.

PERLA M. MORRIS v. JOSEPH P. MORRIS

No. 8513DC495

(Filed 18 February 1986)

Husband and Wife § 11.2; Divorce and Alimony § 30— separation agreement—waiver provisions—military pension—no equitable distribution—effect of amendment to statute

The release or waiver provisions of the parties' 2 August 1982 separation agreement barred plaintiff wife from an equitable distribution of defendant husband's military pension, and amendment of the Equitable Distribution Act to include military pensions as marital property did not apply to permit plaintiff recovery, since the amendment became effective 1 August 1983 and was prospective only in its application.

APPEAL by plaintiff from *Greer, Judge.* Order entered 25 March 1985, *nunc pro tunc* 7 March 1985, in District Court, COLUMBUS County. Heard in the Court of Appeals 1 November 1985.

Rose, Rand, Ray, Winfrey & Gregory, P.A., by Randy S. Gregory, for plaintiff appellant.

Macrae, Perry, Pechmann, Boose & Williford, by Michael C. Boose, for defendant appellee.

WHICHARD, Judge.

Plaintiff-wife and defendant-husband entered a separation agreement on 2 August 1982. The agreement contains no reference to defendant-husband's military pension. It specifically provides that each party is forever barred from any or all rights or claims not therein reserved which arise out of the marital relation and that each releases and relinquishes all claims or interest in and to all property of the other, whether then owned or subsequently acquired.[1]

1. The release or waiver provisions are as follows:

3. *General Property Rights and Release*: Both parties hereto mutually agree that each may freely sell or otherwise dispose of his or her own property by deed, gift, or will without the assent of the other and each party may encumber his or her own property in the like manner and each party is hereby barred forever from any or all rights or claims by way of dower, curtesy, descent, distribution and inheritance, widow's year's allowance, the right to administer upon the estate of the other, and all other rights or claims not herein reserved which arise out of the mar-

Plaintiff-wife now seeks an award of a portion of defendant-husband's military pension pursuant to N.C. Gen. Stat. 50-20, the Equitable Distribution Act. The trial court granted defendant-husband's motion for summary judgment. We affirm.

At the time the agreement was entered the Equitable Distribution Act provided that "[v]ested pension or retirement rights and the expectation of nonvested pension or retirement rights shall be considered separate property." N.C. Gen. Stat. 50-20(b)(2) (Supp. 1981). This provision conformed to the United States Supreme Court's holding that military pensions were personal entitlements rather than property interests and were therefore not includable in a marital estate for purposes of equitable distribution. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981). Congress expressly overruled *McCarty*, however, by enacting the Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. Sec. 1408, which provides that military pensions may be included in the marital estate for purposes of equitable distribution from 26 June 1981 in accordance with the law of each state. 10 U.S.C. Sec. 1408(c)(1). Accordingly, our General Assembly amended N.C. Gen. Stat. 50-20 to provide specifically that "[m]arital property includes all vested pension and retirement rights, including military pensions eligible under the federal [USFSPA]." N.C. Gen. Stat. 50-20(b)(1).

The issue here is whether the release or waiver provisions of the 2 August 1982 separation agreement bar plaintiff-wife from an equitable distribution of defendant-husband's pension. Plaintiff-wife does not challenge the validity of the agreement but claims that the release or waiver provisions do not apply because her right to equitable distribution of the pension accrued upon enactment of the USFSPA after the signing of the agreement.

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riage relation and each party hereby releases and relinquishes to the other and to the heirs, executors, administrators and assigns thereof all claims or interest in and to all real or personal property of the other whether now owned or hereafter acquired and all other rights or interest of whatsoever nature not herein reserved which arise out of the marriage relation between them. . . .

4. *Division of Personal Property*: The parties hereto agree that as of the effective date of this Agreement, they have divided their personal property to their satisfaction, except for that property, if any, described in Schedule A attached hereto and incorporated herein by reference. That property, if any, described in Schedule A may be retained by Mr. Morris until such time as Mrs. Morris, in her discretion, shall decide to take possession of said property.

In *McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E. 2d 344 (1984), defendant-wife sought equitable distribution of plaintiff-husband's partnership interests in certain businesses. The parties had entered a valid separation agreement prior to enactment of the Equitable Distribution Act. Plaintiff-husband raised the agreement as a defense. The trial court granted summary judgment in his favor, and this Court affirmed. This Court held specifically that the waiver provisions in the agreement precluded defendant-wife from seeking an equitable distribution. It reasoned:

> To rule otherwise would impermissibly open up to attack many separation agreements entered into before the effective date of the Act. It would also run counter to the established law of North Carolina, which has given effect to general language of the sort used here absent evidence of coercion or other unfairness. [Citations omitted.]
>
> The enactment of the Act has no effect on this result. The Act did not purport to change the general validity of separation agreements or modify existing agreements. [Citations omitted.]

McArthur, 68 N.C. App. at 486-87, 315 S.E. 2d at 345-46.

Subsequently, this Court stated:

> G.S. 52-10 allows husband and wife to enter a separation agreement which "release[s] and quitclaim[s]" any property rights acquired by marriage, and that a release will bar any later claim on the released property. Such a valid separation agreement is an enforceable contract between husband and wife. . . . The same rules which govern the interpretation of contracts generally apply to separation agreements. . . . Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties. . . . When a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution. [Citations omitted.]

Blount v. Blount, 72 N.C. App. 193, 195, 323 S.E. 2d 738, 740 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985).

The reasoning of *McArthur* indicates that an amendment to the Act should not affect an agreement entered prior to the effec-

tive date of the amendment. Specifically, plaintiff-wife here waived her right to any interest in defendant-husband's military pension in the agreement, just as defendant-wife in *McArthur* waived any right to plaintiff-husband's partnership interests there by similar language in that agreement. The subsequent amendment of the Act to include military pensions as marital property should not permit plaintiff-wife to avoid the release provisions of the agreement, just as the original passage of the Act did not allow defendant-wife to disturb the agreement in *McArthur.*

Plaintiff-wife contends, however, that *McArthur* does not control. *McArthur* involved the disposition and release or waiver of property rights that were expressly existing or reasonably foreseeable at the time the agreement was entered. Here, by contrast, plaintiff-wife argues that by virtue of the retroactive application of 10 U.S.C. Sec. 1408 she had a right to defendant-husband's pension at the time she entered the agreement, but this right was not known to her until the subsequent passage of the USFSPA. Thus, she argues, she did not waive her right to this pension for there was no " 'intentional relinquishment of a known right.' " *Jones v. Insurance Co.*, 254 N.C. 407, 412, 119 S.E. 2d 215, 219 (1961).

"Although the [USFSPA] became effective 1 February 1983, . . . it is clear that the federal act is to be applied retroactively to 26 June 1981, 10 U.S.C. Sec. 1408(c)(1) . . . ." *Faught v. Faught*, 67 N.C. App. 37, 47-48, 312 S.E. 2d 504, 510, *disc. rev. denied*, 311 N.C. 304, 317 S.E. 2d 680 (1984). *Cf. Gardner v. Gardner*, 63 N.C. App. 678, 681, n. 1, 306 S.E. 2d 496, 498, n. 1 (1983). Accordingly, the Court in *Faught* affirmed the trial court's order, pursuant to an alimony award, assigning the income from defendant-husband's military pension to plaintiff-wife, where the trial court issued the order prior to 1 February 1983, the effective date of the USFSPA, but after 26 June 1981, the date of retroactive application.

Retroactive application of the USFSPA has enabled courts in several jurisdictions to modify decrees filed after *McCarty* but before enactment of the USFSPA, and thereby to fulfill the clear Congressional intent to eliminate all effects of *McCarty. See, e.g., In re MacDonald*, 104 Wash. 2d 745, 747-49, 709 P. 2d 1196, 1198-

99 (1985). In *Castiglioni v. Castiglioni*, 192 N.J. Super. 594, 597-98, 471 A. 2d 809, 811 (1984), the court held that the USFSPA applied retroactively to a divorce decree filed between *McCarty* and enactment of the USFSPA and that, under these circumstances, a release clause in the parties' negotiated settlement did not bar equitable distribution of plaintiff-husband's military pension. *Castiglioni*, 192 N.J. Super. at 597-99, 471 A. 2d at 810-11. The court reasoned that "the release provision in the parties' settlement agreement does not encompass the defendant wife's right to an interest in the plaintiff's military pension if the pension was not considered in reaching the terms of their agreement." *Id.* at 598-99, 471 A. 2d at 811.

In *Rockwell v. Rockwell*, 77 N.C. App. 381, 335 S.E. 2d 200 (1985), defendant-wife sought specific performance of the parties' separation agreement which provided that plaintiff-husband would designate her as the beneficiary of his military pension. At the time the agreement was entered applicable federal law prohibited such designation of a former spouse. Plaintiff-husband thus contended that because this provision was prohibited by law when the agreement was entered, it could not be validated by subsequent enactment of the USFSPA which permitted such designation. The Court stated:

> While the general rule is that the law at the time of the making of the contract governs and a bargain illegal on account of a statute existing at the time is not rendered enforceable by subsequent repeal of the statute, a contrary result obtains when the repealing statute expressly provides for retroactive application to existing contracts, or if the court finds an implication to that effect. 6A Corbin, *Corbin on Contracts*, Sec. 1532 (1962).
>
> In our view, the clear implication of the [USFSPA] was to correct manifest injustice and unfairness in situations such as the one at bar. . . . To adopt plaintiff's contention would eviscerate the language of the amendments. If Congress did not intend that the amendments would apply to contractual agreements entered into prior to the effective date of the statute, there would have been no need for Public Law 98-94 Section 94(1) which provided that the one year period from date of the decree of divorce, dissolution or annulment for

> electing, in 10 U.S.C. 1448(b)(3)(A), would begin to run on the date of the enactment of the Act, 24 September 1983, with respect to a person defined in that subsection.

77 N.C. App. at 384, 335 S.E. 2d at 202-03.

While *Faught*, *Castiglioni*, and *Rockwell* tend to support plaintiff-wife's position, they do not control. Plaintiff-wife would have us hold that retroactive application of the USFSPA, and the clear Congressional intent to remove the harsh effects of *McCarty* by such retroactive application, permit her to obtain an equitable distribution of defendant-husband's military pension despite a valid separation agreement with general release or waiver provisions similar to those in *McArthur*. For reasons that follow, we decline to do so.

Plaintiff-wife brought this action under the Equitable Distribution Act, N.C. Gen. Stat. 50-20. The provisions of that act therefore must govern. In amending N.C. Gen. Stat. 50-20(b)(1) to include military pensions as marital property, the legislature could have provided that this amendment, like the federal USFSPA, would apply retroactively. *See Hospital v. Guilford County*, 221 N.C. 308, 311, 20 S.E. 2d 332, 334 (1942). It chose not to do so. It provided instead that the amendment would become effective 1 August 1983. 1983 N.C. Sess. Laws, chs. 758 and 811. *See Morton v. Morton*, 76 N.C. App. 295, 297, 332 S.E. 2d 736, 737-38 (1985). Hence, the amendment is presumed to apply prospectively only. *See Housing Authority v. Thorpe*, 271 N.C. 468, 470-71, 157 S.E. 2d 147, 150 (1967), *rev'd on other grounds*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed. 2d 474 (1960). "*If it is doubtful whether the . . . amendment was intended to operate retrospectively, the doubt should be resolved against such operation.*" *Smith v. Mercer*, 276 N.C. 329, 337, 172 S.E. 2d 489, 494 (1970), quoting 50 Am. Jur. Statutes Sec. 478.

The General Assembly almost certainly was fully cognizant of the express retroactivity of the federal USFSPA when it declined to give retroactive effect to the amendment to N.C. Gen. Stat. 50-20(b)(1). The conscious legislative intent thus would appear to be that the amendment apply prospectively only, and that disturbance of equitable distribution awards entered prior to the effective date of the amendment (1 August 1983) not be allowed. In light of this expression of state policy by the General Assem-

bly, we decline to create an exception to the rule of *McArthur* to allow disturbance of a valid separation agreement entered prior to the effective date of the amendment to N.C. Gen. Stat. 50-20 (b)(1). We thus hold that the agreement here bars an award to plaintiff-wife under the Equitable Distribution Act of a share in defendant-husband's military pension. Accordingly, there is no genuine issue as to any material fact and defendant-husband is entitled to a judgment in his favor as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56(c); *Lowe v. Bradford*, 305 N.C. 366, 368-70, 289 S.E. 2d 363, 365-67 (1982). The grant of summary judgment in favor of defendant-husband thus was proper.

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

CHARLES L. ROWE v. FRANKLIN COUNTY; BOARD OF COMMISSIONERS OF FRANKLIN COUNTY; FRANKLIN MEMORIAL HOSPITAL; BOARD OF TRUSTEES OF FRANKLIN MEMORIAL HOSPITAL; JAMES S. HUNT, INDIVIDUALLY AND AS CHAIRMAN OF BOARD OF COMMISSIONERS OF FRANKLIN COUNTY AND BOARD OF TRUSTEES OF FRANKLIN MEMORIAL HOSPITAL; JAMES S. WEATHERS; RONALD W. GOSWICK; J. THURMAN GRIFFIN; BERNIE R. GUPTON, AND JAMES W. MILLS, INDIVIDUALLY AND AS COUNTY MANAGER OF FRANKLIN COUNTY

No. 859SC687

(Filed 18 February 1986)

Hospitals § 2.1— trustees' employment of administrator—no authority of trustees

Because the authority of defendant hospital board of trustees was totally in the control of the defendant county board of commissioners under N.C.G.S. § 131-126.21, since repealed, a 6 June 1983 resolution of the commissioners declaring that defendant county would enter into a management contract with Hospital Corporation of America for Franklin County Hospital was effective to take away defendant trustees' authority to manage the hospital, and therefore eliminated the power of the trustees to enter into a long-term employment contract on 15 June 1983 with plaintiff as administrator of the hospital.

Judge WELLS dissenting.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 30 April 1985 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 3 December 1985.

This action arose out of a dispute over the operation of Franklin County Hospital, a public hospital established under the authority granted the counties in this State by G.S. 131-126.18, *et seq.* (This statute was replaced effective 1 January 1984, but governed all relevant actions in this case.) The Franklin County Board of Commissioners ("Commissioners") established by resolution a hospital Board of Trustees ("Trustees") in 1948, vesting the Trustees with all the authority allowed by law. Such authority included the power to hire and fire hospital personnel. G.S. 131-126.21. The Commissioners began negotiating with two private, non-profit hospital management companies for a contract to manage the hospital. Under this arrangement, the management authority of the Trustees would end. The management company would be directly responsible to the Commissioners.

The Trustees had retained plaintiff-appellant in November 1981 to be the Administrator of Franklin County Hospital. When the two management companies began bidding for the right to manage the hospital, appellant's job situation became very uncertain. Being apparently very satisfied with appellant's performance as hospital administrator, the Trustees endeavored to place appellant under a long-term employment contract in order to ensure that he continued as administrator even under private management. To that end, the Trustees instructed the hospital attorney to draft a contract, which was presented to them in May 1983. However, because of a dispute over a clause providing appellant with a car, action on the contract was delayed.

In the meantime, the Commissioners were continuing to negotiate with the two private hospital management firms. At their 6 June 1983 meeting, the Commissioners voted unanimously to contract with the HCA Management Company, Inc. to manage Franklin County Hospital. Effective 15 June 1983, the Commissioners entered into an "Interim Agreement" with HCA to manage the hospital until the final contract was ready to be signed. The Trustees, having legitimate concerns over the capability of HCA to effectively manage the hospital, at their 15 June meeting, entered into a three-year employment contract with appellant. The Commissioners, viewing this action by the Trustees as an attempted usurpation of their authority, on 17 June 1983 disbanded the Board of Trustees, named themselves as the hospital trustees

and, the next day, notified appellant that his employment as hospital administrator was terminated.

Plaintiff sued for breach of contract and tortious interference with contract. The trial judge, after discovery granted defendants' motion for summary judgment. Plaintiff appeals.

Hollowell and Silverstein, P.A. by Thaddeus B. Hodgdon for plaintiff-appellant.

Bailey, Dixon, Wooten, McDonald, Fountain and Walker by J. Ruffin Bailey and Gary S. Parsons; Jolly, Williamson and Williamson by Wilbur M. Jolly for defendants-appellees.

PARKER, Judge.

On a motion for summary judgment, the moving party bears the burden of proving: (i) there is no genuine issue of material fact and (ii) that he is entitled to judgment as a matter of law. *Smith v. Smith*, 65 N.C. App. 139, 308 S.E. 2d 504 (1983). Appellant contends that a genuine issue of material fact remained to be decided; *i.e.*, whether the Trustees had the authority to enter into a long-term contract with appellant on 15 June 1983. However, the answer to this question involves an issue of statutory interpretation, which is a question of law for the court to decide. *See, e.g., State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E. 2d 294 (1984). The specifics as to what happened and when are undisputed. The only remaining issues are the legal effect of those happenings. Accordingly, the case is appropriate for summary judgment. *Mattox v. State*, 280 N.C. 471, 186 S.E. 2d 378 (1972).

To determine whether defendant was entitled to judgment as a matter of law, the first question to be answered is when the authority of the Trustees to enter into the contract with appellant was terminated by the Commissioners. If the Trustees' authority was terminated at the 6 June 1983 meeting when the Commissioners voted to engage HCA to manage the hospital and entered into an Interim Agreement with HCA, then the contract with appellant is *ultra vires* and, thus, void. *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E. 2d 716 (1967). If, however, the Trustees' authority to contract with appellant was not revoked until 27 June 1983 when the Commissioners disbanded the Trustees and expressly regained all authority previously dele-

gated to the Trustees, then the contract was valid and is binding on any agency succeeding the Trustees. *Plant Food Co. v. City of Charlotte*, 214 N.C. 518, 199 S.E. 712 (1938).

The statute under which the Commissioners acted in creating a Board of Trustees was G.S. 131-126.21. The Franklin County Commissioners exercised the authority given by that statute in 1948 when it created, by resolution, a hospital Board of Trustees "with full authority to employ an architect, select a site and for the planning, establishment, construction, maintenance, and to employ such other personnel as are necessary for the proper operation of said Hospital . . . ." As part of this broad grant of authority, the Trustees were responsible for hiring the administrator of the hospital. Thus, they were acting pursuant to delegated authority when they retained appellant in 1981 and when they negotiated with appellant for a contract in May 1983.

However, the right to create an agency necessarily carries with it the right to destroy that agency. *Simmons v. City of Elizabeth City*, 197 N.C. 404, 149 S.E. 375 (1929). The wording of G.S. 131-126.21(a) is permissive: "[a]ny authority vested by this Article . . . *may* be vested by resolution of the governing body . . . in an officer or board . . . whose powers, duties, compensation, and tenure shall be prescribed in the resolution . . ." (emphasis added). This language implies that the Commissioners had the choice of establishing or not establishing a separate board of trustees; one was not required by the Legislature. The discretion then remained with the Commissioners to eliminate the separate board of trustees. *See Simmons, id.*

The statute also vested in the Commissioners the power to set and limit the scope of the Trustees' authority. This power to delegate authority to the Trustees necessarily implies power in the Commissioners to amend that authority. *City of Salisbury v. Arey*, 224 N.C. 260, 29 S.E. 2d 894 (1944); *see also Swain County v. Sheppard*, 35 N.C. App. 391, 241 S.E. 2d 525 (1978).

The question becomes, then, whether the resolution adopted by the Commissioners on 6 June 1983 declaring that the County would enter into a management contract with HCA for Franklin County Hospital was effective to take away the Trustees' authority to manage the hospital by amending the 1948 resolution. The 6 June resolution makes no specific reference to either the 1948

resolution or the Trustees; therefore, any amendment of the 1948 resolution must be by implication.

The rules of statutory construction applied to interpret acts of the Legislature also generally apply to county and municipal ordinances. *Clark v. City of Charlotte*, 66 N.C. App. 437, 311 S.E. 2d 71 (1984). The primary guideline for interpretation of a statute is the intent of the legislature. *State ex rel. Utilities Commission v. The Public Staff of the North Carolina Utilities Commission*, 309 N.C. 195, 306 S.E. 2d 435 (1983). The actions of the Commissioners both before and after enactment of the 6 June resolution demonstrate that the Commissioners clearly intended to revoke the power of the Trustees to enter into a long-term employment contract with appellant.

This intent brings the 6 June resolution into conflict with the 1948 resolution granting broad authority to the Trustees. The rule of construction used in construing ordinances in conflict was stated in *State v. Lance*, 244 N.C. 455, 94 S.E. 2d 335 (1956):

> The presumption is always against the intention to repeal where express terms are not used, and where both statutes by any reasonable construction can be declared to be operative without obvious or necessary repugnancy. But, if the two statutes by any reasonable construction are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.

Id. at 457, 94 S.E. 2d at 337.

In the instant case, by any reasonable construction giving effect to the legislative intent, the resolution of 6 June 1983 declaring that HCA will be the new manager of the Franklin County Hospital is repugnant to the authority of the Trustees to enter into a long-term contract with the appellant. The management proposal from HCA, referred to in the Interim Agreement adopted by the 6 June resolution as being the guideline for the final contract, specifically states that HCA "will employ the Administrator . . . without additional costs to the Hospital." The intent of the Commissioners is expressed by the 6 June resolution: "That the Franklin County Board of Commissioners enter into a management contract with Hospital Corporation of America of

Nashville, Tennessee." This statement is clearly "repugnant" to the continued management of the Board of Trustees as provided by the 1948 resolution. The latter resolution acts as a repeal of the earlier one "to the extent of the repugnancy." The two resolutions are contradictory as to the services HCA was to provide, one of which was an administrator.

Appellant contends that the Interim Agreement called for HCA to provide an Administrator only "if requested" and that, since no request was made until 27 June 1983, the Trustees still had the authority to employ an administrator until that date. However, the Interim Agreement was to cover only the period between 16 June and the date the final contract between the County and HCA was signed. That agreement had no impact upon the Trustees' power to obligate the management company, the successor agency to the Trustees, to a long-term contract.

Because the authority of the Board of Trustees was totally in the control of the Board of Commissioners under the since-repealed statute, G.S. 131-126.21, we hold that the 6 June 1983 resolution of the Commissioners effectively eliminated the power of the Trustees to enter into a long-term employment contract with the appellant. That contract is thus *ultra vires* and void. The judgment appealed from is

Affirmed.

Judge ARNOLD concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In my opinion, the Commissioners got ahead of themselves. At the time the trustees entered into their three year contract with plaintiff, their authority to manage the hospital had not been revoked other than by implication, which the law does not favor. I would hold that on 6 June 1983, the trustees still retained the authority to contract with plaintiff, and that therefore plaintiff was entitled to partial summary judgment on the issue of breach of his employment contract, leaving only damages to be determined.

STATE OF NORTH CAROLINA v. NELSON NASH RIGGS

No. 854SC907

(Filed 18 February 1986)

1. **Criminal Law § 21— motion in limine—denial not prejudicial**

Defendant was not prejudiced by the trial court's denial of his motion *in limine* whereby he sought to ensure that certain evidence would not be brought before the jury before the court held *voir dire*, since defendant retained the right to request *voir dire* during trial.

2. **Criminal Law § 98.2— sequestration of witnesses—denial not abuse of discretion**

The trial court did not abuse its discretion in denying defendant's motion to sequester all witnesses of both the State and the defense where defendant presented no argument to the trial court in support of his motion.

3. **Criminal Law § 92.3— joinder—motion made on day of trial**

There was no merit to defendant's contention that the trial court erred in allowing the State's motion to join all offenses because the motion was made on the day the defendant's trial began.

4. **Criminal Law § 43— photographs of marijuana—admission for illustration**

The trial court did not err in allowing into evidence for illustrative purposes photographs of marijuana purchased by the State's witness from one of defendant's alleged coconspirators.

5. **Narcotics § 4— possession of marijuana with intent to sell—sufficiency of evidence**

Evidence was sufficient to permit the jury to conclude beyond a reasonable doubt that defendant possessed with the intent to sell and deliver 45 pounds of marijuana where it tended to show that a law officer working through an SBI informant arranged to purchase marijuana from defendant's coconspirator; the coconspirator, by numerous phone calls and meetings, arranged to obtain the marijuana from defendant; the coconspirator and defendant drove to the edge of some woods where defendant had hidden approximately 45 pounds of marijuana and loaded the marijuana into the informant's truck; the coconspirator then drove back to the informant's trailer and assisted the law officer in unloading the marijuana; and the substance provided by defendant was submitted to the SBI laboratory and was determined to be marijuana.

6. **Weapons & Firearms § 2— possession of firearm by convicted felon—length of weapon—sufficiency of evidence**

In a prosecution of defendant for possession of a firearm by a convicted felon, there was no merit to defendant's contention that the charge should have been dismissed because the indictment did not allege and the State did not prove all of the essential elements of the firearms charge, to wit, the length of the handgun or firearm allegedly possessed, since defendant was

charged with possession of "a Charter Arms .38 caliber pistol, which is a handgun . . ."; assuming N.C.G.S. § 14-415.1 required the State to prove the length of the handgun, the indictment was sufficient to give defendant notice of the offense charged and to allow defendant to prepare his defense; and the State produced at trial the pistol alleged to have been possessed by defendant so that jurors could determined in court the pistol's length.

7. Constitutional Law § 61— discrimination in selection of petit jury—failure to make prima facie case

Defendant failed to make a prima facie case of discrimination in selection of the petit jury where he did no more than allege that the requirement in N.C.G.S. 9-2.1, that the procedure for composing the jury list be available for public inspection in the clerk's office, was violated, and he made no showing or allegation that the violation affected him.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 2 September 1983 in Superior Court, DUPLIN County. Heard in the Court of Appeals 3 February 1986.

The defendant was charged in a proper bill of indictment with possession of marijuana with intent to sell and deliver and with the possession of a firearm by a convicted felon. The defendant was found guilty as charged and from a judgment imposing prison sentences of five years for each offense he appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Willie A. Swann, for defendant appellant.

WEBB, Judge.

[1] The defendant first argues that the trial court erred in summarily denying his motion in limine. We disagree.

In *State v. Ruof*, 296 N.C. 623, 628, 252 S.E. 2d 720, 724 (1979), our Supreme Court stated:

> Generally, a motion in limine seeks to secure in advance of trial the exclusion of prejudicial matter. North Carolina has no statutory provisions for such a motion, and it is rarely if ever used in this State. In those jurisdictions which recognize the motion, however, the uniform rule appears to be that the decision whether to grant the motion is addressed to the trial judge's discretion. (Citations omitted.)

In the instant case, we discern no prejudice resulting from the trial judge's failure to grant defendant's motion in limine. The trial judge was not in a position prior to trial to know the context in which the matter defendant sought to exclude would be presented. Defendant retained his right to object to such testimony when it was offered at trial. We, therefore, hold that the trial judge properly denied defendant's motions.

In this case the defendant sought by motion in limine to ensure that certain evidence would not be brought before the jury before the court held voir dire. As the defendant retained the right to request voir dire during trial we discern no prejudice from denial of this motion.

[2] The defendant next argues that the court erred in denying his motion to sequester all witnesses of both the State and the defense. We disagree. A motion to sequester witnesses is within the trial court's discretion and his ruling thereon will not be disturbed absent a showing of abuse of that discretion. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). As the defendant presented no argument to the trial court in support of his motion, denial of the motion does not constitute abuse of discretion.

[3] In his next assignment of error the defendant argues that the court erred in allowing the State's motion to join all offenses because the motion was made on the day the defendant's trial began. We disagree.

G.S. § 15A-952 provides in pertinent part:

(b) Except as provided in subsection (d), when the following motions are made in superior court they must be made within the time limitations stated in subsection (c) *unless the court permits filing at a later time*:

. . . .

(6) Motions addressed to the pleadings, including:

. . . .

e. Motions for joinder of related offenses under G.S. 15A-926(c).

Because a motion for joinder is addressed to the trial court's sound discretion, his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 47, 50 L.Ed. 2d 69 (1976). The defendant has made no showing of abuse of discretion or of any resulting prejudice. This assignment of error has no merit.

[4] The defendant next contends that the trial court erred in allowing into evidence for illustrative purposes photographs of marijuana purchased by the State's witness from Raybon Whaley, one of the defendant's alleged coconspirators. The defendant argues that this evidence had no probative value and therefore should have been excluded. We disagree.

It is well settled that a witness may use photographs to illustrate his testimony so long as the photographs are sufficiently accurate. H. Brandis, *Brandis on North Carolina Evidence* § 34 (1982). The witness in this case testified that the photographs fairly and accurately depicted the marijuana about which he had testified. The defendant made no objection to the witness' oral testimony. Furthermore, the defendant was on trial for several offenses, including conspiracy to traffic in marijuana. Testimony concerning the acts of the defendant's alleged coconspirators was relevant to the conspiracy charges. This assignment of error is without merit.

The defendant next argues that the trial court erred in denying his motions for nonsuit on the possession of marijuana and possession of firearms charges. We disagree.

[5] To withstand a motion to dismiss the evidence must be sufficient, when taken in the light most favorable to the State, to permit any rational juror to find every element of the charged offense beyond a reasonable doubt. *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). The defendant first argues that there was not sufficient evidence to sustain his conviction for possession of marijuana with intent to sell and deliver. The necessary elements of possession of a controlled substance with intent to sell and deliver are (1) the defendant possessed a substance, (2) it was a controlled substance, and (3) the defendant had the intent to sell and distribute the substance. *State v. Casey*, 59 N.C. App. 99, 296 S.E. 2d 473 (1982).

The State in this case presented evidence tending to show that Sergeant Conerly of the Sampson County Sheriff's Department, working through an SBI informant Eithel Grady, arranged to purchase marijuana from Raybon Whaley. Whaley, by numerous phone calls and meetings, arranged to obtain the marijuana from the defendant. Whaley and the defendant drove to the edge of some woods where the defendant had hidden approximately 45 pounds of marijuana and loaded the marijuana into Eithel Grady's truck. Whaley then drove back to Grady's trailer and assisted Sergeant Conerly in unloading the marijuana. The substance provided by the defendant was submitted to the SBI laboratory and was determined to be marijuana. This evidence is sufficient to permit the jury to conclude beyond a reasonable doubt that the defendant possessed with the intent to sell and deliver 45 pounds of marijuana, a controlled substance.

[6] The defendant also argues that because the indictment did not allege and the State did not prove all the essential elements of the possession of firearms charge, the court erred in denying his motion to dismiss. Again, we disagree.

G.S. 14-415.1 provides in part:

> (a) 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 . . . .

The defendant was charged in an indictment which alleged that the defendant "unlawfully, willfully and feloniously did possess and have in his custody a Charter Arms .38 caliber pistol, which is a handgun . . .," but made no mention of the pistol's length. Assuming for the sake of argument that G.S. 14-415.1 requires the State to prove the length both of handguns and of "other firearm" we believe this indictment is sufficient to give the defendant notice of the offense charged and to allow the defendant to prepare his defense. Furthermore, the State produced at trial the pistol alleged to have been possessed by the defendant so that jurors could determine in court the pistol's length. This assignment of error has no merit.

The defendant next argues that the trial court erred in denying his motion for mistrial because the trial court failed to make findings of fact. We disagree. The denial of a motion for mistrial in a noncapital case rests largely in the trial court's discretion and his ruling thereon, without findings of fact, is not reviewable absent a showing of gross abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). This assignment of error has no merit.

[7] Finally the defendant argues that the trial court erred in summarily denying his motion to quash the petit jury. In his motion to quash, the defendant merely alleged that he had been unable to find in the Office of the Clerk of Court the documents required by G.S. 9-2.1. At the time of the defendant's trial G.S. 9-2.1 provided:

> In counties having access to electronic data processing equipment, the functions of preparing and maintaining custody of the list of prospective jurors, the procedure for drawing and summoning panels of jurors, and the procedure for maintaining records of names of jurors who have served, been excused, been delayed in service, or been disqualified, may be performed by this equipment, except that decisions as to mental and physical competency of prospective jurors shall continue to be made by jury commissioners. The procedure for performing these functions by electronic data processing equipment shall be in writing, adopted by the jury commission, and kept available for public inspection in the office of the clerk of court. The procedure must effectively preserve the authorized grounds for disqualification, the right of public access to the list of prospective jurors, and the time sequence for drawing and summoning a jury panel.

The defendant argues that the court should have conducted a hearing on his motion to quash to determine whether the requirements of G.S. 9-2.1(a) were being followed in Duplin County.

With respect to a challenge to the jury list our Supreme Court has held that to establish a prima facie case of violation of the requirement that a jury be composed of persons who represent a fair cross-section of the community, the defendant must document (1) that the group alleged to have been excluded is a distinctive group, (2) that the representation of the group in ques-

tion within the venire is not fair and reasonable with respect to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *State v. Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980).

In the present case the defendant has done no more than allege that the requirement in G.S. 9-2.1, that the procedure for composing the jury list be available for public inspection in the Clerk's Office, was violated. We hold that the defendant has not made a prima facie case of discrimination. There is nothing in the record to indicate any grounds for charging discrimination. The mere failure to follow the statutory requirement without showing or at least alleging how such failure affects the defendant is not a sufficient basis to quash the jury list. This assignment of error has no merit.

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

This case, however, must be remanded for sentencing since the court imposed a five year sentence for each conviction of a Class I felony. The presumptive sentence for a Class I felony is two years and the court had no authority to impose a greater sentence without making findings of factors in aggravation. G.S. 15A-1340.4(a).

No error in trial, remanded for sentencing.

Chief Judge HEDRICK and Judge PARKER concur.

FRED LARRY DELLINGER AND LESLIE G. DELLINGER v. JOSEPH EDWARD LAMB, JR., CAROLYN D. LAMB, AND WALTER ROY BOGGS, D/B/A ROY BOGGS CONSTRUCTION CO.

No. 8525SC673

(Filed 18 February 1986)

1. Negligence § 2; Sales § 6; Vendor and Purchaser § 6.1— negligence of home builder—action by purchasers other than original owners

The complaint of plaintiffs, who were not the original owners of a house, was sufficient to state a cause of action for negligence against defendant

builder where plaintiffs generally stated that building code violations and construction defects existed in the stone and brick fireplaces which were located in the house.

2. Sales § 6; Vendor and Purchaser § 6— sale of home by original owners—no misrepresentation of condition of premises

In an action to recover damages for numerous alleged building defects in the chimney and fireplace hearth extensions in plaintiff's home, the trial court properly entered summary judgment for defendant prior owners where the evidence did not show that defendants knowingly and falsely represented that a flue existed in the basement of the house and that the house was in good condition; the evidence did show that they represented only what they believed existed in the house; during construction of the house, they specifically requested that a flue liner be placed in the basement; there was no evidence that they knew or had reason to believe that the builder had not properly built the fireplaces or flue liner; representations made by the owners' agent as to the condition of the house were made prior to purchase of the house by the plaintiffs and upon information that the owners had supplied the agent; the contract for sale of the house mentioned no warranty concerning the basement flue, the fireplaces, or the general condition of the house but did contain a merger clause declaring that the entire agreement of the parties was contained in the writing; and evidence of the agent's statements made prior to the signing of the contract were therefore inadmissible to prove existence of an express warranty.

APPEAL by plaintiffs from *Ferrell, Judge*, and *Kirby, Judge*. Order of Dismissal entered 27 August 1984, and Order of Summary Judgment entered 28 March 1985 in Superior Court, CATAWBA County. Heard in the Court of Appeals 6 November 1985.

Randy D. Duncan for plaintiff appellants.

Williams & Pannell by Richard A. Williams, Jr., for defendant appellees, Joseph Edward Lamb, Jr., and Carolyn D. Lamb.

No brief filed for defendant appellee, Walter Roy Boggs, d/b/a Roy Boggs Construction Co.

COZORT, Judge.

Plaintiffs brought this action against the defendants seeking damages for numerous alleged building defects in the chimney and fireplace hearth extensions of their home. The trial court granted the defendant Boggs' motion to dismiss for failure to state a claim upon which relief could be granted, and the trial court granted the defendant Lambs' motion for summary judgment. Plaintiffs appealed. We reverse the dismissal of the action

as to Boggs and affirm the granting of summary judgment in favor of the Lambs.

This action arises from the sale of a house and a lot in Maiden, North Carolina. Plaintiffs, Fred and Leslie Dellinger, purchased the house pursuant to a written contract from the defendants, Joseph and Carolyn Lamb, on 29 March 1983 for the sum of $78,500.00. The house was originally built for the Lambs in 1977 by defendant Walter Roy Boggs, d/b/a Roy Boggs Construction Co. After moving into the house, the plaintiffs discovered that a flue liner which the plaintiffs believed extended into the basement of the house was not in the proper place. Further investigation by the plaintiffs revealed other alleged defects in the fireplace hearth extensions and flue liners, including the construction of these improvements on and adjacent to combustible materials. The plaintiffs alleged that the Lambs knowingly and falsely represented and warranted to the plaintiffs that the flue behind the basement cinder block walls could be used to hook up plaintiffs' wood stoves by making a hole in the wall and attaching a "thimble"; that the home was in good condition, working order and repair; and that the fireplaces and heating systems were in good condition and operated properly. The plaintiffs also alleged that Walter Roy Boggs, d/b/a Roy Boggs Construction Co., the builder of the house, violated the North Carolina Uniform Residential Building Code by building the house with hidden defects which constitute dangerous safety hazards. The Lambs answered denying any liability, alleging that the Statute of Frauds barred any alleged oral warranties made by the Lambs and cross claimed against defendant Boggs. Defendant Boggs moved, pursuant to Rule 12(b)(6), for dismissal of all plaintiffs' claims against him. The Lambs moved for summary judgment. The trial court allowed defendant Boggs' Rule 12(b)(6) motion and the Lambs' summary judgment motion. Plaintiffs appealed.

[1] First, we address plaintiffs' assignment of error regarding the trial court's granting the defendant Boggs' motion to dismiss for failure to state a claim upon which relief could be granted. The recent North Carolina Supreme Court decision in *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985), is dispositive of this assignment. The issue in *Oates* was "whether an owner of a dwelling house who is not the original purchaser has a cause of action against the builder and general contractor for negligence in

the construction of the house, when such negligence results in economic loss or damage to the owner." *Id.* at 277, 333 S.E. 2d at 223-24. The court held that such a cause of action does in fact exist where the plaintiffs' complaint sounded in negligence. *Id.*

The plaintiffs' amended complaint in the instant case alleges:

> VIII. That the residence as constructed by the defendants contains a number of defects and building code violations, as set forth in the February 20, 1984, letter from the Catawba County Building Inspector's office, a copy of which is attached as Exhibit E.
>
> IX. That said defects and building code violations are not readily observable, are located behind basement cinder block walls and in and behind stone and brick fireplaces so as to be hidden from view, and were not discovered by plaintiffs until after the purchase of said residence.
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> * * * *
>
> XV. That, upon information and belief, the defendant, Boggs, foresaw or should have forseen [*sic*] that because of the nature of the latent and hidden defects in the home which are to the extent of actually being dangerous safety hazards a substantial and proximate risk of personal injury and/or financial harm existed as to persons such as plaintiffs.

We note for the purposes of this appeal that our decision is not based on the 20 February 1984 letter from the Catawba County Building Inspector's office, wherein specific violations of the North Carolina Uniform Residential Building Code were cited because that letter is not found within the record on appeal. Rule 9, N.C. Rules App. Proc. The plaintiffs have generally stated that building code violations and construction defects existed in the stone and brick fireplaces that were located in the house. Plaintiffs also state that they have been damaged as a result of defendant Boggs' construction of the house with defects. Plaintiffs' complaint sufficiently states a cause of action for negligence. In accordance with the decision in *Oates*, the trial court's dismissal of plaintiffs' action against defendant Boggs is reversed.

[2] Plaintiffs in their second assignment of error allege that the trial court erred by granting the defendant Lambs' motion for

summary judgment. The standard for reviewing a summary judgment motion is "whether 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.]" *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E. 2d 584, 586 (1980). In their complaint the plaintiffs allege that the Lambs knowingly and falsely represented and expressly warranted that a flue existed in the basement of the house and that the house was in good condition. The depositions and affidavits submitted in support of summary judgment show that Bob Hullet, the Lambs' real estate agent, represented to the plaintiffs that a flue existed in the basement and a wood stove could be hooked up to it by breaking a piece of ceramic tile and inserting a thimble into the space. Hullet also stated that the house was in good condition. These representations were made prior to the purchase of the house by the plaintiffs and upon information that the Lambs had supplied Mr. Hullet.

The contract for the sale of the house makes no mention of any warranty concerning the basement flue, the fireplaces, or the general condition of the house and contains a merger clause declaring that the entire agreement of the parties is contained in the writing. The agreement provided that the house was being sold "as is." Where the parties have put their agreement in writing, it is presumed that the writing embodies their entire agreement. Thus, all prior and contemporaneous negotiations are regarded as merged into the written agreement. *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 464, 323 S.E. 2d 23, 25 (1984); *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953). In the absence of fraud, parol testimony of prior or contemporaneous negotiations is inadmissible to prove the existence of a warranty.

Although the plaintiffs allege false representations, the plaintiffs' evidentiary forecast shows none. Fred Dellinger's deposition shows that a flue did in fact exist in the basement; however, the flue only extended approximately 18 to 20 inches below floor level. The evidence also showed that the defendant Lambs only represented what they believed existed in the house. During the construction of the house, the Lambs specifically requested that a flue liner be placed in the basement. There was no evidence that the Lambs knew or had reason to believe that the builder had not

properly built the fireplaces or flue liner or that their agent, Mr. Hullet, knew of any defects. As a matter of law the statements made by the Lambs through their agent did not amount to fraud. *Hawks v. Brindle*, 51 N.C. App. 19, 275 S.E. 2d 277 (1981).

The allegation of fraud set aside, we now address the plaintiffs' claim based on breach of express warranty. "The merger clause in the written contract clearly excludes from the agreement everything not included in the writing, and parol evidence of express warranties made prior to the execution of the contract [is] incompetent and inadmissible." *Clifford, supra*, at 464, 323 S.E. 2d at 25. Therefore, the statements made by Mr. Hullet before the signing of the contract are inadmissible and the existence of the express warranty could not be proved at trial.

The trial court correctly granted summary judgment in favor of the defendant Lambs.

Reversed in part; affirmed in part.

Judges ARNOLD and MARTIN concur.

CHRISTINE McCUBBINS, EMPLOYEE v. FIELDCREST MILLS, INC., EMPLOYER, SELF-INSURER

No. 8510IC210

(Filed 18 February 1986)

1. Master and Servant § 68— workers' compensation—occupational disease—time for filing claim

Plaintiff's claim for workers' compensation benefits on the ground that she was disabled by an occupational disease was timely filed where a physician told plaintiff twenty years earlier that she was allergic to cotton dust and should seek other employment, but he did not diagnose her condition as chronic obstructive pulmonary disease or any other lung disease, nor did he tell her that her disease was caused by her work environment, and it was not until several months after her claim was filed that plaintiff was advised by a doctor that her lung disease was related to her work in defendant's mill. N.C.G.S. § 97-58(c).

2. Master and Servant § 68— workers' compensation—sufficiency of evidence of occupational disease

Evidence in a workers' compensation proceeding was sufficient to support a finding that plaintiff had an occupational disease where two physicians testified that plaintiff had chronic obstructive pulmonary disease with elements of bronchitis and bronchiectasis and that, while her disease was probably not caused by cotton dust, they were both of the opinion that the cotton dust contributed significantly to the development of the disease.

3. Master and Servant § 68— workers' compensation—occupational disease—sufficiency of evidence of disability

Evidence in a workers' compensation proceeding was sufficient to support a finding that plaintiff was disabled within the meaning of the Workers' Compensation Act where it tended to show that plaintiff was an uneducated, untrained 62-year-old woman who worked in defendant's mill as long as she could, then worked first as a beautician and then as a nurse's aide until her breathing difficulties made it impossible for her to do any work which required physical activity or exertion.

APPEAL by defendant from the Opinion and Award of the North Carolina Industrial Commission filed 5 December 1984. Heard in the Court of Appeals 26 September 1985.

Based upon findings and conclusions that plaintiff is totally and permanently disabled by an occupational disease contracted while in the defendant's employment, the Industrial Commission awarded her workers' compensation benefits accordingly.

In 1944, when plaintiff began working at defendant's mill in Eden, where cotton was processed and the air was dusty, she was in good health, did not smoke and had no respiratory problem. In 1956 she began coughing, having chest pains and experiencing shortness of breath, and because these symptoms gradually worsened she had to quit her job in 1963. For several years after that she was able to work in a cotton dust free environment, first as a beautician, then as a nurse's aide; but in August, 1974, her breathing problems required her to stop work altogether. Her claim for workers' compensation benefits, in which it was alleged that she was disabled by an occupational disease caused by her exposure to cotton dust while working for defendant, was not filed until 11 August 1981. In a hearing thereafter held, in pertinent part, plaintiff testified that: When her breathing difficulties in the mill first developed she consulted several local physicians, and in 1958 she was referred to Dr. David Cayer in Winston-Salem, an allergist and specialist in diseases of the chest and

lung. Between then and 1963 Dr. Cayer subjected her to various diagnostic tests and told her she was allergic to cotton dust and should seek other employment. In another hearing, Doctors Sieker and O'Neill, pulmonary specialists, testified, in substance, that they examined her in March and May, 1982 and in their opinion she was totally and permanently disabled by chronic obstructive lung disease, the development of which was significantly contributed to by her exposure to cotton dust. Defendant moved to dismiss plaintiff's claim on the grounds that it had not been timely filed.

In an opinion and award filed on 1 February 1984, Deputy Commissioner Shuping found that while in defendant's employment plaintiff had developed chronic obstructive pulmonary disease with components of chronic bronchitis and bronchiectasis, an occupational disease under G.S. 97-53(13), but dismissed the claim for lack of jurisdiction because it was not filed within the time allowed by G.S. 97-58. Upon appeal the Full Commission held that the claim was improperly dismissed and noted that the physician who supposedly first diagnosed plaintiff's lung disease did not testify, that the only evidence of his supposed diagnosis came from plaintiff's own testimony as to a conversation between her and the physician and that her testimony did not support the Deputy Commissioner's conclusion that the doctor then informed her of the nature and work-related cause of her disease. With respect to the evidence concerning plaintiff's knowledge of her condition, the Commission made the following findings:

> 5. . . . Plaintiff's recollection is that Dr. Cayer told her she was allergic to the dust at work and that her condition would get worse if she continued to work. Plaintiff was never informed of the true nature of her lung disease or that it was caused or aggravated by cotton dust. The terms byssinosis and chronic obstructive lung disease were never used or explained to plaintiff.
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> . . . .
>
> 8. Plaintiff was examined by Dr. William O'Neill, a specialist in pulmonary medicine in March 1982. He diagnosed chronic obstructive pulmonary disease with underlying bronchitis and bronchiectasis. On May 5, 1982, plaintiff was examined by Dr. Herbert Sieker, also a specialist in pul-

monary medicine. Based upon his examination, x-rays, and plaintiff's medical records, his diagnosis was also chronic obstructive pulmonary disease. In the opinion of both physicians, and as we have found, plaintiff's exposure to cotton dust aggravated the development of her lung disease which led to her disability. Both physicians were of the opinion that plaintiff is totally and permanently disabled from all but sedentary work.

Ling & Farran, by Stephen D. Ling, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and Caroline Hudson, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant first contends that the record shows plaintiff's claim was not timely filed and that it was error for the Commission to vacate the Deputy Commissioner's dismissal of the claim. This contention is without merit. G.S. 97-58(c) provides that "[t]he 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." Though the two year time limit for timely filing is a jurisdictional requisite, without which the Industrial Commission may not consider a workers' compensation claim, the time does not begin to run against occupational disease claims until the employee is informed by competent medical authority of the nature and work-related cause of the disease. *Taylor v. J. P. Stevens*, 300 N.C. 94, 265 S.E. 2d 144 (1980). Since this is a jurisdictional question, the Commission's findings are not conclusive, *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965), and after reviewing the entire record we must make our own findings thereon. *Lucas v. L'il General Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976).

Defendant argues, in substance, that plaintiff's own evidence shows that she was advised by Dr. Cayer nearly twenty years before this claim was filed that she had an occupational disease and that the only conclusion that can properly be drawn therefrom is that the Commission's jurisdiction was not timely invoked. But nothing in the record suggests that Dr. Cayer diagnosed plaintiff as having chronic obstructive pulmonary disease, or any other lung disease, or that he told her she had such a disease or

that it was caused by her work environment. The import of Dr. Cayer's advice to plaintiff, as we read her testimony, was that she was allergic to cotton dust and should seek other employment. Defendant's reliance on *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215 (1983), *reh. denied*, --- N.C. ---, 311 S.E. 2d 590 (1984), is misplaced, as the plaintiff in that case was informed by a doctor more than two years before he filed his claim that he had a work-related lung disease and was completely disabled by it. Closer to the question presented by this appeal is *Lawson v. Cone Mills*, 68 N.C. App. 402, 315 S.E. 2d 103 (1984). In that case we found that the plaintiff did not know enough about his condition to trigger the running of the statutory period, even though he had been told by a doctor that he had a lung disease, since the evidence also showed that he was not told that his disease was caused by conditions on his job. So far as the record in this case shows it was not until March of 1982, several months after her claim was filed, that plaintiff was advised by a doctor that her lung disease was related to her work in defendant's mill. Accordingly, we adopt the findings made by the Full Commission and reject defendant's contention on this point.

[2, 3] Defendant's other contentions are that the Commission erred in finding and concluding that plaintiff had a compensable occupational disease and that she was totally and permanently disabled. Since these are not jurisdictional questions and the Commission's findings of fact thereon are supported by competent evidence and the findings support the conclusions of law, these contentions must be and are overruled also. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). That plaintiff was at a greater risk than the public at large of contracting chronic obstructive pulmonary disease during the many years that she was exposed to cotton dust in defendant's mill, the evidence leaves no room for doubt. Two physicians testified that plaintiff has chronic obstructive pulmonary disease with elements of bronchitis and bronchiectasis, and that while her disease was probably not caused by cotton dust, they both were of the opinion that the cotton dust contributed significantly to the development of the disease. This evidence is sufficient to support the finding that plaintiff had an occupational disease. *Rutledge v. Tultex*, 308 N.C. 85, 301 S.E. 2d 359 (1983). As to plaintiff's disability the Commission found that she was totally disabled due to her occupational

disease as of 12 August 1974. "Disability" under the Workers' Compensation Act is the incapacity of a worker, due to injury or disease covered by the Act, to earn the wage he was earning prior thereto. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982). The record here supports the finding that plaintiff was so disabled, as it shows an uneducated, untrained 62 year old woman who worked in the mill as long as she could and then worked first as a beautician and then as a nurse's aide until her breathing difficulties made it impossible for her to do any work that required physical activity or exertion. That plaintiff may be capable of doing sedentary work, as the doctors testified, does not establish that she is not disabled, as defendant contends. Disability under the Workers' Compensation Act is not to be equated with physical infirmity. Other factors tending to show the unemployability of the worker, such as age, education and experience, can be considered, *Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978), and the Commission's finding in this regard is based not only upon her incapacitating lung disease, but upon "her age, education, background and work experience," which tend to show that she is not employable.

Affirmed.

Judges WEBB and JOHNSON concur.

HENRIETTA S. MAINOR v. K-MART CORPORATION

No. 8512SC211

(Filed 18 February 1986)

1. Negligence § 57.5— shelves extending into store aisle—fall by customer—sufficiency of evidence of negligence

Evidence was sufficient to be submitted to the jury in an action to recover for injuries sustained by plaintiff when she fell in a store operated by defendant where the evidence tended to show that defendant displayed cookies at eye level for the purpose of attracting customers' attention; plaintiff was looking at the cookies and did not see metal shelves stacked on end against the end of the counter which extended approximately one inch into the aisle; plaintiff tripped over the shelves which then fell, causing her to fall on top of them

and suffer injury; and the jury could find from the evidence that employees of defendant stacked the shelves.

2. Negligence § 58.1— fall in store by customer—instructions proper

In an action to recover for injuries sustained by plaintiff when she fell in a store operated by defendant, the trial court's instructions correctly stated plaintiff's evidence and contentions, and the court properly refused to give defendant's requested instruction that there could be more than one proximate cause of the injury, since there was no evidence that there was any cause for plaintiff's injury other than defendant's negligence or plaintiff's contributory negligence.

3. Damages § 17.4— future pain and suffering—instructions improper

In an action to recover for injuries sustained by plaintiff when she fell in a store operated by defendant, the trial court erred in charging that the jury could award damages for future pain and suffering in the absence of expert testimony as to permanent injury.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 3 December 1984 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 September 1985.

This is an action for injuries received by the plaintiff in a fall in a store operated by the defendant. Plaintiff's evidence showed that she and her husband entered the defendant's store on 16 October 1981. They walked to the aisle where cookies were displayed on shelves. Most of the cookies were displayed at eye level. There were some metal shelves stacked on end against the end of the counter. One of the shelves extended approximately one inch into the aisle. The plaintiff testified that she was following her husband as they passed the shelves and she did not see them. She was following her husband and was looking "at shoulder all the time; you know, looking directly, you know, at his shoulder. That's as far as I could see, my husband's shoulder." After the plaintiff and her husband had selected the cookies they wanted and were preparing to leave, the plaintiff took a step backward and tripped over the part of the shelves that were extended into the aisle. The shelves fell and she fell on them, causing her to be injured.

The jury answered issues of negligence and contributory negligence favorably to the plaintiff and awarded her damages in the amount of $65,000.00. The defendant appealed from a judgment entered on the jury verdict.

Reid, Lewis & Deese, by Marland C. Reid, for plaintiff appellee.

Haythe & Curley, by Alexandra M. Hightower, Samuel T. Wyrick, III and Robert A. Ponton, Jr., for defendant appellant.

WEBB, Judge.

[1] The defendant assigns error to the court's failure to grant its motion for directed verdict and its motion for judgment notwithstanding the verdict. We believe we are bound by *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981) to overrule this assignment of error. In *Norwood* the defendant operated a retail store in which a pallet extended three or four inches into the aisle. The plaintiff tripped over the pallet and our Supreme Court held there was sufficient evidence of negligence to be submitted to the jury. It held that the evidence did not establish contributory negligence as a matter of law. In that case there was evidence that the defendant had displayed certain items on its shelves so as to attract the attention of customers. The Court said it was a jury question as to whether a person using ordinary care would have looked down. In this case the plaintiff was looking at the cookies. Under *Norwood* we believe it is a jury question as to whether using ordinary care she should have looked down at the shelves.

The defendant argues that there was not sufficient evidence that it had placed the shelves in the position in which the plaintiff tripped on them or was aware they were in such a position for the jury to find it did so. It argues relying on *France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 320 S.E. 2d 25 (1984), *disc. rev. denied*, 313 N.C. 329, 327 S.E. 2d 889 (1985) that there was not sufficient evidence of negligence to be submitted to the jury. In *France* the plaintiff slipped on pickle juice on the defendant's floor. There was no evidence that the defendant knew the pickle juice was on the floor. We believe *France* is distinguishable from this case in that in this case the jury could find from the evidence that employees of the defendant stacked the shelves.

[2] The appellant assigns error to the charge on the ground that the court incorrectly stated the plaintiff's evidence. The court charged the jury that: "the color of these shelves was such that they blended against the general background of the store and

therefore were not noticeable; that one without very specific and careful inspection could not determine whether they were in some way attached or secured or not . . . ." The appellee testified that the shelves were the same color as the counter and they blended with the background against which they were placed. She testified that there was no shelf or device to hold the shelves to the end of the cookie counter. The court correctly summarized this part of the evidence.

The appellant also contends the following part of the charge in which the court stated the plaintiff's contentions is not supported by the evidence:

> [T]he shelves, because they blended with the decor and because of the other distractions in the store and because of the fact that the condition was an unusual condition that one would not reasonably anticipate in the store, that the plaintiff in the exercise of reasonable care would not have had any particular reason to either look at these shelves or to pay them any particular note, and that it was not reasonable to expect a customer to pay the special attention to these shelves necessary to know that they were stacked in such a way that they could very easily have fallen, ...

The appellee testified that her attention was attracted to the cookies on the cookie counter, which were displayed at eye level, that there was nothing to draw her attention to the shelves at the end of the counter and that there were no cookies or any other merchandise displayed on the floor near the place at which the shelves were located. This testimony is evidence which supports this part of the charge.

The appellant also assigns error to the court's failure to give its requested instruction as to proximate cause. The court did not, as requested by the appellant, instruct the jury that there could be more than one proximate cause of the injury. The court charged the jury that the plaintiff could recover if the defendant's negligence was a proximate cause of the injury and that she could not recover if her contributory negligence was a proximate cause of the injury. The issues as to negligence and contributory negligence were clear. There was no evidence that there was any cause for the plaintiff's injury other than the defendant's negligence or the plaintiff's contributory negligence. There was

no prejudice to the defendant by the court's refusal to give this requested instruction.

[3] The appellant assigns error to the court's charge that the jury could award damages for future pain and suffering. We believe this assignment of error has merit. The rule in this State has been stated to be that if an injury

> is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there "be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case . . . that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering as a result of the injury proven" [citation omitted].

Gillikin v. Burbage, 263 N.C. 317, 326, 139 S.E. 2d 753, 760 (1965); *Brown v. Neal*, 283 N.C. 604, 197 S.E. 2d 505 (1973). In both *Brown* and *Gillikin* the plaintiffs had received back injuries and there was evidence of a ruptured disc in *Gillikin*. Both plaintiffs suffered pain from the time of the injuries until the trials. There was no expert testimony as to permanent injury. The Court said in each case that the injuries were subjective and without expert testimony it was error to allow the jury to award damages for future pain and suffering. The facts in both *Brown* and *Gillikin* are remarkably similar to the facts in this case. We believe we are bound by these two cases to hold it was prejudicial error to allow the jury to award damages for future pain and suffering.

The defendant also assigns error to the court's denial of its motion to strike certain testimony of two orthopedic surgeons, Dr. Stanly Gilbert and Dr. James Johnson. Dr. Gilbert testified that he treated the plaintiff beginning on 21 October 1981. She was suffering from hip pain. An x-ray revealed a small hairline fracture in a portion of the hip bone. This fracture was consistent with the history she had given him. On 16 November 1981 the hip pain was resolving but she complained of pain in her lower back. He testified that the pain in her lower back could have been caused by the fall but it was troublesome that the back pain did not become severe enough for her to call it to his attention until a

month after the fall. A myelogram was performed which revealed a small disc herniation which was of no clinical significance. In his opinion it did not produce any symptoms. The defendant requested the court to instruct the jury to disregard all testimony regarding the disc injury. The court denied this request and the defendant assigns this as error. This testimony as to a disc herniation was not prejudicial to the defendant and it was not error to deny the motion to strike it.

Dr. Johnson testified that he began treating the plaintiff on 21 July 1982. He made a diagnosis of "back strain, contusions on her hip, and a possible mild herniated disc." He testified that her complaints were consistent with her fall as she described it. The defendant moved to strike the testimony of Dr. Johnson as to the relation of the plaintiff's pain to the fall and assigns error to the court's failure to do so. This testimony expressed his opinion as to the connection of the fall to the plaintiff's symptoms. It was not helpful to the plaintiff to a large extent and we find no error in its admission.

The defendant also assigns error to the admission of testimony by the plaintiff's employer at the time of the accident. He testified that the plaintiff had been approved by the State of North Carolina to work as a supervisor in charge in a family care home. The defendant contends this was hearsay testimony. There is nothing in the record to show the witness did not know of his own knowledge that the plaintiff was approved by the State to work as a supervisor in charge. We cannot hold this was hearsay testimony.

We have held that there was error only as to the damage issue. In our discretion we award a new trial only as to this issue. The judgment as to liability is affirmed.

New trial on issue of damages.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. WILLIAM LOGAN

No. 8526SC945

(Filed 18 February 1986)

1. **Constitutional Law § 67— confidential informant—disclosure of State's information**

The trial court properly denied defendant's motion to strike testimony concerning a visit to defendant's apartment by an undercover police officer and a confidential informant for the purpose of buying drugs, properly denied defendant's motion for a mistrial, and properly denied defendant's motion for a continuance, since the State met its obligation of disclosure by revealing the name of the informant, "Butch," which was all it knew about his identity, and there was no showing by defendant that he might reasonably be able to locate the informant.

2. **Criminal Law § 122.2— inability of jury to reach verdict—instructions proper**

Defendant was not prejudiced by the trial court's failure to give all of the instructions set forth in N.C.G.S. § 15A-1235(a) and (b) when reinstructing the jury after it appeared that the jury was deadlocked, since defendant did not object at trial; moreover, there was no "plain error" because evidence of defendant's guilt was very strong, and instructions given by the trial judge were in substantial conformity with the statute.

ON certiorari to review the judgment of *Kirby, Judge*. Judgment entered 28 July 1982 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 4 February 1986.

Upon proper indictments, defendant was convicted of sale and delivery of cocaine, possession with intent to sell and deliver cocaine, sale and delivery of heroin and possession with intent to sell and deliver heroin. Defendant's appeal was not timely perfected due to an inadvertent failure to appoint counsel to represent defendant on appeal when defendant entered notice of appeal on 28 July 1982. This Court subsequently allowed defendant's petition for a writ of certiorari.

At trial, the State's evidence tended to show the following events and circumstances. In July of 1981, Agent Bryan Beatty was on assignment in the Charlotte area as an undercover narcotics agent for the State Bureau of Investigation. Officer D. L. Givens was employed as an officer in the Charlotte Police Department, also working as an undercover narcotics officer. At about 2:45 p.m. on 24 July 1981, Beatty and Givens went together by automobile to a duplex residence identified as 1400-B Newland

Road in Charlotte. They went there for the purpose of purchasing a controlled substance *from defendant* (emphasis supplied). Beatty had previously visited the residence at 1400-B Newland Road on 16 and 21 July 1981 to purchase controlled substances from defendant. Officer Givens also accompanied Beatty on the 21 July visit but remained in the car. On 24 July, Beatty parked his car about twenty-five feet from the residence, went to the front door where he was met by defendant, entered the residence and remained there five or six minutes while he purchased both cocaine and heroin from defendant. When defendant came out to admit Beatty, Givens observed defendant on the porch of the residence. Beatty's and Givens' descriptions of defendant were consistent with each other. Officer W. H. Caldwell, Jr. of the Charlotte Police Department observed a green Pontiac automobile parked in front of the residence. Caldwell, who knew defendant, had seen defendant driving that car on numerous occasions. Both Beatty and Givens identified defendant as the person they saw at the Newland Road residence on 24 July and Beatty identified him as the person with whom he dealt on all three of his visits.

Defendant did not testify, but presented alibi evidence through others. These witnesses testified that on 24 July 1981 defendant resided at 608 Georgetown Drive in Charlotte and that 1400-B Newland Road was the address of defendant's estranged wife. There was testimony that from 12:00 or 12:30 p.m. on 24 July 1981 until 6:00 or 8:00 p.m. defendant was at a birthday party at 2421-A Horne Drive, and specifically that defendant was there at about 2:50 p.m. These witnesses' description of defendant on that day did not agree with the description given by Beatty and Givens.

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

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

WELLS, Judge.

In his brief, defendant contends that the trial court erred in denying his motion for a mistrial, in denying his motion for continuance to allow him to locate a non-appearing confidential in-

formant and in instructing the jury. We overrule each of defendant's assignments of error and find no error in the trial.

[1] On direct examination, Agent Beatty testified that he had made visits to the Newland Road residence on 16 and 21 July and identified defendant as the person with whom he dealt. On cross-examination, Beatty testified that he did not know defendant before 16 July 1985 but was informed by a confidential and reliable informant that he could purchase "drugs" from defendant. The informant was with Beatty on the 16 July visit but did not participate in the purchase. On defendant's motion, the State revealed the informant's identity as a person named "Butch." The State was unable to identify "Butch" further or to furnish any information as to his whereabouts. Defendant requested that the State be ordered to produce the informant; that motion was denied. Defendant then moved in the alternative that the trial court strike all testimony as to the 16 July visit or that the trial court declare a mistrial; that motion was denied. Defendant also requested a continuance in order to try to locate the informant; that request was denied.

We agree with defendant that the State's privilege to withhold the identity of an informant must give way where the disclosure of identity "is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause. . . ." *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957); *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969). This court has held, however, that the State's disclosure obligation is met when it discloses all the information it possesses as to an informant's identity or whereabouts. *State v. Newkirk*, 73 N.C. App. 83, 325 S.E. 2d 518, *disc. rev. denied*, 313 N.C. 608, 332 S.E. 2d 81 (1985). Assuming without deciding that "Butch's" testimony would have been relevant on the question of defendant's identity, we hold that, in this case, the State met its obligation of disclosure and that the trial court properly denied defendant's motions to strike the testimony as to the 16 July visit or for a mistrial. We also hold that in the light of the paucity of information possessed by the State as to "Butch's" identity or whereabouts, absent a showing by defendant that he might reasonably be able to locate "Butch," the trial court properly denied defendant's motion for a continuance.

The State contends that defendant's arguments on this aspect of the trial should be rejected because "Butch" was not a participant in the offenses for which defendant was being tried. Because we have overruled defendant's assignments of error based on these aspects of the trial on other grounds, we need not reach that question.

[2] Defendant next contends that the trial court erred in reinstructing the jury when it appeared that the jury was deadlocked by not giving all of the instructions set out in N.C. Gen. Stat. § 15A-1235(a) and (b) (1983). The statute provides:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

When the jury informed Judge Kirby that it had been unable to agree on a verdict, he reinstructed the jury as follows:

> Members of the jury, of course your foreman has just informed me that so far you have been unable to agree upon a verdict. I want to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and reconcile your differences if you can without the surrender of your conscientious convictions. No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict. I'm going to let you go back to the juryroom and resume your deliberations.

In *State v. Williams*, slip op. No. 50A84, filed 7 January 1986, our Supreme Court held that when a trial judge attempts to give any of the G.S. 15A-1235(a) and (b) instructions to a deadlocked jury, he must give all those instructions. The *Williams* court held that the failure to so instruct the jury in that case was non-prejudicial because defendant did not object to the instruction given at trial and that the error committed did not rise to the level of "plain error" under the instruction given. We are faced with the same question, as defendant in this case did not object at trial. We have reviewed the entire record, *see Williams, supra*, and *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), and conclude there was no "plain error" here. First, the evidence of defendant's guilt was very strong; second, the instructions given by Judge Kirby were in substantial conformity with the statute. We overrule this assignment of error.

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

No error.

Judges WHICHARD and COZORT concur.

THE NORTHWESTERN BANK v. MRS. R. H. BARBER, A/K/A NORMA G. BARBER, AND TOM KINLEY

No. 8526SC678

(Filed 18 February 1986)

1. **Usury § 1— endorsement of promissory note—guaranty—no "things of value" within meaning of N.C.G.S. § 24-8**

Endorsement of a note and guaranty agreements which served as security for a loan under $300,000 did not constitute a "thing of value" within the meaning of the statute prohibiting the lender from charging or receiving from the borrower any "sum of money, thing of value or other consideration" other than the security or collateral pledged to secure payment of the principal and allowable fees and interest. N.C.G.S. § 24-8.

2. **Usury § 5— no usurious rate of interest charged**

In an action to recover sums due under the terms of a promissory note and guaranty agreements following foreclosure sale, the trial court did not err in granting a judgment for an amount which included interest, since there was no contract, promise or agreement to a usurious rate of interest which would require forfeiture of the entire interest which the note carried, nor did the court err in allowing plaintiff to amend its complaint so as to reduce the interest sought to that calculated at 12% per annum. N.C.G.S. 24-1.1.

3. **Attorneys at Law § 7.4— fees not provided for in note—awarding of fees improper**

In an action to recover sums due under the terms of a promissory note and guaranty agreements, the trial court erred in awarding plaintiff attorney's fees where the promissory note did not provide for payment of counsel fees in an action to collect the debt, but the guaranty agreements did so provide, but written notice was not sent to defendant advising him of his right under N.C.G.S. § 6-21.2(5) to pay the outstanding balance on the note without incurring the attorney's fees.

APPEAL by defendant Kinley from *Snepp, Judge*. Judgment entered 23 October 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 December 1985.

Plaintiff initiated this action seeking sums allegedly due under the terms of a promissory note and guaranty agreements following foreclosure sale. The trial court heard the matter without a jury and made findings of fact which read in pertinent part as follows:

1. On November 30, 1973, Carolina Jeep, Inc., a North Carolina corporation, executed and delivered to the plaintiff

Northwestern Bank a Promissory Note in the original principal sum of $200,000.00, at a rate of interest at prime plus two percent.

2. The defendants, who were officers and shareholders of Carolina Jeep, Inc., signed said Note on the reverse side thereof.

3. The defendants, Mrs. R. H. Barber, a/k/a Norma G. Barber, and Tom R. Kinley, executed and delivered to the Northwestern Bank Unconditional Guaranty Agreements, dated December 20, 1976, and March 18, 1977.

4. On November 30, 1973, Carolina Jeep, Inc. executed and delivered to the Northwestern Bank a Deed of Trust on real estate to secure the Promissory Note referred to in number one above. Thereafter, Carolina Jeep, Inc. conveyed said property to a third party subject to said Deed of Trust.

5. Payments were not made on said Note according to its terms, and defendants failed and refused to make such payments upon demand. The plaintiff elected to accelerate the payment of the balance due on said Note and defendants were so notified of same.

6. At the time of default on said Promissory Note, the principal balance due the plaintiff was $184,700.00.

7. The plaintiff Northwestern Bank commenced foreclosure proceedings under the terms and provisions of said Deed of Trust.

. . . .

9. At the foreclosure sale held on August 3, 1981, the plaintiff was the high bidder for the sum of $185,000.00. After the payment of the costs incurred in said foreclosure sale, totalling $12,477.68, the sum of $172,522.32 was credited on the Promissory Note by the plaintiff as follows: $31,636.83 for accrued interest through August 3, 1981 and $140,885.49 was credited to principal, thereby leaving a principal balance due the plaintiff of $43,814.51.

10. Plaintiff paid delinquent taxes on the real estate covered under the Deed of Trust in the sum of $13,051.33, after prorating said taxes through August 18, 1981.

11. The accrued interest due the plaintiff on said Promissory Note, after the credits were allocated as set forth in number nine, from August 3, 1981 until October 16, 1984, is $21,394.52, calculated at the rate of twelve percent per annum.

12. There was no evidence presented as to the fair value of said real estate which was the subject of said foreclosure proceeding.

13. At no time did the plaintiff charge, collect, reserve or accrue interest on said Promissory Note at a rate in excess of twelve percent.

14. The Guaranty Agreements provide for attorneys' fees, costs and expenses of collection incurred by the plaintiff in enforcing any of the liabilities therein stated.

15. The Deed of Trust provides that any sums expended by the plaintiff for the payment of taxes on the property covered by said Deed of Trust, or to remove any prior liens or incumberances [sic], shall be added to and constitute a part of the debt thereby secured, and shall bear interest at the same rate.

Based on the findings of fact and other evidence presented at trial, the court made the following conclusions of law:

1. The defendants are indebted to the plaintiff, under the terms of said Promissory Note, Deed of Trust and Guaranty Agreements, for principal, plus an additional principal sum for the delinquent taxes paid by the plaintiff, and interest on the total of said principal sums to the date of the entry of this Judgment, at the rate of twelve percent per annum.

2. At the time of the execution of said Promissory Note, the interest rate therein provided was nonusurious, nor has the plaintiff charged, collected, reserved or accrued interest on said Note at a usurious rate.

3. Defendants are not entitled to rely on § 45-21.36 of the General Statutes of North Carolina as a defense. Similarly, § 24-8 of the General Statutes of North Carolina does not apply as a defense in this cause.

4. Plaintiff is entitled to recover attorney fees from the defendants in the amount of fifteen percent of the total sum due the plaintiff from the defendants.

Based on the findings of fact and conclusions of law the court ordered that:

1. Defendants Mrs. R. H. Barber, a/k/a Norma G. Barber, and Tom R. Kinley, jointly and severally, pay to the plaintiff the sum of $78,260.35.

2. The defendants pay to the plaintiff, or its attorney, Michael P. Mullins, the sum of $11,739.05 for attorney fees.

. . . .

4. Defendants shall pay interest to the plaintiff on all such sums referred to herein at the rate of eight percent per annum from and after the date of this Judgment until all of such sums have been paid in full.

From the judgment, defendant Kinley appeals.

No brief for plaintiff appellee.

Erwin, Beddow and Reese, by Fenton T. Erwin, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred when it failed to apply the provisions of G.S. 24-8 to the evidence. G.S. 24-8 provides in pertinent part:

No lender shall charge or receive from any borrower or require in connection with a loan any borrower, directly or indirectly, to pay, deliver, transfer or convey or otherwise confer upon or for the benefit of the lender . . . any sum of money, thing of value or other consideration other than that which is pledged as security or collateral to secure the repayment of the full principal of the loan, together with fees and interest provided for in . . . the . . . Statutes, where the principal amount of a loan is not in excess of three hundred thousand dollars ($300,000.00).

The loan between plaintiff and Carolina Jeep, Inc. was for less than $300,000.00. Defendant argues that both the guaranty agreements and his endorsement of the promissory note as "Vice Pres." are "a thing of value" within the meaning of the statute and thus G.S. 24-8 precluded plaintiff from taking these incident to the loan. We do not agree.

The limitation imposed by G.S. 24-8 concerns a thing of value "other than that which is pledged as security or collateral to secure the repayment of the full principal of the loan, together with fees and interest . . . ." In this instance, defendant's endorsement and the guaranty agreements served as security for the loan to Carolina Jeep, Inc. No additional sum or thing of value is involved other than securing for the plaintiff that the loan will be repaid in full. Thus, the statute has not been violated.

[2] Defendant next contends that the trial court erred in granting a judgment for an amount which included interest. We disagree.

Plaintiff loaned the $200,000.00 to Carolina Jeep, Inc. on 30 November 1973. On that date, G.S. 24-1.1 (Cum. Supp. 1971) provided in pertinent part as follows:

> [T]he parties to a loan . . . may contract in writing for the payment of interest not in excess of: . . . (4) Twelve percent (12%) per annum where the principal amount is more than one hundred thousand dollars ($100,000.00) but not more than three hundred thousand dollars ($300,000.00). . . .

G.S. 24-2 mandates the forfeiture of the entire interest which the note carries with it when there has been a "taking, receiving, reserving or charging a greater rate of interest" than that allowed by law. The "charging" which constitutes a forfeiture under G.S. 24-2 is the contract, promise or agreement to a usurious rate of interest as opposed to the actual collection or payment of that interest. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Haanebrink v. Meyer*, 47 N.C. App. 646, 267 S.E. 2d 598 (1980). However, we see no need to discuss the question of usury since there is nothing in this record to show that plaintiff ever charged or collected anything more than the legal rate of interest.

Plaintiff in its complaint sought interest in excess of the 12% allowed under G.S. 24-1.1. Defendant excepts to the trial court

allowing plaintiff to amend the complaint so as to reduce the interest sought to that calculated at 12% per annum. Rule 15(b) of the North Carolina Rules of Civil Procedure provides that a party may amend the pleadings to conform to the evidence. Plaintiff presented evidence as to the amount of the interest when calculated at 12% per annum. The allowance of conforming amendments is in the trial court's sound discretion. *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588, *cert. denied*, 281 N.C. 758, 191 S.E. 2d 356 (1972). We find the trial court did not abuse its discretion in granting the amendment to the pleadings.

Defendant also contends the trial court erred when it failed to receive into evidence a land appraisal prepared at plaintiff's request. The evidence was hearsay and does not fall within any of the hearsay exceptions. We find no error in the exclusion of this appraisal.

[3] Finally, defendant contends the trial court erred when it awarded the plaintiff attorneys' fees. As to this contention, we agree.

The promissory note evidencing the loan did not provide for payment of counsel fees in an action to collect the debt, but the guaranty agreements signed by defendant did so provide. Provisions relative to the payment of attorneys' fees are not enforceable unless expressly authorized by statute. *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 266 S.E. 2d 812 (1980). G.S. 6-21.2(5) allows recovery of attorneys' fees incurred in the collection of a note provided written notice is sent to the debtor advising him of the right under the statute to pay the outstanding balance on the note without incurring the attorneys' fees. *See Blanton v. Sisk*, 70 N.C. App. 70, 318 S.E. 2d 560 (1984). The record fails to contain any evidence of such notice to the debtor. Absent such evidence, the attorneys' fees were improperly granted. That portion of the judgment awarding attorneys' fees is therefore reversed.

Affirmed in part, reversed in part and remanded.

Judges WELLS and PARKER concur.

JAMES A. PITTMAN v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 8516SC1037

(Filed 18 February 1986)

1. **Insurance § 136— fire insurance policy—no willful material misrepresentation**

In an action to recover on a fire insurance policy, the evidence was sufficient to support a jury finding that plaintiff did not knowingly and willfully make a material misrepresentation to defendant so as to void the policy under N.C.G.S. § 58-176(c) with regard to the contents of the closet where the first fire began, the amount of personal property lost in the fire, and plaintiff's whereabouts before and after the fire.

2. **Insurance § 136— fire insurance policy—claim for additional living expenses and damage to real property**

In an action to recover on a fire insurance policy, the trial court did not err in denying defendant's motion for directed verdict regarding plaintiff's claim for additional living expenses and for damage to real property on the ground that plaintiff did not present sufficient evidence to support the recoveries, since defendant stipulated to the costs of repairing the real property and failed to list the proper amount of real property damage compensation as a triable issue, and plaintiff offered evidence from which the jury could have reasonably found additional living expenses in the amount of $1,500.

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 6 May 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 February 1986.

The parties to this action stipulated in a pre-trial order that on the night of 21 July 1982 and the morning of 22 July 1982 two fires caused $40,034.34 damage to real property owned by James and Mary Pittman and insured by Nationwide Mutual Fire Insurance Company. Plaintiff, James Pittman, asserted a claim under the insurance policy for $10,553.44 compensation for real property loss, more than $21,763.99 personal property loss and $5,932.00 additional living expenses due to the fire. Defendant refused to pay the claim on the grounds that "James A. Pittman intentionally set fire to the insured property and has misrepresented to Nationwide the facts and circumstances surrounding the loss as well as the estimated amount of the loss." Plaintiff then brought suit for the fire loss under the insurance contract and for libel and defamation. The trial court granted defendant's motion

for partial summary judgment as to the libel and defamation claim.

Defendant's evidence adduced during the trial of plaintiff's contract claim tends to show the following:

1) Plaintiff made misrepresentations as to the contents of the closet where the first fire began, the amount of personal property lost in the fire and his whereabouts before and after the fire. Plaintiff on three occasions, once under oath, stated that there was nothing in the closet except some bags of cotton, yet at trial plaintiff stated that newspapers used while cleaning painting and refinishing equipment with kerosene were left in the closet. Plaintiff listed as lost several items which were not lost including a $1,100 wood stove which plaintiff later sold for $500 and an $899 television set which plaintiff stated in a prior insurance claim was destroyed by lightning before the fire. In his sworn deposition, plaintiff testified that immediately prior to the first fire he had a date with a woman who failed to meet him. In answering an interrogatory plaintiff identified his date as Pat Trexler. At trial plaintiff stated that his date did meet him and her name was Connie Fore.

2) Plaintiff set the fires himself. Plaintiff had the opportunity to set both fires and was without an alibi witness to place plaintiff away from the scene. Defendant's expert witness testified that in his opinion the first fire was set by lighting a trail of kerosene which ran from near plaintiff's bedroom to kerosene soaked newspapers in a closet. Defendant's expert also testified that in his opinion the second fire was not caused by the first fire. Plaintiff was also behind in his mortgage payments at the time of the fire.

Plaintiff's evidence tends to show the following:

1) Plaintiff made no intentional misrepresentations. Plaintiff testified that he was told that the inventory forms he completed were not very important and that he was to list the replacement cost of all damaged property. He also testified that he had difficulty understanding the forms.

2) Plaintiff did not set the fires. Plaintiff summoned the fire department and attempted to put out the first fire. The

kerosene residues found at the scene were the result of refinishing the floors in the house. Plaintiff was driving around Robeson County at the time of the second fire. Plaintiff's estranged wife threatened to burn the house down. Plaintiff earned $30,000 per year and was in good financial standing at the time of the fire.

3) Plaintiff spent $2,611 in rent since his house burned and lost $21,763.99 in personal property.

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

Musselwhite, Musselwhite & McIntyre, by W. Edward Musselwhite, Jr., for plaintiff, appellee.

Moore, Ragsdale, Liggett, Ray & Foley, by Peter M. Foley, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant contends the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict on the grounds that the evidence established as a matter of law that plaintiff made willful and material misrepresentations to defendant insurance company. We disagree.

G.S. 58-176(c) governs defendant's affirmative defense of material misrepresentation. The statute, in pertinent part, provides:

> This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

To prove the G.S. 58-176(c) misrepresentation defense, defendant must show that the insured made statements that were: 1) false; 2) knowingly and willfully made; and 3) material. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985).

Defendant's motion for directed verdict and its motion for judgment notwithstanding the verdict raised the identical question. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981). The question raised is whether the plaintiff's evidence, when taken as true and considered in the light most favorable to the plaintiff, was insufficient as a matter of law to justify a verdict for the plaintiff. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976). Stated another way, the question raised is whether "the evidence was of such a character that reasonable men could form divergent opinions of its import, thereby justifying submission of the issues to the jury." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 371, 329 S.E. 2d 333, 339 (1985).

A review of the evidence relating to the issue of defendant's misrepresentation defense demonstrates that the evidence, when viewed in the light most favorable to plaintiff, the non-movant, was sufficient to support a jury finding that plaintiff did not knowingly and willfully make a material misrepresentation to the insurance company so as to void the policy under G.S. 58-176(c). The jury could have reasonably concluded that plaintiff's statements regarding who he was with prior to the fire did not influence defendant's decisions in investigating, adjusting or paying the claim and were therefore not material. The jury could have believed plaintiff when he testified that he forgot that the newspapers used to clean painting and refinishing equipment were in the closet. The jury also could have believed plaintiff when he explained his confusion concerning what property was damaged by fire and how he was supposed to complete the property loss form.

Defendant next assigns error to the trial court's denial of its Rule 59 motion "to set aside the verdict or in the alternative to require a remittitur." The courts of the State of North Carolina have no authority to grant remittiturs without the consent of the prevailing party. *Bethea v. Kenly*, 261 N.C. 730, 136 S.E. 2d 38 (1964). Failing to do that which the trial court has no authority to do is hardly an abuse of discretion.

An appellate court's review of a trial judge's discretionary ruling denying a motion to set aside a verdict and order a new trial is limited to a determination of whether the record clearly demonstrates a manifest abuse of discretion by the trial judge. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290

S.E. 2d 599 (1982). The record in the present case demonstrates no such abuse of discretion.

[2] Defendant's final contention on appeal is that the trial court erred in denying appellant's motion for directed verdict regarding plaintiff's claim for additional living expenses and for damage to real property on the grounds that plaintiff did not present sufficient evidence to support the recoveries. Defendant argues that the insurance policy requires compensation based upon actual cash value and that no evidence of actual cash value was submitted. In the pretrial order, defendant stipulated to the cost of repair and made a list of triable issues which included the proper amount of personal property damage compensation and additional living expenses but did not include the proper amount of real property damage compensation. We hold that by stipulating to the costs of repairing the real property and failing to list the proper amount of real property damage compensation as a triable issue, defendant waived jury trial on this issue. Therefore, the trial court did not err in denying defendant's directed verdict motion pertaining to real property damage.

The trial court also did not err in denying defendant's directed verdict motion regarding additional living expenses. Plaintiff put on evidence from which the jury could have reasonably found additional living expenses in the amount of $1,500.

All of defendant's assignments of error are overruled. In the trial we find no prejudicial error.

No error.

Judges WEBB and PARKER concur.

OLYMPIC PRODUCTS COMPANY, A DIVISION OF CONE MILLS CORPORATION, PLAINTIFF v. ROOF SYSTEMS, INC., CARLISLE CORPORATION, D/B/A CARLISLE TIRE & RUBBER COMPANY, CAROLINA STEEL CORPORATION, AND CRAVEN STEEL, INC., DEFENDANTS, AND CAROLINA STEEL CORPORATION, THIRD-PARTY PLAINTIFF v. CARLOS M. SUAREZ, T/A AND D/B/A CARLOS M. SUAREZ AND ASSOCIATES, THIRD-PARTY DEFENDANT

No. 8518SC166

(Filed 18 February 1986)

Limitation of Actions § 4.1— design and construction of roof—willful and wanton negligence alleged—accrual of cause of action—applicability of amendment of statute

Where two defendants designed and erected the steel superstructure for plaintiff's roof in 1969 and 1970, and the roof collapsed in 1982, plaintiff's claims for damages based on the alleged willful and wanton negligence of defendants were not barred by N.C.G.S. § 1-50(5), which provided at the time of construction that no action to recover damages for injury to an improvement to real property arising out of a defective condition of the improvement could be brought more than six years after the improvement was completed, since the statute was amended in 1981 to eliminate claims involving willful or wanton negligence from operation of the statute.

Judge PHILLIPS concurs in the result.

APPEAL by plaintiff and defendant Carlisle Corporation from *DeRamus, Judge.* Judgment entered 16 November 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 September 1985.

This action arose out of the collapse of a roof of the plaintiff's building on 26 May 1982. The plaintiff alleged that on 2 February 1982 Roof Systems entered into a contract for the installation of a new roof on a part of the building and was negligent in the installation of the roof which negligence was a proximate cause of the roof's collapse. Plaintiff alleged that Carlisle furnished the roofing material to Roofing Systems and was negligent in the instructions it gave to Roofing Systems and in the supervision of the installation of the roof which negligence was a proximate cause of the collapse of the roof. Plaintiff also alleged a breach of warranty by Carlisle.

The plaintiff alleged that in December 1969 it entered into a contract with Carolina Steel to design and erect the steel super-

structure for the roof and that Carolina Steel's willful and wanton negligence in the construction of the roof was a proximate cause of the roof's collapse. Plaintiff alleged that Craven Steel contracted with Carolina Steel in 1970 to erect the superstructure and its willful and wanton negligence in the erection of the superstructure was a proximate cause of the roof's collapse.

All defendants filed answers and Carlisle cross claimed against Carolina and Craven alleging that one or both of them were negligent in the construction of the roof which proximately caused its collapse. Carlisle alleged that this negligence intervened and insulated any negligence by Carlisle, that the negligence of Carolina and Craven was active negligence while any negligence of Carlisle was passive negligence so that Carlisle is entitled to indemnity from Carolina and Craven, and that if the roof's collapse was caused by the joint negligence of Carlisle and either Carolina or Craven it was entitled to contribution from either or both of them.

Extensive discovery was conducted. Carolina and Craven made motions for summary judgment. The court granted the motions on the ground that the claims against Carolina and Craven were barred by G.S. 1-50(5). It did not pass on the contentions of these two defendants that the materials filed showed there was no willful or wanton negligence by either of them.

The plaintiff and Carlisle appealed.

Smith, Moore, Smith, Schell & Hunter, by Vance Barron, Jr., for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan and Keith A. Clinard, for defendant appellant Carlisle Corporation.

Gabriel, Berry, Weston & Weeks, by M. Douglas Berry, for defendant appellee Craven Steel, Inc.

Adams, Kleemeier, Hagan, Hannah & Fouts, by W. Winburne King III and Thomas W. Brawner, for defendant appellee Carolina Steel Corporation.

WEBB, Judge.

This is not an appeal from a final judgment. The order granting summary judgment as to the claims against Carolina Steel and Craven Steel did not determine all claims. In our discretion we shall determine the matters brought forward by this appeal.

This appeal brings to the Court a question involving the interpretation of G.S. 1-50(5). G.S. 1-50(5) provided at the time of the construction of the building involved in this case that no action to recover damages for injury to an improvement to real property arising out of a defective condition of the improvement shall be brought more than six years after the improvement is completed. This section was amended in 1981 to provide that this limitation may not be asserted by any person who was guilty of willful or wanton negligence. The roof on the plaintiff's building was alleged to have collapsed in 1982. The question posed by this appeal is whether the 1981 amendment which eliminated claims involving willful or wanton negligence from G.S. 1-50(5) allows this action to be maintained when it could not have been brought prior to the amendment.

The appellees contend that six years after the building was complete any action by the plaintiffs was barred by G.S. 1-50(5) as it then was written. They say that at that time they had a vested right not to be sued and the General Assembly could not and did not amend G.S. 1-50(5) to take away this vested right.

We believe the resolution of this case depends on the interpretation our Supreme Court has given to G.S. 1-50(5). Our Supreme Court has interpreted G.S. 1-50(5) as a statute of repose and not a statute of limitation. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983); *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). A statute of limitations bars a claim which has arisen. A statute of repose does not bar a claim but defines it. If an action is not brought on an existing claim within the time prescribed by a statute of limitations the claim is barred and the defendant has a vested right not to be sued which the legislature may not take from him. In the case of a statute of repose which defines a claim the legislature can create claims based on matters that occur in the future. In this case the General Assembly in 1981 defined claims for injuries which occurred after that date. The plaintiff's claim arose

after the adoption of this statute and it is not barred by the applicable statute of limitations. It is not a claim which has been barred by a statute of limitation which the legislature has attempted to revive. If the injury had occurred before the 1981 amendment to the statute and more than six years after the completion of the construction there would have been no claim and the amendment to G.S. 1-50(5) would not have affected it.

We find support for our reasoning in *Trustees of Rowan Technical College v. Hammond Assoc., Inc.*, 313 N.C. 230, 233-234, 328 S.E. 2d 274, 276 (1985) in which our Supreme Court stated:

> At the outset we note that the present version of [G.S. 1-50(5)] as amended effective 1 October 1981 (1981 Sess. Laws, c. 644), does not apply to this claim. Both parties concede that had plaintiff's claim accrued after the effective date of the 1981 amendments to [G.S. 1-50(5)], it would be governed by the six-year statute of repose contained therein. Plaintiff's claim accrued, however, before the effective date of this statute. If plaintiff's claim was already barred when amended [G.S. 1-50(5)] became effective, it could not be revived by the amendments.

This case is distinguishable from *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 320 S.E. 2d 273 (1984), *review denied*, 312 N.C. 796, 325 S.E. 2d 485 (1985) relied on by the defendants. In that case the damage occurred before the 1981 amendment. The statute then in effect said there was not a claim and the legislature did not create a claim based on matters that had occurred in the past.

Craven Steel argues that even if the claim is not barred by G.S. 1-50(5) it was not error to dismiss the claim. They say that although the plaintiff alleges their actions were willful and wanton the factual allegations show that at worst their actions constituted no more than negligence. We believe that pursuant to *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984) the plaintiff has alleged enough to withstand a motion to dismiss the claim for willful or wanton negligence. The superior court did not pass on the sufficiency of the evidence to support a claim for willful or wanton negligence and no appeal was taken on this facet of the case. We do not pass on this part of the case.

Craven Steel also argues that Carlisle did not allege any willful or wanton negligence and the exclusion of G.S. 1-50(5) would not apply to Carlisle. As we read the allegations of Carlisle G.S. 1-50(5) does not apply. If Carlisle can show that any negligence attributed to it is insulated by the negligence of Carolina or Craven or that there was joint negligence of Carlisle and Carolina or Craven G.S. 1-50(5) does not prevent them from doing so.

For the reasons stated in this opinion we reverse the order for summary judgment in favor of Carolina Steel Corporation and Craven Steel, Inc.

Reversed and remanded.

Judge JOHNSON concurs.

Judge PHILLIPS concurs in the result.

STATE OF NORTH CAROLINA v. ALFONZA BULLARD

No. 8518SC821

(Filed 18 February 1986)

1. **Homicide § 30.3— first degree murder—instruction on involuntary manslaughter not required**

The trial court in a first degree murder case did not err in refusing to submit to the jury the possible verdict of guilty of involuntary manslaughter, since all the evidence showed that defendant intentionally took a swipe at the victim with a utility knife, and there was no evidence from which a jury could find that defendant committed involuntary manslaughter.

2. **Criminal Law § 138.32, 138.40— second degree murder—punishment—no mitigating factors**

The trial court was not required to find as mitigating factors for second degree murder that (1) defendant committed the offense under duress, coercion, threat, or provocation, since evidence that the victim was armed and initiated the confrontation by calling defendant an obscene name was contradicted; (2) defendant acted under strong provocation or the relationship between defendant and the victim was otherwise extenuating, since such finding was not required by uncontradicted evidence that defendant and the victim had been arguing over an extended period of time, and evidence that defendant was provoked was not uncontradicted or manifestly credible; and (3) defendant voluntarily acknowledged wrongdoing at an early stage of the criminal

process, since defendant acknowledged striking the victim but denied that he cut and killed him. N.C.G.S. 15A-1340.4(a)(2)b, i and l.

3. **Criminal Law § 138.28— punishment—aggravating factors—nolo contendere plea as prior conviction**

The trial court properly considered a plea of nolo contendere to a prior offense as a prior conviction for the purpose of sentencing. N.C.G.S. 15A-1340.2(4).

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 4 April 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 February 1986.

Defendant was charged in a proper bill of indictment with first degree murder. At trial, the State introduced evidence which tends to show that defendant struck the victim across the groin with a utility knife, severing his femoral artery and that the victim died a few minutes thereafter. Defendant was found guilty of second degree murder. From a judgment imposing a prison sentence of twenty years, defendant appealed.

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

Public Defender Wallace C. Harrelson and Assistant Public Defender Charles L. White, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns as error the trial court's refusal to submit to the jury the possible verdict of guilty of involuntary manslaughter. Defendant contends that the evidence in this case could support a finding of an unintentional homicide resulting from the reckless use of a deadly weapon. In support of this argument, defendant relies on the testimony of police officers regarding statements made by defendant following his arrest. Defendant told the officers that he swung the knife at the victim, but that he did not remember cutting him. This argument is without merit.

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from an act not amounting to a felony nor naturally dangerous to human life, or from a culpably negligent act or omission. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). The submission to the jury of a possible verdict of involuntary manslaughter when

the defendant has been charged with murder is necessary "only when there is evidence from which a jury could find such an included crime was committed." *State v. Whitley*, 311 N.C. 656, 667, 319 S.E. 2d 584, 591 (1984).

There is no evidence from which a jury could find that defendant committed involuntary manslaughter in this case. All of the evidence shows that defendant intentionally took a swipe at the victim with a utility knife. The trial court, therefore, properly refused to submit the possible verdict of involuntary manslaughter to the jury. *See, State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984).

Defendant next contends that the trial court erred in failing to find the following statutory mitigating factors listed in G.S. 15A-1340.4(a)(2):

> b. The defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability.
>
> . . .
>
> i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
>
> . . .
>
> l. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

We disagree with defendant's contention.

Where the evidence in support of a mitigating factor is uncontradicted and manifestly credible, it is error for the trial court to fail to find such mitigating factor. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The defendant has the burden of establishing such mitigating factors by the preponderance of the evidence. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983), *cert. denied*, 310 N.C. 310, 312 S.E. 2d 653 (1984).

[2] Defendant argues that evidence tending to show that defendant struck the victim with the knife after the victim started a heated argument by calling defendant by an obscene name and that the victim appeared to be armed compelled the trial court to

find that defendant committed the offense under "duress, coercion, threat, or provocation." The trial court did not err in failing to make such a finding, however, because this evidence was not uncontradicted or manifestly credible. Neither witness to the encounter testified that the victim was armed, and one witness denied that the victim initiated the confrontation by calling defendant by an obscene name.

In support of his argument that the trial court erred in failing to find that defendant "acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating," defendant again cites evidence tending to show that the victim initiated the confrontation as well as evidence tending to show that the victim and defendant had had a continuing antagonistic relationship. As discussed above, evidence tending to show that defendant was provoked is not uncontradicted or manifestly credible. Although the evidence that defendant and the victim had been arguing over an extended period of time was not contradicted, this evidence does not compel a finding that their relationship was "otherwise extenuating," because such evidence "does not necessarily lessen the seriousness of the crime committed." *State v. Michael*, 311 N.C. 214, 220, 316 S.E. 2d 276, 280 (1984).

In support of his contention that he voluntarily acknowledged wrongdoing at an early stage of the criminal process defendant relies upon evidence that, following his arrest, he told officers of the location of the knife and admitted striking the victim. This evidence, however, fails to affirmatively show that defendant acknowledged wrongdoing. While he acknowledged striking the victim, he denied that he cut and killed him, attributing the fatal blow to someone else. The court, therefore, was not required to find this mitigating factor. *See, State v. Michael*, 311 N.C. 214, 316 S.E. 2d 276 (1984).

[3] Finally, defendant contends that the trial court erred in considering a plea of nolo contendere to a prior offense as a prior conviction for the purposes of sentencing. This contention is without merit because the Fair Sentencing Act provides that "[a] person has received a prior conviction when he . . . has entered a plea of guilty or no contest to a criminal charge . . . ." G.S. 15A-1340.2(4); *State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985).

For the foregoing reasons, we hold that defendant had a fair trial free of prejudicial error.

No error.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL SESSOMS

No. 856SC832

(Filed 18 February 1986)

Narcotics § 3.1— substance purchased from defendant—chain of custody

In a prosecution of defendant for possession with intent to sell and deliver and delivery of a controlled substance, evidence was sufficient to establish a chain of custody and to show that a foil packet purchased from defendant by an undercover agent was received by an SBI chemist who analyzed its contents and determined that the packet contained cocaine.

Judge PARKER concurring in result.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 8 January 1985 in Superior Court, HERTFORD County. Heard in the Court of Appeals 10 February 1986.

Defendant was charged in a proper bill of indictment with the felonious possession with intent to sell and deliver a controlled substance and selling and delivering a controlled substance. At trial, the State offered evidence tending to show that on 18 July 1984, an SBI undercover agent, Lili Johnson, approached defendant and asked him if he would sell her some cocaine. Agent Johnson testified that Sessoms said he would "go and get it" and later returned and said that "he had it." She further testified that she purchased two aluminum foil packets from him for $50.00, which she placed in her pocket and later mailed to the SBI lab. An SBI chemist testified that she analyzed the contents of the packets and that, in her opinion, they contained cocaine.

Defendant testified that although Agent Johnson came to his apartment on 18 July 1984, he did not speak to her and did not sell cocaine to her.

The jury found defendant guilty as charged. From a judgment consolidating the offenses for sentencing and imposing a prison sentence of six years, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert G. Webb, for the State.

Assistant Appellate Defender Geoffrey C. Mangum for defendant, appellant.

HEDRICK, Chief Judge.

We note at the outset that the appellate defender continues to violate Rule 10(c) of the Rules of Appellate Procedure which in pertinent part provides, "[e]ach assignment of error . . . shall state plainly and concisely and without argumentation the basis upon which error is assigned." The assignments of error are not "plain and concise and without argumentation."

Defendant first undertakes to bring forward and argue questions purportedly raised by assignments of error four, five and six, based on ten exceptions noted in the record. Five of these exceptions have been noted in the record by a stamp bearing the following legend: "NO OBJECTION STATED AT TRIAL." Such an exception presents no question for review. The indiscriminate use of such a stamp demonstrates a disregard of our appellate process and we disapprove of such a practice.

Exceptions six and nine, purportedly supporting assignments of error four and five, are noted in the record after defendant was asked a series of questions on cross examination to which defendant did not object. Defendant did, however, object to two specific questions where the court made no ruling. Defendant did not move to strike the answers, which were in no way prejudicial to defendant.

Exception eight, purportedly supporting assignment of error six, relates to an objection to a question asked defendant on cross-examination, which the court sustained. Defendant was hardly prejudiced by this ruling.

Exceptions fifteen and sixteen, also purportedly supporting assignment of error six, relate to the court's allowing the State to offer into evidence and pass to the jury a photograph of defend-

ant, taken subsequent to the time of the events giving rise to the charges for which he was being tried. Defendant has failed to show that the introduction of the photograph was in any way prejudicial.

Assignments of error four, five and six are without merit.

By assignment of error one, based on exception one, defendant contends that the trial court erred in allowing the SBI chemist to testify that the substance she examined was cocaine. Defendant's argument based on this assignment of error does not relate in any way to the witness' competency to testify that the substance she analyzed was cocaine. This assignment of error is without merit.

Finally, based on assignments of error one, two, eight and nine, defendant argues that "the trial court erred in denying defendant's motion to dismiss the charges because the State failed to prove that the substance analyzed by Agent Miller was the same as that taken from defendant or that the substance tested was a controlled substance." Agent Johnson testified that she purchased two aluminum foil packets from defendant for $25.00 each, placed them in her pocket, and later placed them in an "evidence bag" which she labeled with her initials and the case number. She placed the bag in her briefcase and later mailed the bag in a manila envelope to the SBI lab. SBI Chemist Miller testified that she received the envelope in the mail, analyzed the contents, placed her initials and case number on the bag and returned the contents to Agent Johnson. Agent Johnson further testified that upon receiving the bag in the mail, she locked it in her file cabinet until the day of the trial. Both the chemist and the undercover agent identified the bag at trial by their initials and the case number. This evidence is sufficient to establish a chain of custody and to show that the foil packet purchased by Johnson was the substance analyzed by Miller. Miller testified that the substance she received, analyzed, and mailed to Agent Johnson was, in her opinion, "cocaine." This evidence was sufficient for the jury to conclude that defendant sold Agent Johnson a controlled substance in violation of G.S. 90-95.

These assignments of error have no merit.

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

No error.

Judge WEBB concurs.

Judge PARKER concurs in the result.

Judge PARKER concurring in result.

I concur in the result only. By stamping the record with the notation, no objection made at trial, the appellate defender appeared to be following the requirement stated in *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983) that a party must alert the appellate court that no action was taken by counsel at trial before asserting plain error or that a defect affected a substantial right which may be noticed although not brought to the attention of the trial judge. For this reason, I do not concur in the second paragraph of the majority opinion.

LILLARD THEODORE CROW, JR. AND JEAN EDWARDS CROW, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. CITICORP ACCEPTANCE CO., INC., A DELAWARE CORPORATION, AND CITICORP PERSON TO PERSON FINANCIAL CENTER, INC., A NORTH CAROLINA CORPORATION

No. 8510SC969

(Filed 18 February 1986)

Rules of Civil Procedure § 23— purchasers of mobile homes who financed purchase —no community of interest—no class action

There was insufficient community of interest between the named plaintiffs and the unnamed plaintiffs to require the trial court to certify the action as a class action where plaintiffs alleged that they and unnamed others purchased new mobile homes within North Carolina and financed at least $3,000 of their purchases through retail installment sales contracts entered after 1 April 1980; the contracts fixed a finance rate in excess of the maximum rate allowed by statutes; and the contracts were ultimately assigned to defendants.

APPEAL by plaintiffs from *Bailey, Judge*. Order entered 3 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 5 February 1986.

This is an appeal from an order granting partial judgment on the pleadings and dismissing without prejudice the claims of all unnamed class action plaintiffs. The plaintiffs allege that the plaintiffs, both named and unnamed, purchased new mobile or manufactured homes within North Carolina; that they financed at least $3,000.00 of their purchases through retail installment sales contracts entered after 1 April 1980; that the retail installment sales contracts fixed a finance charge rate in excess of the maximum rate allowable under G.S. 25A-44(1), part of the North Carolina Retail Installment Sales Act and G.S. 24-2, the North Carolina general usury statute; and that the retail installment sales contracts were ultimately assigned to defendants. Defendants moved pursuant to Rules 12(f), 12(c) and 23(a) of the North Carolina Rules of Civil Procedure to strike plaintiffs' motion to certify the action as a class action and to dismiss the class action without prejudice. From an order dismissing the class action without prejudice, plaintiffs appealed.

Edelstein and Payne, by M. Travis Payne; Nixon, Yow, Waller & Capers, by John B. Long; Hull, Towill, Norman & Barrett, by David E. Hudson; and Dye, Miller, Tucker & Everitt, by Thomas W. Tucker, for plaintiffs, appellants.

Moore, Van Allen, Allen & Thigpen, by John T. Allred, Robert D. Dearborn, Randel E. Phillips and William D. Dannelly, for defendants, appellees.

HEDRICK, Chief Judge.

The first issue raised by this appeal is whether it should be dismissed as premature. The order dismissing the class action does not determine the controversy and is interlocutory. However, the order affects a substantial right of the unnamed plaintiffs and is immediately appealable. *Perry v. Cullipher*, 69 N.C. App. 761, 318 S.E. 2d 354 (1984).

In *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979), we set out six requirements for class actions under G.S. 1A-1, Rule 23(a).

These requirements are:

1. The existence of a class;

2. The class members within the jurisdiction of the court must adequately represent any class members outside the jurisdiction of the Court;

3. The class must be so numerous as to make it impracticable to bring each member before the court;

4. More than one issue of law or fact common to the class should be present;

5. The party representing the class must fairly insure the representation of all class members;

6. Adequate notice must be given to the class members.

Id. The party asserting the class action has the burden of showing that all of the prerequisites to utilizing the class action procedure have been satisfied. *Id.* Although Rule 23 should receive a liberal construction and be kept free from technical restrictions, a court has broad discretion in deciding whether to allow a class action. *Id.*; *In re Engelhard & Sons Co.*, 231 U.S. 646, 34 S.Ct. 258, 58 L.Ed. 416 (1914); 7A Wright and Miller, *Federal Procedure*: Civil Sec. 1785, p. 134.

In applying the law of class actions to the case at hand, we find it necessary to discuss only the first requirement of class actions, the existence of a class. Whether a class exists is a question of fact to be determined by the court on a case-by-case basis. "Apparently any group of persons having a community of interest in a particular matter constitutes a class and one or more of the group may sue or be sued on behalf of all." Shuford, *N.C. Civ. Prac. & Proc.* (2nd ed.), Sec. 23-3. The central issue raised by this appeal is whether there is a sufficient community of interest between the named plaintiffs and the unnamed plaintiffs to meet the requirements of G.S. 1A-1, Rule 23(a).

In *Nodine v. Mortgage Corp.*, 260 N.C. 302, 132 S.E. 2d 631 (1963), a mortgagor brought suit on behalf of himself and a class of unnamed plaintiffs to challenge the defendant-mortgagee's use of a late charge clause in the defendant-mortgagee's standard form deed of trust. Our Supreme Court stated that:

> The interest of Nodine, the named plaintiff, relates solely to the note and deed of trust executed and delivered by him under date of April 2, 1952; and the interest of each of the so-called "unnamed plaintiffs" relates solely to the particular note and deed of trust executed and delivered by him. The facts alleged are insufficient to show Nodine had or has authority to file suit or otherwise act in behalf of any of the unnamed persons he undertakes to join as plaintiffs in this cause. Such unnamed persons may not be considered plaintiffs herein.

Id. at 304, 132 S.E. 2d at 633. Although *Nodine* was decided prior to the enactment of G.S. 1A-1, Rule 23, it continues to state the rule in effect in North Carolina. See *Mosley v. Finance Co.*, 36 N.C. App. 109, 243 S.E. 2d 145, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978).

Nodine and *Mosley* are not significantly distinguishable from the case before us. The interest of each of the unnamed plaintiffs relates solely to the particular retail installment sales contract which each plaintiff signed. We therefore hold that the trial court did not err in dismissing the class action. There is insufficient "community of interest" between the named plaintiffs and the unnamed plaintiffs to require the trial court to certify the action as a class action.

Appellants' reliance on *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893 (1955) is misplaced. In *Mills*, one cemetery plot owner was allowed to sue for all cemetery plot owners in an attempt to enjoin a nonconforming grave site, suspend improper cemetery regulations and receive certain promised improvements. A determination of which aesthetic cemetery regulations are enforceable would directly affect all lot owners. While only one cemetery was at issue in *Mills*, more than one contract is at issue in the present case.

For the foregoing reasons, we find no error in the trial court's order dismissing the class action.

Affirmed.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN MAYNARD, JR.

No. 855SC650

(Filed 18 February 1986)

1. **Trover and Conversion § 4; Criminal Law § 142.4— destruction of vehicle—amount of restitution to owner improper**

In a prosecution for conversion of a vehicle by a bailee, the trial court erred in ordering defendant to pay $2,507.90 as restitution to the owner of the vehicle as a condition of probation where the court arrived at that figure by adding to the purchase price the amount the owner had invested in repairs and restoration and by subtracting from the result the sum the owner had received from her insurer for loss of the vehicle, since the amount of restitution should have been the fair market value or reasonable worth at the time of the vehicle's destruction.

2. **Criminal Law § 142.3— destruction of vehicle—no restitution to insurer—restitution to owner proper**

Though the trial court could not order defendant to pay restitution to the insurer who had paid a vehicle owner its market value at the time of its destruction, the court could order defendant to pay the vehicle owner a sum no higher than the largest figure contained in the evidence representing fair market value, $1,500 paid to her by her insurer, and defendant could be ordered to pay restitution to the aggrieved party even though she had previously received the sum from a third party. N.C.G.S. § 15A-1343(d).

APPEAL by defendant from *Collier, Judge.* Judgment entered 16 October 1984 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 30 October 1985.

Attorney General Thornburg, by Associate Attorney General J. Mark Payne, for the State.

Robert U. Johnsen for defendant appellant.

WHICHARD, Judge.

An automobile owner entrusted her vehicle to defendant for repairs and painting. She instructed that defendant was not to drive the vehicle for his personal use. Defendant nevertheless commenced a trip to Texas during which the vehicle "broke down" and was "scrapped."

The State indicted defendant for conversion by bailee in violation of N.C. Gen. Stat. 14-168.1. Following the State's evidence at trial defendant withdrew his plea of not guilty and

the State accepted a plea of guilty of unauthorized use of a motor vehicle in violation of N.C. Gen. Stat. 14-72.2. The court imposed a sentence of two years imprisonment. It suspended the sentence and placed defendant on supervised probation for five years. As a regular condition of probation, N.C. Gen. Stat. 15A-1343, the court ordered defendant to pay $2,507.90 as restitution to the owner of the vehicle. It arrived at this figure by adding to the purchase price the amount the owner had invested in repairs and restoration and by subtracting from the result the sum the owner had received from her insurer for loss of the vehicle.

[1] Defendant's sole contention is that "[t]he amount of restitution . . . is not supported by the evidence, constitutes a penalty or punishment [,] and is therefore excessive as a matter of law." We hold that the measure of damages used to determine the amount of restitution does not accord with the statutory definition of restitution, and that the restitution condition of defendant's probation thus must be vacated.

Restitution as a condition of probation is controlled by statute. N.C. Gen. Stat. 15A-1343(d). The amount of restitution "must be limited to that supported by the record." *Id.* Restitution is defined as "compensation for damages or loss as could ordinarily be recovered by an aggrieved party in a civil action." *Id.* The measure of damages in a civil action for the tortious destruction of personal property is the fair market value or reasonable worth of the property at the time and place of destruction. *Hart v. R.R.*, 144 N.C. 91, 92, 56 S.E. 559 (1907); *Beaufort and Morehead Railroad Co. v. The Damyank*, 122 F. Supp. 82, 84 (E.D.N.C. 1954). *See also R.R. v. Houtz*, 186 N.C. 46, 49, 118 S.E. 850, 851 (1923); *Newsom v. Cothrane*, 185 N.C. 161, 162, 116 S.E. 415, 416 (1923); D. Dobbs, *Remedies* Sec. 5.10 (1973). This measure is a corollary to the more familiar principle that the measure of damages for injury to personal property is the difference between market value immediately before and immediately after the injury. *E.g. Kaplan v. City of Winston-Salem*, 286 N.C. 80, 83, 209 S.E. 2d 743, 746 (1974); *Roberts v. Freight Carriers*, 273 N.C. 600, 606, 160 S.E. 2d 712, 717 (1968). It follows that the measure of damages for property which is destroyed and thus lacks market value is its fair market value immediately prior to destruction.

The owner here testified that the vehicle was "totaled" and was "in the salvage yard in Georgia." The vehicle thus, in effect,

was destroyed, and the measure of damages the owner could recover in a civil action was its fair market value immediately prior to destruction. As noted, the court arrived at its restitution figure by adding to the purchase price the amount the owner had invested in repairs and restoration and subtracting from the result the sum the owner had received from her insurer. Since this measure did not reflect fair market value or reasonable worth at the time of the vehicle's destruction, it did not accord with the statutory definition of restitution for probation purposes and the court erred in applying it.

When asked "the approximate fair market value of [the] vehicle," the owner testified: "I paid thirteen hundred for it." When asked "do you have any other knowledge as to the value of your car other than the price you paid for it," she testified: "No, I don't, except what the insurance company gave me for it." She further testified that the insurer paid her $1,500.00 for the vehicle. There was no other evidence of the fair market value or reasonable worth of the vehicle at the time of its destruction. The court thus could have based restitution as a condition of probation only on this evidence.

[2] The record establishes that the insurer has paid the owner the largest figure representing fair market value contained in the evidence. N.C. Gen. Stat. 15A-1343(d) provides that "no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant." The court thus cannot order defendant to pay restitution to the insurer. *See State v. Stanley*, 79 N.C. App. 379, 339 S.E. 2d 668 (1986) (filed simultaneously herewith).

N.C. Gen. Stat. 15A-1343(d), as it read when the order was entered, was unclear as to whether a defendant could be ordered to pay restitution to the aggrieved party even though the aggrieved party had previously received the sum from a third party. The 1985 General Assembly amended the statute, however, to read as follows:

> [N]o third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant, *but the liability of a third party to pay indemnity to an aggrieved party or any payment of indemnity*

actually made by a third party to an aggrieved party does not prohibit or limit in any way the power of the court to require the defendant to make complete and full restitution or reparation to the aggrieved party for the total amount of the damage or loss caused by the defendant.

1985 N.C. Sess. Laws, ch. 474 (language added by amendment emphasized by the Court). "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." *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E. 2d 481, 483 (1968); *see also Desk Co. v. Clayton, Comr. of Revenue*, 8 N.C. App. 452, 458, 174 S.E. 2d 619, 623 (1970). We believe the legislative purpose in enacting the foregoing amendment to N.C. Gen. Stat. 15A-1343(d) was to clarify the original act rather than to change its substance. We thus hold that while the court erred in ordering defendant to pay the aggrieved party a sum that did not accord with the statutory definition of restitution, it may order him to pay her a sum no higher than the largest figure contained in the evidence representing fair market value, *viz*, the $1,500.00 paid to her by her insurer.

Accordingly, the restitution condition of defendant's probation is vacated, and the cause is remanded for entry of an appropriate condition consistent with this opinion.

Condition of probation vacated; remanded for entry of an appropriate condition.

Chief Judge HEDRICK and Judge JOHNSON concur.

IN THE MATTER OF: THE WILL OF HOMER CLIFTON GARDNER

No. 8526SC384

(Filed 18 February 1986)

1. Wills § 21.4— caveat—undue influence—insufficiency of evidence

The trial court in a caveat proceeding did not err in refusing to submit to the jury an issue as to undue influence where the evidence tended to show

that the testator left his entire estate to his wife of twenty years who looked after his needs and comfort during many years of declining health; testator's failing health caused him to be suspicious and quarrelsome rather than pliable and submissive; no prior will was revoked; testator's 1962 will in favor of caveators, his children by his first marriage, was revoked by law when he married propounder the next year; the final disposition which testator made of his property was completely natural; though testator lived with his wife, he was not under her constant control or supervision; the caveators and other relatives had unrestricted access to him, telephoning and visiting him whenever they saw fit; and the testator, rather than his wife, arranged for the execution of the will.

2. **Wills § 22— caveat—evidence of mental capacity—inventory of assets improperly excluded**

In a caveat proceeding where testamentary capacity was strongly contested, the trial court erred in refusing to receive into evidence an inventory of testator's assets made by his court-appointed guardian a few months after the will was executed which showed that testator had savings of nearly $100,000, since testator told the drafter of the will, at the time it was drawn, that his savings amounted to about $50,000, and such evidence tended to indicate that testator did not know the extent and value of his property, one of the cardinal requisites of testamentary capacity.

APPEAL by caveators from *Snepp, Judge*. Judgment entered 8 November 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 October 1985.

The testator died in Charlotte on 5 February 1983 at age 81, survived by his wife of twenty years, Ellie Gardner, and three adult children by his first wife, who died in 1962. The will, executed on 24 January 1980, left his entire estate to his wife. Seven weeks after executing the will he had a stroke; two weeks later a proceeding to declare him mentally incompetent was initiated; and on 9 April 1980, following a jury trial, he was so adjudged and a guardian was appointed. After the stroke Mr. Gardner required institutional care and stayed in a hospital or nursing home until he died. The propounders are Thomas G. Ginn, the executor, and Mrs. Gardner; the caveators are decedent's three children, who alleged that he lacked testamentary capacity and was unduly influenced. At trial the court directed a verdict against the caveators on the undue influence issue, and the jury answered the testamentary capacity issue in favor of the propounders.

In pertinent part, the testimony of testator's children and other relatives, all of whom lived in the county, was to the follow-

ing effect: Before the will was executed the testator and Mrs. Gardner lived alone in their home and Mrs. Gardner did the housework and attended to his needs to the extent necessary. During his last years Mr. Gardner's failing health made him depend on Mrs. Gardner for the daily management of his personal and financial affairs; he had severe diabetes, his vision was poor, and he trembled badly. During that period their relationship was mistrustful and quarrelsome; he feared that she wanted to get rid of him or kill him for his money and complained that she controlled his personal affairs more than necessary; she feared that he would predecease her and leave none of his property to her; they had many heated arguments, and on one occasion Mrs. Gardner said she would take all of his money and put him out on the street. During the year before the will was executed, as his health continued to decline, he had many sudden mood changes, often was forgetful, sometimes did not recognize his children, occasionally said inappropriate things, was less active, and required more rest. At all times during the marriage the children visited Mr. Gardner and telephoned him whenever they wanted to, and some did so often. Mrs. Gardner was never friendly toward the children, did not encourage their visits and once told Donald Gardner, the testator's son, to leave the house, but whether he left or not the evidence does not show.

A public health nurse, who visited the Gardner home weekly during the testator's latter years, testified that he occasionally argued with his wife, occasionally forgot to take his medication, and often worried about his declining health and becoming dependent on others. Patrick Hunter, the lawyer who drafted the will, testified: He visited the Gardner home on 17 January 1980 to obtain information necessary to draft the will; Mrs. Gardner though at home was not in the room when he and Gardner discussed the will; Gardner told him how he wanted his property to go and said: "[Ellie Gardner] earned everything she's got coming just by living with me. John D. Rockefeller wouldn't have had enough money to make up for living with me." Mr. Hunter's testimony also indicated that Mr. Gardner knew what he was doing, knew the nature and extent of his property, and was under no apparent influence from his wife.

Leonard, Shannonhouse, McNeely, MacMillan & Durham, by Thomas J. Hefferon, and Haynes, Baucom, Chandler, Claytor & Benton, by Rex C. Morgan, for caveator appellants.

Sanders & London, by Alvin A. London, for propounder appellees.

PHILLIPS, Judge.

[1] The caveators' first contention, that the trial judge erred in refusing to submit the undue influence issue to the jury, has no merit and we overrule it. The evidence stated above, when viewed in the light most favorable to the caveators, tends to show only that Mr. Gardner's health was failing and that Mrs. Gardner had the opportunity to influence him in the making of his will. It does not tend to show that she ever influenced him, unduly or otherwise, or that she was capable of substituting her will for his, which is the essence of undue influence. *In re Will of Harris*, 218 N.C. 459, 461, 11 S.E. 2d 310, 310-11 (1940). According to the evidence the testator's failing health caused him to be suspicious and quarrelsome, rather than pliable and submissive. No prior will was revoked; his 1962 will in favor of the children was revoked by the law when he married Mrs. Gardner the next year. The final disposition that Mr. Gardner made of his property—to the wife that had looked after his needs and comfort during many years of declining health—was completely natural. Though the testator lived with Mrs. Gardner, he was not under her constant control or supervision; the caveators and other relatives had unrestricted access to him, telephoning and visiting him whenever they saw fit. And the testator, rather than Mrs. Gardner, arranged for the execution of the will and for aught that the record shows she played no part in it. Thus, the evidence failed to raise the undue influence issue and the court correctly directed verdict thereon. The cases of *In re Will of Andrews*, 299 N.C. 52, 261 S.E. 2d 198 (1980) and *In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932), which caveators rely upon, involved factual situations quite unlike the one here.

[2] But the caveators' other contention, that the court erred to their prejudice by refusing to receive certain evidence bearing on the testamentary capacity issue, is well taken. The evidence that the court refused to receive was an inventory of Mr. Gardner's

assets made by his court-appointed guardian a few months after the will was executed. According to the inventory, Mr. Gardner had savings amounting to nearly $100,000; whereas, when the will was drafted he told the drafter, according to the latter's testimony, that his savings amounted to about $50,000. This evidence should have been received. It tends to indicate that Mr. Gardner did not know the extent and value of his property, one of the cardinal requisites of testamentary capacity under our law. *In re Will of Shute*, 251 N.C. 697, 111 S.E. 2d 851 (1960). Since the testamentary capacity issue was so strongly contested the rejection of this evidence could have deprived the caveators of a verdict and a new trial is required.

New trial.

Judges WEBB and JOHNSON concur.

STUART K. WARD v. JANET TURCOTTE

No. 853SC891

(Filed 18 February 1986)

Libel and Slander § 16— accusation of crime—statement made without good faith or probable cause—summary judgment for defendant improper

The trial court in an action for slander erred in entering summary judgment for defendant where the evidence tended to show that golf carts were vandalized; defendant, as a member of the country club, told the cart owner that plaintiff and others were guilty of the vandalism; defendant's evidence established her qualified privilege; but defendant's statement that she had "no earthly idea" where she had heard that plaintiff had committed vandalism and that she had not seen plaintiff commit vandalism was sufficient to raise a genuine issue of material fact as to whether her statements were made without good faith or probable cause, thus constituting actual malice and defeating her claim of qualified privilege.

APPEAL by plaintiff from *Phillips, Judge*. Judgment entered 5 October 1984 in PITT County Superior Court. Heard in the Court of Appeals 16 January 1986.

Plaintiff filed this action on 23 September 1983, alleging that defendant slandered him and praying that compensatory damages

of $100,000 and punitive damages of $100,000 be recovered. After answering, defendant moved for summary judgment.

The forecast of the evidence before the trial court tended to show the following facts and circumstances. Gordon Fulp was the golf professional at the Greenville Country Club in 1982. He was the owner of all the golf carts at the club and solely responsible for their operation and maintenance. On three occasions carts at the club had been vandalized; the third time alone approximately twelve carts were damaged.

In September and October of 1982, Janet Turcotte was a "dependent member" of the Country Club, her husband Edward being a member. Ms. Turcotte approached Mr. Fulp in September and told him that she knew who had damaged his carts, mentioning the names of four local boys, including plaintiff. According to Mr. Fulp, when asked how she had obtained this information, Ms. Turcotte said that "one of her relatives or something that's at one of the schools had told her. And I said, 'Well, are you sure?' And she says, 'What she says is pretty reliable information.' "

Ms. Turcotte returned a week later to find out what action Mr. Fulp had taken against the four boys. Mr. Fulp replied that he was reluctant to pursue the matter, to which Ms. Turcotte answered, "Well, I would," and further reassured him that she had "good information." However, when asked later at a deposition where she had heard that plaintiff had been involved in the vandalism, defendant replied, "I have no idea where I heard it. . . . I have no earthly idea."

After examining the interrogatories, answers to interrogatories, affidavits and depositions offered, the trial court entered summary judgment for defendant. Plaintiff appealed.

Paul W. White for plaintiff-appellant.

Jeffrey L. Miller for defendant-appellee.

WELLS, Judge.

Summary judgment should be granted when a party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure; *Ipock v. Gilmore*, 73 N.C.

App. 182, 326 S.E. 2d 271, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985).

Defendant admits in her brief that the elements of slander, as alleged by plaintiff, are sufficiently proven to overcome a motion for summary judgment. Thus, the only issue before this Court is whether defendant's forecast of the evidence on the issue of her qualified privilege defense leaves no genuine issue of material fact and entitles her to judgment as a matter of law.

> What constitutes a privileged occasion is defined [as] ". . . when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter. . . . [Qualified privilege] relates more particularly to private interests; and comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social made to a person having a corresponding interest or duty." [Citations omitted.]

Ponder v. Cobb, 257 N.C. 281, 126 S.E. 2d 67 (1962). Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute. *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971). Qualified privilege is an affirmative defense and must be specially pleaded. *Id.* The burden is on defendant to establish facts sufficient to support this plea. *Id.* Where qualified privilege exists, plaintiff cannot recover absent actual malice; the burden of proving actual malice rests on plaintiff. *Id.* Actual malice may be proven by showing that the defendant published the defamatory material with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity. *Gibby v. Murphy*, 73 N.C. App. 128, 325 S.E. 2d 673 (1985).

Gordon Fulp owned, operated and maintained the golf carts and had an interest in determining the identity of the vandals. Ms. Turcotte had a moral and social duty to Mr. Fulp, the victim of a crime, to inform him of the perpetrators' identity. This duty

was buttressed by the Country Club rule that states, "The membership is strongly encouraged to report violators and damages." This duty constitutes a qualified privilege. *Ponder v. Cobb, supra.*

However, the defense of qualified privilege may be defeated by a showing of actual malice on the part of the declarant. *Stewart, supra.* Actual malice may be found in a reckless disregard for the truth, *Gibby, supra,* and may be proven by a showing that the defamatory statement was made in bad faith, without probable cause or without checking for truth by the means at hand. *Dellinger v. Belk,* 34 N.C. App. 488, 238 S.E. 2d 788 (1977), *disc. rev. denied,* 294 N.C. 182, 241 S.E. 2d 517 (1978).

In her deposition Ms. Turcotte stated that she had "no earthly idea" where she had heard that the plaintiff had committed vandalism. She also said that she had not seen the plaintiff vandalize the golf carts and had never heard of anyone seeing him vandalize the carts. This evidence is sufficient to raise a genuine issue of material fact as to whether Ms. Turcotte's allegations were made without good faith or probable cause, thus constituting actual malice. For this reason we hold that summary judgment was improvidently granted.

We note that, should the jury find actual malice on the part of defendant, defendant may be held liable for punitive damages as well as compensatory damages. *Cochran v. Piedmont Publishing Co.,* 62 N.C. App. 548, 302 S.E. 2d 903, *disc. rev. denied,* 309 N.C. 819, 310 S.E. 2d 348 (1983), *cert. denied,* --- U.S. ---, 105 S.Ct. 83, 83 L.Ed. 2d 30 (1984).

Reversed.

Judges ARNOLD and WEBB concur.

E. F. BLANKENSHIP COMPANY v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; WILLIAM R. ROBERSON, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; AND NORTH CAROLINA STATE HIGHWAY, ADMINISTRATOR, BILLY ROSE

No. 8510SC709

(Filed 18 February 1986)

Highways and Cartways § 9— action to recover for highway construction—claim improperly filed—complaint dismissed

Where plaintiff alleged that it had not received compensation properly due under a highway construction contract and filed a claim pursuant to N.C.G.S. § 136-29, but plaintiff's verification was not filed with its first claim and the second claim was not received within the statutorily prescribed period, plaintiff failed to fulfill a condition precedent to maintaining its action in superior court and its complaint was properly dismissed.

Judge BECTON dissenting.

APPEAL by the plaintiff from *Bailey, Judge*. Judgment entered 26 February 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 3 December 1985.

The plaintiff entered into a highway construction contract with the North Carolina Department of Transportation. On 12 March 1984, after completion of the project, the plaintiff received payment of its final estimate from the Department. The plaintiff, alleging that it had not received the compensation properly due under the contract, filed a claim pursuant to G.S. 136-29.

The plaintiff's office manager assembled and mailed the claim on 9 May 1984, but "inadvertently failed to attach" the plaintiff's president's affidavit verifying the claim. After the State Highway Administrator received the claim on 10 May 1984 he responded that the claim could not be considered because it was not verified as required by G.S. 136-29. The plaintiff then submitted an amended claim, which was another copy of the original claim with the affidavit attached. This amended claim was received on 21 May 1984. In a letter of 22 May 1984 the State Highway Administrator stated that the plaintiff's claim could not be considered because the first claim was not verified and the second claim was not received within the statutory time period.

The plaintiff filed this action which was dismissed by the superior court. The plaintiff appealed.

Blanchard, Tucker, Twiggs, Earls & Abrams, by Charles F. Blanchard and Donald R. Strickland, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Eugene A. Smith and Assistant Attorney General Evelyn M. Coman, for defendant appellee.

WEBB, Judge.

This action was brought pursuant to G.S. 136-29 which provides in part:

> (a) Upon the completion of any contract for the construction of any State highway awarded by the Department of Transportation to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within 60 days from the time of receiving his final estimate, submit to the State Highway Administrator a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based . . . .
>
> (b) As to such portion of the claim as is denied by the State Highway Administrator, the contractor may, within six (6) months from receipt of said decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. . . .
>
> . . . .
>
> (d) The submission of the claim to the State Highway Administrator within the time and as set out in subsection (a) of this section and the filing of an action in the superior court within the time as set out in subsection (b) of this section . . . shall be a condition precedent to bringing such an action under this section and shall not be a statute of limitations.
>
> (e) The provisions of this section shall be deemed to enter into and form a part of every contract entered into between the Department of Transportation and any contractor, and no provision in said contracts shall be valid that is in conflict herewith.

The sole issue is whether the plaintiff's first claim, received on 10 May 1984, was "written and verified" within the meaning of G.S. 136-29(a) so that the plaintiff fulfilled a condition precedent to bringing this action in superior court.

The express language of G.S. 136-29(a) provides that a contractor may "within 60 days from the time of receiving his final estimate, submit to the State Highway Administrator a *written and verified claim* . . . ." (Emphasis added.) G.S. 136-29(d) then clearly states that "submission of the claim to the State Highway Administrator within the time and *as set out in subsection (a)* . . . shall be a condition precedent to bringing such an action under this section . . . ." (Emphasis added.) Therefore, to satisfy G.S. 136-29 the contractor must submit a claim, accompanied by evidence of verification, within the statutory time limit.

Because the plaintiff's verification was not filed with the first claim and the second claim was not received within the prescribed period, the plaintiff failed to fulfill a condition precedent to maintaining its action in superior court and the plaintiff's complaint was properly dismissed.

The plaintiff argues that it complied with the statute because the claim was both written and verified within the statutory period. It contends the claim had been verified at the time it was filed on 10 May 1984 although the verification was not filed with the claim. We believe the plain words of the statute require that the verification be filed with the claim.

Affirmed.

Judge BECTON dissents.

Judge COZORT concurs.

Judge BECTON dissenting.

North Carolina General Statutes Section 136-29(a) (1981) clearly requires that the claim be written and verified at the time it is submitted and that it be submitted within sixty days. In my opinion, however, the statute does not clearly require that proof of verification, as a separate document or as part of the claim, be

submitted with the claim itself. No one seems to dispute that the claim was, in fact, verified on 9 May 1984, before it was submitted the first time. Indeed, the 9 May 1984 certified letter to defendant Department of Transportation states in the first sentence that plaintiff is "submitting a written *and verified* claim setting forth the facts upon which it is based." (Emphasis added.) Because all the evidence suggests that the claim was verified when it was first submitted, and because the Commission was in no way prejudiced (having notice that a claim that had been verified was pending), I vote to reverse the trial court and allow the claim to be heard.

MICKI S. MEWBORN LOVE v. VIRGIL MEWBORN, III

No. 8515DC1060

(Filed 18 February 1986)

1. **Husband and Wife § 11.1— separation agreement—"alimony" as part of property settlement**

The trial court could properly consider parol evidence regarding the situation of the parties at the time of execution of their separation agreement and property settlement to determine whether payments denominated "alimony" in the agreement were part of the property settlement between the parties.

2. **Husband and Wife § 12— separation agreement—obligation to pay not terminated upon renewal of sexual relations**

Evidence was sufficient to support the trial court's finding that property settlement and alimony payments were mutually dependent which in turn supported its conclusion that defendant's obligation to pay under the parties' separation agreement and property settlement did not terminate upon renewal of sexual relations.

APPEAL by defendant from *Allen (J.B., Jr.), Judge.* Judgment entered 1 August 1985 nunc pro tunc 21 May 1985. Heard in the Court of Appeals 12 February 1986.

Plaintiff and defendant who were husband and wife separated on 14 January 1980. They entered a "separation agreement and property settlement" on 1 May 1980. As part of the separation agreement and property settlement, the defendant agreed to pay plaintiff $800.00 per month "alimony" for a period of ten

years. By the terms of the agreement, defendant's obligation would terminate upon the death or remarriage of plaintiff.

The parties admit that a reconciliation occurred in May of 1981 and that sexual relations resumed during the less than twenty-four hour reconciliation period. The parties were divorced in July of 1982 and plaintiff remarried in July of 1983. Following the reconciliation of May 1981, defendant stopped making the $800.00 per month payments to plaintiff. On 27 December 1984, plaintiff commenced this action to recover $800.00 per month from June of 1981 through the time of her remarriage. From a judgment granting plaintiff $20,800 plus interest, defendant appealed.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison, for plaintiff, appellee.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by Wiley P. Wooten and T. Randall Sandifer, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant contends that the twenty-four hour reconciliation of the parties terminated defendant's "alimony" obligations. It is well settled that a single act of sexual intercourse between a husband and wife constitutes a reconciliation and terminates alimony obligations. *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978). However, property settlements may be executed before, during or after marriage and are not necessarily terminated by reconciliation. See G.S. 50-20(d); *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984). Thus the central issue on this appeal is whether the trial court erred in determining that the $800.00 per month payments denominated "alimony" in the agreement were part of the property settlement between the parties.

[1] Defendant by his second and third assignments of error contends that the trial court committed reversible error in admitting the parol evidence upon which the court based its finding that the payments were part of the property settlement. He argues that the term "alimony" in the separation agreement and property settlement was clear and unambiguous and that therefore the evidence regarding the negotiations was inadmissible parol evidence. We disagree.

The fact that payments are denominated "alimony" militates against a finding that the payments are part of a property settlement but is "far from conclusive on the issue." *White v. White*, 296 N.C. 661, 668, 252 S.E. 2d 698, 702 (1979). Evidence regarding the situation of the parties at the time of the agreement is admissible to show whether the parties intended the payments to be merely alimony or a part of the property settlement. *Id.*

Defendant next argues that plaintiff's exhibit B, a letter from plaintiff's attorney to defendant's attorney dated 5 March 1980, was erroneously admitted without foundation. This contention is not properly before us. At trial the defendant objected to the admission of plaintiff's exhibit B on the grounds that "any negotiations between the parties prior to culmination of the separation agreement is not admissible; they were simply negotiations and did not become a part of the separation agreement." Defendant never objected to the foundation laid for plaintiff's exhibit B. Defendant having made a specific objection at trial based upon the parol evidence rule may not argue improper foundations on appeal. *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907 (1981); 1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 27 (2nd ed. 1982).

By assigning error to the trial court's judgment and denial of his motion for directed verdict, defendant challenges the sufficiency of the evidence to support the court's findings of fact, the sufficiency of the findings of fact to support the conclusions of law and the sufficiency of the conclusions of law to support the judgment.

[2] The evidence taken in the light most favorable to the plaintiff is sufficient to support the trial court's finding that the property settlement provisions and the alimony provisions of the separation agreement and property settlement were intended to be mutually dependent. The stipulated testimony of the plaintiff is to this effect. Plaintiff's exhibit B, the letter from plaintiff's attorney to defendant's attorney dated three months prior to the separation agreement and property settlement, states that "Virgil will pay to Micky the sum of $55,000, all to constitute a property settlement. . . . As an alternative to the cash settlement of $55,000, Virgil may pay the sum of $1,000 per month for a period of 8 years. . . ."

The trial court's finding of fact that the property settlement and alimony payments were mutually dependent supports its conclusion that the defendant's obligation did not terminate upon renewal of sexual relations. See G.S. 50-20(d); *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984). The trial court's conclusion that defendant's obligation did not terminate upon renewal of sexual relations supports its judgment ordering defendant to pay the omitted payments. All of defendant's assignments of error are overruled. The judgment of the district court is affirmed.

Affirmed.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. SAM COE CAMPBELL

No. 8518SC1069

(Filed 18 February 1986)

Courts § 3; Gambling § 2— motion to destroy slot machine—no underlying pending action—no jurisdiction of court

The superior court was without jurisdiction to hear a motion for destruction of an illegal slot machine where there was no underlying pending action. N.C.G.S. 14-298.

APPEAL by defendant from *Davis, Judge*. Order directing destruction of seized property entered 14 June 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 February 1986.

The pertinent portions of the record before us contain the following:

1) A warrant for the arrest of Sam Coe Campbell for unlawfully and willfully operating a game of chance in violation of G.S. 14-292;

2) A warrant for the arrest of Sam Coe Campbell for unlawfully and willfully allowing gambling on a premises licensed for

the sale and consumption of alcoholic beverages in violation of G.S. 18B-1005;

3) A warrant for the arrest of Sam Coe Campbell for unlawfully and willfully keeping a slot machine in violation of G.S. 14-295;

4) "State's Brief in Support of Motion";

5) "Verbatim Transcript of the Proceedings Herein"; and

6) An order of the judge of the superior court providing in pertinent part:

a) That defendant possessed one "Hi Lo Double-Up Joker Poker Machine";

b) That the High Point Police Department seized the machine contending that it is an illegal slot machine within the meaning of G.S. 14-306;

c) That the District Attorney made a motion for an order of destruction of the machine pursuant to G.S. 14-298;

d) That the machine "contains" the elements of consideration, chance and reward set out in G.S. 14-306; and

e) That the machine be destroyed by the High Point Police Department.

From the order ordering the destruction of the machine, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Barbara P. Riley, for the State.

Morgan, Post, Herring, Morgan & Green, by James F. Morgan and David K. Rosenblutt, for defendant, appellant.

HEDRICK, Chief Judge.

Although the question is not raised by either party, we must first consider whether the superior court had jurisdiction to enter the order appealed from.

G.S. 14-298 provides:

> All sheriffs and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by G.S. 14-289 through 14-300, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction.

Apparently, the equipment in question was seized by the High Point Police at the time of the service of three arrest warrants for Sam Coe Campbell, the possessor of the premises. Apparently, the defendant charged in the warrants has never been brought to trial in the district court. There appears to be no proceeding in the superior court regarding the equipment in question. While we do not have in the record before us the motion granted, we do have an indication that a motion was filed resulting in the order appealed from.

G.S. 14-298 provides no procedure for the enforcement of the statute. The case relied upon by the State, *McCormick v. Proctor*, 217 N.C. 23, 6 S.E. 2d 870 (1940), is clearly distinguishable procedurally. In *McCormick*, the plaintiff whose property was about to be destroyed filed a proceeding to enjoin the Pitt County Sheriff and the Greenville Chief of Police from destroying his property. Our Supreme Court held that the superior court had jurisdiction to determine whether an injunction should issue. In the present case the district attorney has merely filed a motion for an order directing the police to destroy the equipment seized.

Motions must be filed in a pending action. The record before us indicates that the misdemeanor charges against defendant were not properly before the superior court. No separate action under G.S. 14-298 was instituted in the superior court. Thus, the motion for an order directing destruction of the equipment was made without an underlying pending action. The superior court was without jurisdiction to hear the motion. An order issued without jurisdiction must be vacated. The order appealed from is therefore vacated.

Vacated.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT GRADY

No. 855SC440

(Filed 18 February 1986)

1. **Burglary and Unlawful Breakings § 5.4; Larceny § 7.10— possession of recently stolen property—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for felonious breaking or entering and felonious larceny where it tended to show that the break-in at one house activated an alarm; the officer who responded to the alarm met defendant driving his car in the opposite direction about one-half mile from the break-in; approximately eight hours after the break-ins, defendant was apprehended while sitting on the driver's side in his car; defendant had numerous items stolen from the houses in his possession at the time of his arrest; after being taken into custody, defendant attempted to escape but was recaptured after running only a few blocks; and the items stolen from the two houses were worth over $4,325.

2. **Burglary and Unlawful Breakings § 6.5; Larceny § 8.4— possession of recently stolen property—instructions proper**

In a prosecution for felonious breaking or entering and felonious larceny, the trial court did not err in instructing the jury on possession of recently stolen property, though a wristwatch taken during the crimes in question was found in a police car in which defendant had been placed rather than actually on defendant's person, since defendant was placed in the car before he was searched; the watch was not in the car two hours earlier when it was inspected; and the only other person in the car during the interim was a police officer who had nothing to do with either the crimes or the watch.

APPEAL by defendant from *Strickland, Judge*. Judgments entered 26 October 1984 in Superior Court, PENDER County. Heard in the Court of Appeals 22 October 1985.

In case No. 84CRS706 (the Horne break-in), defendant was convicted of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. In case No. 84CRS708 (the Peay break-in), he was convicted of felonious possession of stolen goods. In case No. 84CRS709, he was convicted of possessing an implement of housebreaking. The several charges arose out of two house break-ins that occurred on the same residential road or street in Pender County on 24 February 1984. Judgment was arrested on the felonious possession of stolen goods conviction in case No. 84CRS706 and defendant appealed from the other convictions.

Attorney General Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's first contention, that the evidence presented at trial does not support his several convictions, has no merit and requires little discussion. The evidence, in brief, was to the following effect: The Horne break-in, which occurred in early afternoon, activated an alarm. The officer that responded to the alarm, when about a half mile from the Horne house, met defendant driving his car in the opposite direction and notified various law enforcement agencies to be on the lookout for the car. A camera, a stereo-radio tape player, and several guns stolen from the house were found in the woods about 150 feet away. Approximately eight hours after the break-ins, when defendant was apprehended in Wilmington, he was sitting in his car on the driver's side and had in his possession a Texas Instrument wristwatch also stolen from the Horne house, as well as some pure silver coins, some paper currency and a silver certificate similar to articles stolen from the Peay house; and in the car was a 30-30 rifle stolen from the Peay residence and a set of bolt cutters. After being taken into custody defendant attempted to escape, but was recaptured after running but a few blocks. The articles stolen from the Horne house were worth $2,125; the articles stolen from the Peay house were worth more than $2,200. This evidence tends to show that defendant committed both break-ins and larcenies and that he had in his possession articles stolen from each house, as well as an implement that could be used in a housebreaking, and defendant's contention to the contrary is rejected.

[2] Defendant's next contention, that the trial court erroneously instructed the jury on the doctrine of recent possession in the Horne case, is likewise without merit. The basis for the charge was that when apprehended but a few hours after the break-in and larceny, defendant had in his possession a Texas Instrument wristwatch that had been stolen from that house. The basis for defendant's contention is that after his escape and recapture he was searched and did not then have the Texas Instrument wrist-

watch, which was found later in the back seat of the police car in which he had been placed; and his argument is that the search conclusively established that he did not have the wristwatch and someone else, therefore, put or left it in the police car. But the evidence also shows that defendant was in the back seat of the police car for a short period before he was searched; that the wristwatch was not in the car two hours earlier when the car was inspected; and that the only other person in the car during the interim was a police officer who had nothing to do with either the larceny or the wristwatch. This evidence is sufficient to show that defendant had the wristwatch in his possession recently after it was stolen and the court's instruction thereon was not error. *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981).

The defendant's other two contentions are likewise rejected. One is that the jury should have been instructed on the lesser included offenses of misdemeanor larceny and misdemeanor possession of stolen goods; whereas, the State's evidence that felonious larceny was committed in each case was not contradicted by other evidence. As *State v. Hicks*, 241 N.C. 156, 160, 84 S.E. 2d 545, 547 (1954) held, a lesser included offense charge is not required when the only basis for it is that the jury might reject part of the State's evidence. The other contention, that his conviction for both felonious breaking or entering and felonious larceny based on the same occurrence is unconstitutional, is contrary to the holding in *State v. Smith*, 66 N.C. App. 570, 312 S.E. 2d 222, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 708 (1984), which we will follow until this question is decided otherwise by our Supreme Court.

No error.

Judges WEBB and JOHNSON concur.

COUNTY OF WAYNE EX REL. JANICE SCANES v. CLIFTON JONES

No. 858DC984

(Filed 18 February 1986)

1. Attorneys at Law § 6— withdrawal of attorney—continuance properly denied

There was no merit to defendant's argument that the district court erred in denying his motion for a continuance since defendant did not have adequate time to obtain new counsel after his attorney's withdrawal where it appeared that defendant told his attorney that he did not require his services any longer, which constituted just cause for the attorney's withdrawal; defendant received reasonable notice of his attorney's withdrawal as evidenced by his statement in court that he did not want a lawyer; and it could be concluded from the court's findings and order permitting counsel's withdrawal that the court gave its permission for such withdrawal.

2. Bastards § 5— paternity and child support case—leading questions proper

In a paternity and child support case, defendant was not prejudiced by the trial court's permitting plaintiff's counsel to ask leading questions concerning the witness's degree of certainty of the identity of her child's father, since there was overwhelming medical evidence tending to show beyond a reasonable doubt that defendant was the child's father.

3. Bastards § 9— child support ordered—sufficiency of findings

The trial court's findings with regard to defendant's income were sufficient to support its order requiring defendant to pay $40 per week for the support of his child.

APPEAL by the defendant from *Setzer, Judge*. Judgment entered 24 April 1985 in District Court, WAYNE County. Heard in the Court of Appeals 5 February 1986.

The plaintiff Wayne County instituted this action seeking an adjudication that the defendant is the natural father of an illegitimate minor child and seeking an order requiring the defendant to pay child support. When the case first came on for hearing on 10 April 1985 the defendant's attorney did not appear in court but was represented by his partner who requested a continuance. At that time the defendant stated that he did not want an attorney. The court continued the case until 24 April 1985.

On 23 April 1985 the defendant's attorney made a motion for leave to withdraw from the case, citing the defendant's consent as justification. The case proceeded to trial on 24 April with the defendant unrepresented by counsel. The defendant's motion for a

continuance to obtain new counsel was denied. In an order signed 24 April 1985 the defendant was adjudged the child's natural father and was ordered to pay child support and hospital bills. On 25 April 1985 the court entered an order granting the defendant's attorney's motion for permission to withdraw. The defendant appealed.

Baddour, Lancaster, Parker & Keller, by E. B. Borden Parker for plaintiff appellee.

Tom Barwick for defendant appellant.

WEBB, Judge.

[1] The defendant first argues that the district court erred in denying his motion for a continuance since the defendant did not have adequate time to obtain new counsel after his attorney's withdrawal. The defendant contends that because his attorney's withdrawal violated Rule 16, General Rules of Practice for Superior and District Courts, the court should have allowed the defendant time to secure a new attorney. We disagree.

Rule 16 states in part:

> No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court.

It appears from the record that the defendant in this case told his attorney that he did not require his services any longer, which constitutes just cause for the attorney's withdrawal within the meaning of the rule. The defendant received reasonable notice of his attorney's withdrawal as evidenced by the defendant's statement in court that he did not want a lawyer. Finally, it is evident from the court's findings in the 24 April order that the court knew the defendant's attorney intended to withdraw and that the defendant intended to proceed unrepresented. This coupled with the order signed on 25 April indicate that the court gave its permission for counsel's withdrawal. This assignment of error is without merit.

[2] The defendant next contends that he was denied a fair trial by the district court's permitting the plaintiff's counsel to ask numerous leading questions of the plaintiff's witness. Again, we disagree.

It is the general rule that it is within the sound discretion of the trial judge to allow the use of leading questions on direct examination. *State v. See*, 301 N.C. 388, 271 S.E. 2d 282 (1980). The leading questions in this case all concerned the witness' degree of certainty of the identity of her child's father. We perceive no prejudice resulting from this use of leading questions in light of the overwhelming medical evidence tending to show beyond a reasonable doubt that the defendant is the child's father. This assignment of error is without merit.

[3] Finally, the defendant argues that the district court's order must be remanded because it is based upon findings of fact unsupported by evidence in the record. We disagree.

In finding of fact #3 the court states "[t]he Court on April 10, 1985 recommended to the defendant that he talk to [his attorney] or seek other counsel." While this finding is not supported by the record and the court erred in including it in its order, the finding is not relevant to the present action. In finding of fact #8 the court states that "[the defendant] is essentially self-employed and earns more than $20,000 per year." There is some evidence to support this finding in the testimony of the child's mother that the defendant once told her that he made over $22,000 per year. The defendant testified that his gross income totalled approximately $20,000 per year but that after paying his sole employee and meeting other business expenses his actual income was approximately $12,000. The court found that the defendant "has substantial bills for his business and his living expenses." The record discloses from the defendant's own testimony that he has net income of approximately $12,000 per year. While the findings made by the trial court could be more definite, we hold the findings are sufficient to support the order that the defendant pay $40 per week for the support of his child. The order appealed from is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. WENDELL MASON

No. 854SC1084

(Filed 18 February 1986)

1. **Assault and Battery § 13— assault with deadly weapon—knife taken from defendant—admissibility**

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and for robbery with a dangerous weapon, admission of a knife seized from defendant on another occasion was not prejudicial error, since the victim testified that she observed a knife in defendant's hand and he stabbed her with it; a medical witness testified that he treated the witness for stab wounds; and the evidence tending to show the victim was stabbed was uncontroverted.

2. **Criminal Law § 119— requested instruction**

The trial court's instructions on eyewitness identification adequately conveyed the substance of defendant's request, and the court therefore did not err in failing to give the instructions in the exact form requested by defendant.

3. **Assault and Battery § 15.2— assault with deadly weapon—knife as deadly weapon—instruction proper**

The trial court did not err in instructing the jury that a knife is a deadly or dangerous weapon where the victim testified that she was stabbed with a pocketknife; her treating physician testified that she was bleeding profusely from all of her wounds when she arrived at the hospital and that she lost from one to two quarts of blood; and the victim had to be hospitalized for four days.

4. **Criminal Law § 66.14— in-court identification of defendant—identification of independent origin**

The trial court did not err in permitting an assault and robbery victim to make an in-court identification of defendant where the court properly found that the identification was of independent origin and was based on the victim's observations at the time of the crimes.

APPEAL by defendant from *Wright, Judge*. Judgments entered 20 March 1985 in Superior Court, DUPLIN County. Heard in the Court of Appeals 12 February 1986.

Defendant was charged in proper bills of indictment with assault with a deadly weapon with intent to kill inflicting serious injury and with attempted robbery with a dangerous weapon. At trial, the State introduced evidence tending to show that on 26 April 1984, defendant entered a clothing store owned by the victim, demanded that she give him money, stabbed her four times with a pocketknife, and fled. Dr. Lewis Rishel testified that he

treated the victim for her injuries and that she was hospitalized for four days. Officer Donnell Lawson testified that a knife was taken from defendant's possession following his arrest in an unrelated incident on 19 May 1984. Defendant was found guilty as charged. From judgments imposing prison sentences of ten years for assault with a deadly weapon and forty years for attempted robbery with a dangerous weapon, such sentences to run consecutively, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Augusta B. Turner, for the State.

Assistant Appellate Defender Gordon Widenhouse, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends that the trial court erred in admitting the knife seized on 19 May 1984 into evidence because no evidence was introduced to connect the knife with the charged offenses. Assuming that defendant's contention is correct, we hold that defendant has failed to show any prejudice resulting from this error. The victim testified that she was standing two or three feet away from defendant when she observed an open pocketknife with a "two and a half to three inches blade" in his hand and that he stabbed her four times with this knife. Dr. Lewis Rishel testified that he treated her for four stab wounds which were each from two to three inches deep. This evidence tending to show that the victim was stabbed was uncontroverted. Thus, the admission of the knife seized from defendant on another occasion was not prejudicial error.

[2] Defendant next contends that the trial court erred in failing to give defendant's requested instruction on the consideration of eyewitness identification. This contention is without merit. The trial court is not required to give a requested instruction in the exact language of the request. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). However, when the requested instruction is correct in law and supported by evidence in the case, the court must give the instruction in substance. *Id.* We have examined the instructions given in this case in regard to eyewitness identification, and hold that they adequately convey the substance of defendant's request. The trial court, therefore, did not err in failing

to give the instructions in the exact form requested by defendant. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981).

[3] Defendant assigns as error the trial judge's instruction to the jury that a knife is a deadly or dangerous weapon, since the matter is a question for the jury. In *State v. Roper*, 39 N.C. App. 256, 249 S.E. 2d 870 (1978), this Court held that a description of a knife as a "keen bladed pocketknife" was sufficient to require the trial court to find that the knife was a deadly weapon per se. The actual effects produced by a weapon may be considered in determining whether it is deadly. *Id.; State v. Lednum*, 51 N.C. App. 387, 276 S.E. 2d 920, *disc. rev. denied*, 303 N.C. 317, 281 S.E. 2d 656 (1981). In the present case, the victim testified that she was stabbed with a pocketknife. Her treating physician testified that she was bleeding profusely from all of her wounds when she arrived at the hospital, that she lost from one to two quarts of blood and that she had to be hospitalized for four days. Thus, the trial court did not err in instructing the jury that a knife is a dangerous or deadly weapon. *See, State v. Lednum*, 51 N.C. App. 387, 276 S.E. 2d 920, *disc. rev. denied*, 303 N.C. 317, 281 S.E. 2d 656 (1981).

[4] Finally, defendant contends that the trial court erred in allowing the victim of the assault to give an in-court identification of defendant. At trial, defendant objected to her in-court identification of defendant as the perpetrator, and the trial court conducted voir dire to hear testimony regarding the out-of-court identification. After voir dire, the court made findings of fact and conclusions of law to the effect that the in-court identification was of independent origin and was based on the victim's observations at the time of the armed robbery and assault. These findings and conclusions are supported by the evidence introduced on voir dire. Therefore, the trial court did not err in allowing the in-court identification of defendant by the victim.

We hold that defendant had a fair trial free of prejudicial error.

No error.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLEY ELIJAH BUNN

No. 856SC686

(Filed 18 February 1986)

Burglary and Unlawful Breakings § 5— permission to enter premises—sufficiency of evidence of crime

In a prosecution for breaking or entering, there was no merit to defendant's contention that the charge should have been dismissed because the State did not present evidence that the victim's girlfriend did not give him permission to enter the victim's mobile home, since the State was not required to disprove every possibility which could exonerate defendant.

APPEAL by defendant from *Small, Judge*. Judgment entered 20 February 1985 in Superior Court, HALIFAX County. Heard in the Court of Appeals 9 December 1985.

Defendant was convicted of felonious breaking or entering, G.S. 14-54(a), and felonious larceny of a firearm, G.S. 14-72(b). Raymond Bunn testified that: On 1 January 1985, upon returning to the mobile home where he resided, he discovered that a pistol and holster which he kept under his mattress were missing; he later discovered that some screws which he had installed on the bedroom window to keep it shut tight had been removed; he questioned defendant, his brother, about the missing gun and holster, and though defendant denied having the pistol, he threw the holster at him. After defendant was arrested he confessed to an officer that he entered the mobile home through the bedroom window, took the gun and holster, and sold the gun for $25.

Attorney General Thornburg, by Special Deputy Attorney General James C. Gulick, for the State.

Acting Appellate Defender Hunter, by Assistant Appellate Defender David W. Dorey, for defendant appellant.

PHILLIPS, Judge.

By the first of only two assignments of error brought forward defendant contends that his motion to dismiss the breaking or entering charge should have been granted because the State's evidence does not establish that he entered Raymond Bunn's residence without consent, in that Raymond Bunn lived in the mobile home with a lady friend who could have given him permission to

enter and no evidence was presented that she did not. This contention has no merit. To convict one of crime the State is not required to disprove every possibility that could exonerate the defendant. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). It is only necessary to present substantial evidence of defendant's guilt. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). This the State did by presenting evidence which showed that Raymond Bunn's residence was broken into and entered without his consent and that defendant is the one who did the breaking and entering.

By his other assignment of error, likewise without merit, defendant contends that the court erred in sustaining the State's objection to his question to the officer that he confessed to as to whether he asked the witness to help him in return for his confession of guilt. Since the record does not disclose what the answer to the question would have been, we cannot assume that it would have been helpful to defendant. G.S. 8C-1, N.C. Rules of Evidence 103; G.S. 15A-1446(a); *State v. Kirkley*, 308 N.C. 196, 209, 302 S.E. 2d 144, 151 (1983). Furthermore, in testifying during the court's *voir dire* as to the voluntariness of his confession, defendant said nothing about making any such request for help.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

HERBERT NELSON COATS v. SHIRLEY TEMPLE COATS

No. 8521DC1040

(Filed 18 February 1986)

Rules of Civil Procedure § 59— amendment of judgment—10-day limit

The trial court had no authority to alter or amend a judgment under N.C.G.S. 1A-1, Rule 59 pursuant to a motion made more than 10 days after entry of the judgment sought to be altered or amended.

APPEAL by the defendant from *Gatto, Judge*. Judgment entered 23 May 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 12 February 1986.

Leonard, Tanis and Cleland, by Robert K. Leonard, for plaintiff appellee.

Mast, Tew, Morris, Hudson & Schulz, by George B. Mast and Bradley N. Schulz, for defendant appellant.

WEBB, Judge.

On 8 November 1982 the parties named in this action entered into a separation agreement wherein the plaintiff agreed to pay support to the defendant. It was also agreed therein that "the terms and provisions of this Agreement may be incorporated in a divorce judgment and [sic] the terms of which may be enforceable as a court order."

The parties were absolutely divorced by judgment entered 31 October 1983. The separation agreement was not incorporated into that judgment. On 19 April 1985 the plaintiff filed in the District Court of Forsyth County a motion to have the separation agreement incorporated into the divorce judgment entered on 31 October 1983.

Although not so designated, plaintiff's motion is essentially one made pursuant to G.S. 1A-1, Rule 59 to alter or amend the judgment entered on 31 October 1983. The trial court has no authority to alter or amend a judgment under this rule pursuant to a motion made more than 10 days after entry of the judgment sought to be altered or amended. Thus, the order appealed from must be vacated.

Vacated.

Chief Judge HEDRICK and Judge PARKER concur.

MARLENE HOGAN, APRIL CORNATZER, AND SONYA MITCHELL v. FORSYTH COUNTRY CLUB COMPANY

No. 8521SC292

(Filed 4 March 1986)

1. **Master and Servant § 87.1; Torts § 1; Trespass § 2— intentional infliction of emotional distress—actions not barred by Workers' Compensation Act**

Plaintiffs' civil actions against their former employer for the intentional infliction of emotional distress are not barred by the exclusivity of remedies provision of the Workers' Compensation Act, N.C.G.S. § 97-10.1.

2. **Master and Servant § 34.2; Torts § 1; Trespass § 2— intentional infliction of emotional distress—employer's ratification of employee's acts**

Plaintiff's forecast of evidence was sufficient to support her claim for the intentional infliction of emotional distress where it tended to show that a chef employed by defendant made sexually suggestive remarks to her while she was working; the chef would brush up against plaintiff, rub his penis against her buttocks and touch her buttocks with his hands; when she refused his advances, he screamed profane names at her, threatened her with bodily injury, and on one occasion, advanced toward her with a knife and slammed it down on a table in front of her; and as a result of the chef's actions toward her, plaintiff became nervous, anxious, humiliated and depressed and was required to seek medical treatment for ulcers. Furthermore, plaintiff's forecast of evidence presented a jury question as to whether defendant ratified and was thus liable for its employee's intentional infliction of emotional distress on plaintiff where it tended to show that plaintiff complained to defendant's general manager several times concerning the chef's conduct but the general manager did nothing to prevent further sexual harassment of plaintiff by the chef and ultimately terminated plaintiff's employment with defendant.

3. **Torts § 1; Trespass § 2— intentional infliction of emotional distress—insufficient evidence**

A second plaintiff's forecast of evidence was insufficient to support her claim for the intentional infliction of emotional distress where it tended to show that defendant's chef screamed and shouted at her, called her names, interfered with her supervision of waitresses under her charge, and on one occasion threw menus at her.

4. **Torts § 1; Trespass § 2— intentional infliction of emotional distress—insufficient evidence**

A third plaintiff's forecast of evidence was insufficient to support her claim for the intentional infliction of emotional distress where it tended to show that defendant's general manager refused to grant her a pregnancy leave of absence, directed her to carry objects such as trash bags, vacuum cleaners and bundles of linen weighing more than 10 pounds while she was pregnant, cursed at her on one occasion, refused her request to be allowed to leave work to go to the hospital, and terminated her employment when she left work without permission.

5. **Master and Servant § 29— negligent retention of employee—sufficiency of evidence**

Plaintiff's forecast of evidence was sufficient to maintain her claim against defendant for negligent retention of an employee where it tended to show that the employee committed the tort of intentional infliction of emotional distress by sexually harassing plaintiff and that defendant's general manager retained the employee in a supervisory position after having actual notice of his proclivity to engage in sexually offensive conduct toward other employees.

6. **Master and Servant § 87.1— negligent retention of employee—action not barred by Workers' Compensation Act**

Plaintiff employee's claim for negligent retention of another employee who sexually harassed plaintiff was not barred by the Workers' Compensation Act since sexual harassment is not a risk to which an employee is exposed because of the nature of her employment.

7. **Master and Servant § 29— negligent retention of employee—insufficient evidence**

Where the evidence was insufficient to establish that either of two plaintiffs had been injured by actionable tortious conduct of an employee of defendant, neither plaintiff may maintain an action against defendant based upon its negligence in employing or retaining the allegedly incompetent employee.

8. **Master and Servant § 10.2— wrongful discharge from employment—insufficient evidence**

Plaintiff's forecast of evidence was insufficient to support a claim for wrongful discharge from her employment at will where it tended to show that a chef employed by defendant became hostile toward plaintiff after plaintiff resisted his sexual advances, that the chef threatened to resign if plaintiff was retained as an employee, and that defendant's general manager terminated plaintiff's employment because the chef was more valuable to defendant than plaintiff was, but there was no evidence that defendant terminated plaintiff's employment in retaliation for her refusal to submit to the chef's sexual advances.

9. **Master and Servant § 10.2— wrongful discharge from employment—insufficient evidence**

The forecasts of evidence of two plaintiffs were insufficient to support claims for wrongful discharge from employment at will where the first plaintiff's evidence tended to show that another employee verbally abused her and other female employees and that she was discharged in retaliation for her complaints about the other employee, and where the second plaintiff's evidence tended to show that she was terminated after leaving work for medical treatment despite the demand of defendant's general manager that she remain at work.

APPEAL by plaintiffs from *Freeman, Judge*. Judgment entered 31 October 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 October 1985.

Plaintiffs, three former employees of Forsyth Country Club Company, joined together to bring this civil action seeking damages for alleged wrongful acts committed by or imputed to defendant. Each plaintiff alleges (1) that she has suffered damages due to severe mental and emotional distress intentionally inflicted by defendant through its agents and employees; (2) that she has suffered damages for mental and emotional distress caused by defendant's negligence in hiring and retaining incompetent and abusive employees; and (3) that she has sustained damages by reason of defendant's wrongful termination of her employment. Actual and punitive damages are sought by each of them. Though the claims asserted by each plaintiff are similar, the factual allegations in support thereof are distinctive and are, therefore, summarized separately.

Plaintiff April Cornatzer alleges that she was employed by Forsyth Country Club (the Club), which is owned and operated by defendant, from 1980 until March 1983. She alleges that beginning in September 1982, the Club's chef, Hans Pfeiffer, began shouting at her, using profanity, interfering with her duties and threatening her. In addition, she alleges he made sexual advances toward her; made sexually derogatory remarks about her; and placed her in fear of bodily harm. She alleges that she complained to Richard Brennan, who was manager of the Club at the time, but that he failed to take any steps to prevent Pfeiffer's harassment of her. She also alleges that Pfeiffer was frequently intoxicated while at work and was abusive toward all of the female employees. According to her allegations, Brennan was aware of Pfeiffer's habitual intoxication and abusive conduct, but negligently retained him as an employee with knowledge of his vicious disposition. She also alleges that she was wrongfully discharged from her employment in March 1983 in retaliation for her complaints against Pfeiffer.

Plaintiff Marlene Hogan alleges that she was employed as dining room manager and hostess at the Club, from February 1979 until 24 July 1983. On or about 22 June 1983, Hogan alleges that Pfeiffer began harassing her by shouting at her, using profanity, interfering with employees under her supervision, threatening her and throwing objects at her. Hogan further alleges that she complained to Clifford Smith, who succeeded Brennan as general manager of the Club, but that he refused to take any action to prevent or control Pfeiffer's abusive conduct. Her allega-

tions relating to defendant's negligence in retaining Pfeiffer are similar to Cornatzer's. Hogan also alleges that she was wrongfully terminated from her employment on 24 July 1983 in retaliation for her complaints against Pfeiffer.

Plaintiff Sonya Mitchell alleges that she was employed by the Club from 5 January 1980 until 10 July 1983. During the latter part of 1982, she became pregnant and, in April 1983, she requested of Brennan that she be allowed a leave of absence due to her pregnancy. Her request was denied. Thereafter, she alleges, Brennan began to harass her by requiring that she perform tasks which she was physically unable to do because of her pregnancy. On 10 July 1983 she alleges that she experienced labor pains and requested Brennan's permission to leave work to receive medical treatment. According to her complaint, Brennan refused to allow her to leave work, and when she left anyway, she was terminated. She claims damages for intentional infliction of emotional distress and for wrongful termination of her employment. Further, Mitchell alleges that Brennan was habitually intoxicated while at work, which contributed to his abusive behavior toward her and other female employees, and that defendant knew or should have known of his incompetence. She maintains that defendant was negligent in retaining Brennan as an employee and that, as a result, she suffered mental and emotional distress.

Defendant answered, asserting the failure of the plaintiffs to state claims upon which relief may be granted, and denying the material allegations of the complaint. Following discovery, defendant moved for summary judgment on all claims. Summary judgment was entered in favor of defendant dismissing all claims asserted by each plaintiff. Plaintiffs appeal.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice, by W. Andrew Copenhaver and M. Ann Anderson, for defendant appellee.

MARTIN, Judge.

Plaintiffs assert error with respect to the entry of summary judgment dismissing each of their multiple claims. For the reasons which follow, we conclude that April Cornatzer is entitled to

a trial upon two of the three claims which she asserts. However, with respect to her claim for wrongful discharge from employment and to each of the claims of Marlene Hogan and Sonya Mitchell, we affirm the judgment of the trial court.

I

It is well settled that in ruling on a motion for summary judgment, a court does not resolve questions of fact but determines whether there exists any genuine issue of material fact. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). In determining whether a genuine issue of material fact exists, the court must view all material furnished in support of and in opposition to the motion for summary judgment in the light most favorable to the party opposing the motion. *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E. 2d 908 (1983). Considering the facts in the light most favorable to the plaintiff, "a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim." *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981), *citing Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979). Where the pleadings and forecast of evidence demonstrate that no claim exists, as a matter of law, summary judgment is appropriate. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

II

The first issue raised by each of the plaintiffs involves the entry of summary judgment dismissing her claim for intentional infliction of emotional distress. Each plaintiff contends that her forecast of evidence is sufficient to raise genuine issues of material fact with respect to her claim sufficient to survive summary judgment.

The tort of intentional infliction of mental or emotional distress was formally recognized in North Carolina by the decision of our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). The claim exists "when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.' " *Id.* at 196, 254 S.E. 2d at 622, *quoting* Prosser, The Law of Torts, § 12, p. 56 (4th Ed. 1971). The elements of the tort consist of: (1)

extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. *Dickens v. Puryear, supra.*

> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

Id. at 452-53, 276 S.E. 2d at 335.

[1] Defendant contends that we should not reach the issue of whether the plaintiffs have successfully forecast evidence of a viable claim under the rules set forth in *Dickens*. It argues that even if the claims exist, they are barred by the exclusivity of remedies provision of the North Carolina Workers' Compensation Act, G.S. 97-10.1. This issue is one of first impression in this State; there is no case law dealing with the tort of intentional infliction of emotional distress in the context of an employer-employee relationship. We conclude that the Act does not bar plaintiffs' claims.

The Act defines injury as "injury by accident arising out of and in the course of the employment." G.S. 97-2(6). Our courts have applied this definition to cases involving assaultive conduct in an employer-employee relationship and have held that an employee is not barred by the Act from bringing a common law action *against a co-employee* for intentional conduct even though the reverse is true for negligent conduct on the part of the co-employee. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982). This Court has also held that the Act bars any common law action by an employee *against his employer* for the intentional conduct of a co-employee, unless the co-employee was acting as the alter ego of the employer. *Id.; Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E. 2d 582 (1982). But the Act does not bar a common law action by an employee against his employer for the intentional conduct of the employer.

The intentional conduct involved in *Andrews* and *Daniels* was assaultive conduct for which damages were sought for physical injuries. In the present case, plaintiffs allege severe emotional

distress; they do not allege any physical or mental illness nor do they allege employment disability or loss of earning capacity resulting from their emotional distress. Therefore, we do not consider the holdings in *Andrews* and *Daniels* to be dispositive of our decision in this case.

The purpose of the Workers' Compensation Act is to furnish compensation for loss of earning capacity. *Wilhite v. Veneer Co.*, 47 N.C. App. 434, 267 S.E. 2d 566 (1980), *rev'd on other grounds*, 303 N.C. 281, 278 S.E. 2d 234 (1981). The Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury or in the same or any other employment." G.S. 97-2(9). In reference to the Act, this court has consistently held that "entitlement to compensation under the Workers' Compensation Act is rooted in and must be measured by plaintiff's capacity or incapacity to earn wages." *Mills v. J. P. Stevens & Co.*, 53 N.C. App. 341, 343, 280 S.E. 2d 802, 803, *disc. rev. denied*, 304 N.C. 196, 285 S.E. 2d 100 (1981). Therefore, in the present case, plaintiffs apparently have suffered damages which would be recoverable in a civil action but which are not compensable under the Act.

Plaintiffs' claims do not involve an isolated physical injury not compensable under the Act, rather they allege an entire class of civil wrongs which are outside the scope of the Act. With reference to non-physical injury torts, one commentator has stated that

> [w]hen no compensation is available, these tort actions fall squarely within the broad class of cases, . . . which do not come within the fundamental coverage pattern of the Act at all, as when certain occupational diseases which were excluded from the Act, or when the incident did not arise out of and in the course of employment.

2A Larson, The Law of Workmen's Compensation § 68.30 (1983). Larson further noted that

> [i]f the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, the action

should be barred even if it can be cast in the form of a normally non-physical tort.

Id. at § 68.34(a). The essence of the tort of intentional infliction of emotional distress is non-physical; the injuries alleged by plaintiffs do not involve physical injuries resulting in disability. Therefore, we conclude that plaintiffs' actions for intentional infliction of mental and emotional distress are not barred by G.S. 97-10.1.

III

Having decided that the plaintiffs' actions are not barred by the provisions of the Workers' Compensation Act, we turn to an examination of the evidentiary materials submitted to the trial court. Because the forecast of evidence as to the factual basis of each plaintiff's claim is unique, each claim must be decided on its own merits.

A

[2] The evidence with respect to April Cornatzer's claim for intentional infliction of emotional distress, taken in the light most favorable to her, tends to show that in September 1982, Hans Pfeiffer began making sexual advances toward her. At her deposition, and in an affidavit, Cornatzer maintained that Pfeiffer made sexually suggestive remarks to her while she was working, coaxing her to have sex with him and telling her that he wanted to "take" her. He would brush up against her, rub his penis against her buttocks and touch her buttocks with his hands. When she refused his advances, he screamed profane names at her, threatened her with bodily injury, and on one occasion, advanced toward her with a knife and slammed it down on a table in front of her. As a result of Pfeiffer's actions toward her, Cornatzer maintains that she became very nervous, anxious, humiliated and depressed, to the extent that she was required to seek medical treatment for ulcers.

Defendant contends that, as a matter of law, the conduct directed toward Cornatzer by Pfeiffer was insufficiently outrageous to meet the requirement of *Dickens*. We disagree. It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery. Re-

statement (Second) of Torts, § 46 comment (h) (1965). However, once conduct is shown which may be reasonably regarded as extreme and outrageous, it is for the jury to determine, upon proper instructions, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability. *Id.*

That Cornatzer's forecast of evidence shows sufficiently outrageous conduct directed toward her by Pfeiffer to entitle her to go to the jury strikes us as irrefutable. No person should have to be subjected to non-consensual sexual touchings, constant suggestive remarks and on-going sexual harassment such as that testified to by Cornatzer, without being afforded remedial recourse through our legal system. Such conduct, if found by a jury to have actually existed, is beyond the "bounds usually tolerated by decent society" and would permit Cornatzer to recover, at least as against Pfeiffer.

Defendant argues further, however, that even if Pfeiffer would be liable, it should not be held liable for his intentional or wanton acts committed against Cornatzer because the acts were not committed for any purpose connected with the work he was employed to do. On the other hand, Cornatzer argues that defendant may be held liable for Pfeiffer's conduct under the doctrine of *respondeat superior.*

As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal. *Snow v. DeButts*, 212 N.C. 120, 193 S.E. 224 (1937). There is no contention that defendant expressly authorized Pfeiffer's conduct; if defendant is to be held liable, there must be some evidence that Pfeiffer was acting within the scope of his employment or that defendant ratified his wrongful conduct.

It is well settled in this State that "[i]f the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do."

Wegner v. Delicatessen, 270 N.C. 62, 66-67, 153 S.E. 2d 804, 808 (1967). In *Overton v. Henderson*, 28 N.C. App. 699, 222 S.E. 2d 724 (1976), this Court stated that "[t]he principal is liable for the acts of his agent, whether malicious or negligent, and the employer for similar acts of his employees, ... The test is whether the act was done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do." *Id.* at 701, 222 S.E. 2d at 726.

Although Pfeiffer's acts against Cornatzer were committed while both were at their jobs on defendant's premises, we can find no evidence, and Cornatzer points us to none, which would support a finding that Pfeiffer was acting within the scope of his employment or in the furtherance of any purpose of the defendant in committing the acts. Rather, it appears that he was acting in pursuit of some corrupt or lascivious purpose of his own.

However, we are constrained to hold that Cornatzer has presented a sufficient showing of ratification of Pfeiffer's conduct by defendant to warrant submission of the question to the jury. Cornatzer's evidence, considered in the light most favorable to her, indicates that she complained to Richard Brennan, defendant's general manager, several times concerning Pfeiffer's conduct and that Brennan did nothing to prevent further sexual harassment by Pfeiffer. "The designation 'manager' implies general power and permits a reasonable inference that he was vested with the general conduct and control of defendant's business . . . , and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." *Gillis v. Tea Co.*, 223 N.C. 470, 474, 27 S.E. 2d 283, 285 (1943), *quoting Kelly v. Shoe Co.*, 190 N.C. 406, 409, 130 S.E. 32, 34 (1925). Thus, Brennan, whose responsibilities as manager included his duty to oversee all aspects of defendant's business and to supervise defendant's employees, was vested with authority to act on behalf of defendant and if, by his actions, he ratified Pfeiffer's wrongful conduct, such ratification would be imputed to defendant. In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act. *See Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E. 2d 252 (1965). Whether Brennan's

actions, consisting of retaining Pfeiffer in defendant's employ, declining to intervene to prevent his further offensive behavior toward Cornatzer, and ultimately terminating Cornatzer from employment, amount to a course of conduct signifying an intention to acquiesce in, approve and ratify Pfeiffer's acts is a question for the jury. For the foregoing reasons, we hold that summary judgment dismissing Cornatzer's claim for intentional infliction of mental distress was improvidently granted.

B

[3] We do not reach the same result, however, with respect to the claims of Marlene Hogan and Sonya Mitchell for intentional infliction of mental distress. Hogan's evidence tends to show that Pfeiffer screamed and shouted at her, called her names, interfered with her supervision of waitresses under her charge, and on one occasion threw menus at her. She also testified that she shouted back at Pfeiffer. This conduct lasted during the period from 22 June 1983 until her termination on 24 July 1983. The general manager, Clifford Smith, received complaints from both Hogan and Pfeiffer concerning the temper of the other. His attempt to discuss the situation with both employees was unsuccessful because Pfeiffer walked out.

While we do not condone Pfeiffer's intemperate conduct, neither do we believe that his alleged acts "exceed all bounds usually tolerated by a decent society," *Stanback, supra,* so as to satisfy the first element of the tort, requiring a showing of "extreme and outrageous conduct." *Dickens, supra.*

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. . . .
>
> The liability clearly does not extend to mere insults, indignities, threats, ... The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind. There is no occasion for the law to intervene in every case

> where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. . . .

Restatement (Second) of Torts, § 46 comment (d) (1965). We hold Pfeiffer's conduct, as shown by Hogan's forecast of evidence, was not such as to be reasonably regarded as "extreme and outrageous" so as to permit Hogan to recover for intentional infliction of mental distress.

[4] Sonya Mitchell bases her claim for intentional infliction of emotional distress upon the alleged conduct and acts of Richard Brennan. Mitchell's evidence, if accepted as true by a jury, would show that Brennan refused to grant her a pregnancy leave of absence, directed her to carry objects such as trash bags, vacuum cleaners, and bundles of linen weighing more than 10 pounds. He cursed at her on one occasion. When she requested, on 10 July 1983, to be allowed to leave work to go to the hospital, Brennan refused to grant permission. When she left without his permission, he terminated her from employment.

We find that Brennan's alleged conduct, though unjustified under the circumstances apparent from Mitchell's testimony, was not so "extreme and outrageous" as to give rise to a claim for intentional infliction of mental or emotional distress.

IV

Plaintiffs also contend that summary judgment was improvidently granted against them on their claims against defendant for negligence in employing Pfeiffer and Brennan and in retaining them as employees with knowledge of their incompetence. Each plaintiff alleges mental distress and humiliation as a proximate result of defendant's negligence.

North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another. In *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E. 2d 627 (1942), our Supreme Court stated:

> [B]efore responsibility for negligence of a servant, proximately causing injury to plaintiff, another servant, can be fixed on the master, it must be established by a greater weight of the

> evidence, the burden being on the plaintiff, that he has been injured by reason of carelessness or negligence due to the incompetency of the fellow servant, and that the master has been negligent in employing or retaining such incompetent servant, after knowledge of the fact, either actual or constructive.

Id. at 177, 19 S.E. 2d at 629. The theory of liability is based on negligence, the employer being held to a standard of care that would have been exercised by ordinary, cautious and prudent employers under similar circumstances. *Lamb v. Littman*, 128 N.C. 361, 38 S.E. 911 (1901). However, before the employer can be held liable, plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency. *Pleasants, supra.*

A

[5] Cornatzer's forecast of evidence is sufficient to maintain her claim that Pfeiffer, by sexually harassing her, committed the tort of intentional infliction of emotional distress proximately causing injury to her. Her evidence is also sufficient to permit a jury to find that defendant, through its general manager, Richard Brennan, who had the power to hire and discharge, retained Pfeiffer in a supervisory position after having actual notice of his proclivity to engage in sexually offensive conduct. Whether defendant's conduct amounts to a failure to exercise such care, in the employment and retention of Pfeiffer, as would have been exercised by a reasonable and prudent employer under similar circumstances is a question of material fact, properly for resolution by a jury. We note, however, that our recognition of this claim merely provides plaintiff Cornatzer a second theory, in addition to her first claim for relief, upon which she may seek to impose liability upon the Club for the intentional conduct of the chef. As stated in 53 Am. Jur. 2d,

> [t]he application of the theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment. In these cases such application allows the injured person to establish

liability on the part of the master where no liability would otherwise exist.

53 Am. Jur. 2d Master and Servant § 422 at 437 (1970).

[6] Defendant argues that plaintiff Cornatzer's claim for negligent retention of an employee is barred by the North Carolina Workers' Compensation Act. We hold to the contrary. Although the Act eliminated negligence as a basis of recovery against an employer, the Act covers only those injuries which arise out of and in the course of employment. *Horney v. Meredith Swimming Pool Co.*, 267 N.C. 521, 148 S.E. 2d 554 (1966); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982). An injury arises out of the employment "when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment." (Citation omitted.) *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E. 2d 350, 354 (1972).

The emotional injury allegedly suffered by Cornatzer, resulting from the chef's sexual harassment, is not, in our view, a "natural and probable consequence or incident of the employment." Sexual harassment is not a risk to which an employee is exposed because of the nature of the employment but is a risk to which the employee could be equally exposed outside the employment. *See Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). Therefore, Cornatzer's claim is neither covered nor barred by the Act. The entry of summary judgment dismissing Cornatzer's claim for negligence must be reversed.

B

[7] Neither Hogan nor Mitchell have any claim against defendant based upon negligence. Intentional infliction of emotional distress by Pfeiffer is the underlying tortious conduct relied upon by Hogan to establish her claim of negligence on the part of the Club in retaining him; a similar claim with respect to Brennan is relied on by Mitchell. We have already held that their evidence is insufficient to establish claims against defendant, Pfeiffer or Brennan for intentional infliction of emotional distress. Since the evidence is insufficient to establish that either Hogan or Mitchell has been injured by actionable tortious conduct of an employee of

defendant, neither of them may maintain an action against defendant based upon its negligence in employing or retaining the allegedly incompetent employee. 53 Am. Jur. 2d, *supra.*

V

Finally, plaintiffs assign error to the entry of summary judgment dismissing their claims, based in tort, for wrongful discharge from employment. Each plaintiff contends that her discharge was retaliatory and in contravention of public policy. Defendant contends that because none of the plaintiffs were employed for a definite period, it had the right to terminate each of them at any time, regardless of its reason for doing so.

North Carolina adheres to the common law doctrine that employment contracts of indefinite duration are terminable at will. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *May v. Tidewater Power Co.*, 216 N.C. 439, 5 S.E. 2d 308 (1939); *Currier v. Lumber Co.*, 150 N.C. 694, 64 S.E. 763 (1909). "Where a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause, except in those instances in which the employee is protected from discharge by statute." *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288, 79 A.L.R. 3d 651, 659 (1976). Recently, however, another panel of this Court recognized a limited exception to the terminable at will doctrine and permitted a claim for relief in tort for "retaliatory discharge" from employment. *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 489 (1985).

In *Sides*, the plaintiff alleged that she was discharged from her employment as a nurse in retaliation for her refusal to testify falsely or incompletely in a civil action for medical malpractice in which her employer was a defendant. The Court noted that, according to her allegations, plaintiff was discharged in retaliation for her refusal to commit a criminal act and that to permit her discharge, without legal recourse, upon such grounds would be offensive to the compelling public interest in the administration of justice. "Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." *Id.* at 342, 328 S.E. 2d at 826. Though the *Sides* court spoke in the broad terms

of "public policy," its holding was actually very narrow. "We hold, therefore, that no employer in the State, notwithstanding that an employment is at will, has the right to discharge an employee . . . without civil liability because he refuses to testify untruthfully or incompletely in a court case . . . ." *Id.*

In *Walker v. Westinghouse Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), decided after *Sides*, plaintiff alleged, *inter alia*, that he had been discharged in retaliation for raising safety concerns. He contended that his discharge violated public policy as promulgated in G.S. 95-126, the Occupational Safety and Health Act of North Carolina. This Court affirmed summary judgment for defendant, stating, "[o]ur decision in *Sides* rested on facts clearly showing a wilful violation of the law and was consistent with other jurisdictions' insistence that the employer's conduct be in clear violation of express public policy to be actionable." *Id.* at 263, 335 S.E. 2d at 86. In *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E. 2d 617 (1986), plaintiff alleged five separate claims for relief, one of which was that she was discharged for following the Nursing Practice Act and hospital policy in transferring two nurses from the emergency room. In affirming the dismissal of this claim, the Court noted the *Sides* case, but declined to include Trought's claim within its limited exception to the terminable at will rule.

The *Sides* court did not view its ruling as a departure from precedent. Plaintiffs, however, request that we "recognize and articulate a public policy exception" to the terminable at will doctrine. Mindful of our responsibility to follow precedent established by our Supreme Court, *Cannon v. Miller*, 313 N.C. 324, 327 S.E. 2d 888 (1985), we decline to do so. We are of the opinion that to recognize such an exception would be a significant departure from the terminable at will doctrine as it currently exists in North Carolina. We interpret *Sides* as recognizing a common law claim for relief in tort in favor of an employee at will who is discharged from his employment in retaliation for (1) his refusal to perform an act prohibited by law, or (2) his performance of an act required by law. Otherwise, under the clear language of *Smith v. Ford Motor Co., supra*, an employee at will may be discharged, with or without cause, at anytime, unless his discharge is expressly prohibited by statute. *See* G.S. 95-81 and 95-83 (denial of employment by reason of labor union membership prohibited), G.S. 95-25.20 (discharge for filing Wage and Hour Act complaint

prohibited); G.S. 95-130(8) (discharge for filing OSHA complaint prohibited); G.S. 97-6.1 (discharge for filing Workers' Compensation claim prohibited).

[8] Considering the claims of each of the plaintiffs in light of the foregoing discussion, we are constrained to hold that summary judgment was appropriately entered against each of them. The forecast of evidence with respect to Cornatzer's claim tends to show that after she resisted Pfeiffer's advances, he became hostile toward her. However, Pfeiffer was neither her supervisor nor was he in a position to participate in personnel actions involving her. Cornatzer's evidence tends to show only that Pfeiffer manifested his hostility toward her by threatening Brennan with his own resignation as chef if Cornatzer was retained as an employee. When Brennan informed Cornatzer of her termination, he told her that "it has come to the point where I have to keep you or the chef. Right now the chef is more valuable to Forsyth Country Club than you are."

In our view, Cornatzer's forecast of evidence might well support an action against Pfeiffer for malicious interference with her terminable at will employment contract. *See Smith v. Ford Motor Co., supra.* She has alleged no such claim in this suit. Moreover, her assertions that Pfeiffer had harassed her sexually, that she had reported the harassment to Brennan and that he had impliedly condoned the harassment by taking no remedial measures, would appear sufficient to create a cognizable claim for damages under Title VII of the Civil Rights Act of 1964, §§ 701 *et seq.* as amended. 42 U.S.C.A. § 2000e *et seq. See Katz v. Dole*, 709 F. 2d 251 (4th Cir. 1983); *Miller v. Bank of America*, 600 F. 2d 211 (9th Cir. 1979). The claim which Cornatzer asserts in the present action, however, is one for tortious discharge from employment. There is no contention that her employment was protected by statute and we find no support in the evidence for her contention that defendant Forsyth Country Club terminated her employment in retaliation for her refusal to submit to Pfeiffer's sexual requests. While Pfeiffer's motives in threatening to quit if Cornatzer was not fired may well have been retaliatory, he was not in a position to, nor did he, fire her. She was terminated by the Club, through Brennan, in order to resolve an intolerable situation which had developed between two Club employees. While Brennan's decision as to how to resolve the problem appears, con-

sidering the evidence in a light favorable to Cornatzer, to have been a poor one, it does not give rise to a claim in tort for wrongful discharge from employment.

[9] Although plaintiff Hogan made no claim that Pfeiffer harassed her sexually, she claims that he verbally abused her as well as other female employees. She contends that she was discharged in retaliation for her complaints about Pfeiffer and because of a pattern of discrimination against female employees by defendant. We observe that she, as well as Cornatzer, may well be entitled to assert a claim against Pfeiffer for malicious interference with her employment contract, as well as claims against Pfeiffer and the Club for discrimination based upon sex. However, neither her allegations nor the forecast of evidence at the summary judgment stage establish any right to relief in tort for wrongful discharge from employment. As an at will employee, she was subject to discharge at any time for any reason, so long as it was not unlawful.

With respect to plaintiff Mitchell, we reach the same conclusion. Her evidence tended to show that she was terminated after leaving work for medical treatment despite Brennan's demand that she remain at work. Although we sympathize with her situation and find the manager's reason for terminating her to be irrational, her firing was neither protected by statute nor for an unlawful purpose. While she may be entitled to assert a claim for gender-based employment discrimination, she has not attempted to do so in this case and her claim in tort for wrongful discharge from employment was properly dismissed by summary judgment.

VI

In conclusion, we reverse the entry of summary judgment dismissing April Cornatzer's claims against defendant for intentional infliction of mental distress and for negligence based upon its continued employment of Pfeiffer after knowledge of his tortious conduct committed against Cornatzer. Those claims are remanded for trial. Otherwise, the judgment of the trial court is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges ARNOLD and WELLS concur.

Lowder v. Doby

W. H. LOWDER, ON BEHALF OF HENRY C. DOBY, JR. AND JOHN M. BAHNER, JR., CO-RECEIVERS OF ALL STAR INDUSTRIES, INC. v. HENRY C. DOBY, JR., JOHN M. BAHNER, MOORE & VAN ALLEN, A PARTNERSHIP, BROWN, BROWN & BROWN, A PARTNERSHIP, JOHN P. ROGERS, COBLE, MORTON & GRIGG, A PARTNERSHIP, CHARLES E. HERBERT, BILLINGS, BURNS & WELLS, A PARTNERSHIP; HENRY C. DOBY, JR. AND JOHN M. BAHNER, CO-RECEIVERS OF ALL STAR INDUSTRIES, INC.

LOIS L. HUDSON, JOE HUDSON, JENNELL H. RATTERREE, ELLEN HUDSON, BRUCE HUDSON, DAVID P. LOWDER, W. H. LOWDER, J. R. LOWDER, CYNTHIA L. PECK, MICHAEL LOWDER AND DOUGLAS LOWDER, ON BEHALF OF ALL STAR MILLS, INC. v. ALL STAR MILLS, INC., MALCOLM M. LOWDER, PATTY S. LOWDER, HENRY C. DOBY, JR., JOHN M. BAHNER, JOHN P. ROGERS, ERNEST H. MORTON, JR., CHARLES E. HERBERT, DONALD R. BILLINGS, MOORE & VAN ALLEN, A PARTNERSHIP, BROWN, BROWN & BROWN, A PARTNERSHIP

W. H. LOWDER, ON BEHALF OF ALL STAR FOODS, INC. v. ALL STAR FOODS, INC., MALCOLM M. LOWDER, PATTY S. LOWDER, HENRY C. DOBY, JR., JOHN M. BAHNER, JOHN P. ROGERS, ERNEST H. MORTON, JR., CHARLES E. HERBERT, DONALD R. BILLINGS, MOORE & VAN ALLEN, A PARTNERSHIP, BROWN, BROWN & BROWN, A PARTNERSHIP

DAVID P. LOWDER, L. L. HUDSON, W. H. LOWDER, J. L. HARRELL, M. E. LOWDER, E. L. CORNELIUS, ON BEHALF OF LOWDER FARMS, INC. v. LOWDER FARMS, INC., MALCOLM M. LOWDER, ET AL.

J. R. LOWDER AND W. H. LOWDER, ON BEHALF OF ALL STAR HATCHERIES, INC. v. ALL STAR HATCHERIES, INC., ET AL.

No. 8520SC588

(Filed 4 March 1986)

1. Attorneys at Law § 7; Corporations § 6— derivative actions dismissed—attorney fees awarded defendants—no error

The trial court did not err by awarding defendants attorney fees in shareholder derivative actions where there was a final judgment on the merits in that the court in effect granted a summary judgment for defendants and where plaintiffs' actions were brought without reasonable cause in that both the United States Bankruptcy Court and the state receivership court had previously dealt with the merits of plaintiffs' allegations and the record was devoid of evidence supporting any reasonable belief that there was a sound chance that plaintiffs' claims might be sustained. N.C.G.S. 55-55(e), N.C.G.S. 1A-1, Rule 12(b)(6).

2. Attorneys at Law § 7— derivative action dismissed—defendants awarded attorney fees—amounts proper

The trial court did not err in the amount or the apportionment of the attorney fees awarded defendants after dismissing plaintiffs' five shareholder derivative actions where commercially sophisticated individuals were dealing at arm's length; most of the bills submitted had already been paid by defendants; the court's orders contained findings that precise time records had been kept; the aggregate fees awarded were substantially similar; the findings of reasonableness were supported by competent evidence contained in the record; plaintiffs offered no basis for their conclusory assertion that the fees awarded were not reasonable; the five lawsuits involved substantial overlapping contentions of law and fact; four of the lawsuits were virtually identical and were linked together for purposes of appeal; the legal principles applicable at the trial court and appellate levels were substantially the same; the underlying factual background was substantially the same; most of the hearings at the trial court level occurred contemporaneously; the motions made and the orders entered generally were identical or consolidated; and it was difficult to attribute particular tasks to a particular matter with complete precision.

APPEAL by plaintiffs from *Albright, Judge*. Orders entered 31 January 1985 in Superior Court, STANLY County. Heard in the Court of Appeals 2 December 1985.

Plaintiffs appeal from orders requiring them to pay defendants reasonable attorneys fees and expenses in five shareholders' derivative actions brought by W. H. (Horace) Lowder and other members of the Lowder family pursuant to G.S. 55-55. The five suits were brought on behalf of five family owned corporations that collectively constituted a single integrated business enterprise.

Background

The business enterprise was run exclusively by Horace Lowder from about 1960 until February, 1979. In January, 1979 a shareholder derivative suit was instituted in Stanly County by Malcolm M. Lowder and his two sons as shareholders of All Star Mills, Inc. (Mills), Lowder Farms, Inc. (Farms), Consolidated Industries, Inc. and beneficial shareholders of All Star Foods, Inc. (Foods). Also named as defendants were All Star Industries, Inc. (Industries), All Star Hatcheries, Inc. (Hatcheries), and Airglide, Inc. The plaintiffs sought damages and other relief on the grounds that Horace Lowder had engaged in unlawful conduct and willfully abused his authority and discretion as chief executive officer and director of the corporations, violating his

obligations to the corporations and their shareholders. Plaintiffs specifically requested that a receiver be appointed. For additional factual background see *Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981).

On 9 February 1979 the Honorable Thomas W. Seay, Jr. entered a receivership order and appointed Henry C. Doby, Jr. and John M. Bahner as receivers over all the corporate defendants. The receivership court retained jurisdiction until April 1979 when the corporate defendants, through Horace Lowder, filed for protection under Chapter XI of the United States Bankruptcy Act in the United States Bankruptcy Court for the Middle District of North Carolina. On 26 June 1979 Judge Seay entered an order retaining jurisdiction of all matters pending in the receivership action. The Chapter XI proceeding was converted to a Chapter X reorganization in July, 1979. On 28 February 1980 the Chapter X reorganization was dismissed and the corporations were returned to the state court receivers and the receivership court's jurisdiction.

The receivership action is still pending in Stanly County Superior Court. The receivership action has generated seven years of litigation and created a factual and procedural history that is voluminous and complex. Details not relevant to the issues on appeal in the instant case are not included here but may be found in the following opinions by this Court and our Supreme Court: *Lowder v. Mills, Inc., supra; Lowder v. Mills, Inc.*, 60 N.C. App. 275, 300 S.E. 2d 230 (1983); *Lowder v. All Star Mills*, 309 N.C. 695, 309 S.E. 2d 193 (1983); and *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E. 2d 649 (1985).

The Parties

The plaintiffs in these five derivative actions include Horace Lowder and other Lowder family members who are all stockholders in the various receivership corporations. Defendants Henry C. Doby, Jr. and John M. Bahner are the co-receivers appointed in 1979 by Judge Seay. However, in each of the five derivative suits they are sued as individuals and not in their official capacities. Defendant John P. Rogers served as trustee in the Chapter X reorganization from 13 July 1979 until 31 August 1979 at which time he resigned. Defendant Charles E. Herbert served as successor trustee under the Chapter X reorganization from 31 August

1979 until the Chapter X proceeding was dismissed. Both defendants Rogers and Herbert are also sued as individuals and not in their official capacities.

Defendant Ernest H. Morton, Jr. served as attorney for John P. Rogers, trustee. Mr. Morton is a partner in the law firm of Coble, Morton, Grigg and Odom (formerly Morton & Grigg) which is also named as a defendant in one of the five derivative suits. Defendant Donald R. Billings served as attorney for Charles E. Herbert, trustee. Mr. Billings is a partner in the law firm of Billings, Burns & Wells which is also named as defendant in one of the five derivative suits. Defendants Moore and Van Allen (now Moore, Van Allen, Allen & Thigpen) and Brown, Brown & Brown are partnerships engaged in the practice of law who were employed as attorneys for the co-receivers Doby and Bahner on 14 February 1979. They continue at the present time to serve in that capacity. Malcolm M. and Patty S. Lowder, husband and wife, are named defendants in four of the five derivative actions.

The Complaints

Plaintiffs filed five separate actions beginning on 8 May 1981. In the first action (81CVS438), brought on behalf of Industries, the complaint alleged that Industries was a creditor of Norman R. Lowder Poultry Farms, Inc. in the amount of $475,000 plus interest. The debt was evidenced by nineteen promissory notes in the face amount of $25,000 each, signed by Poultry Farms and Norman R. Lowder. The complaint further alleged that certain real estate and personal property belonging to Poultry Farms had been transferred to Norman Lowder or his two sons individually or as partners in Dogwood Farms for little or no consideration constituting a fraud on the creditors of Poultry Farms.

As to the defendants, the complaint alleged that they failed to bring suit on the notes promptly enough, thereby risking being barred by the statute of limitations; failed to plead a claim for fraudulent conveyance; improperly admitted certain allegations made by Poultry Farms in its counterclaim; failed to file notice of lis pendens; and generally failed to prosecute the suit with sufficient vigor.

The remaining four derivative actions are brought on behalf of Mills (81CVS512), Foods (81CVS655), Farms (82CVS166) and

Hatcheries (82CVS167). The complaints' allegations are virtually identical. The first cause of action in each complaint alleges that all the defendants engaged in a conspiracy beginning with the filing of the lawsuit in 1979 against Horace Lowder and the family owned corporations. The allegations basically attack the receivership action and allege that the defendants used their positions in the receivership action to destroy the various corporations in order to coerce other shareholders into paying Malcolm Lowder an inflated price for his stock.

The complaints allege that the defendants Moore and Van Allen and Brown, Brown & Brown improperly disclosed confidential information; and that all the defendants excluded Horace Lowder from participating further in the management of the corporations; operated the corporations for their own personal benefit; created large and unnecessary attorney fees, accounting fees and other unnecessary expenses; failed to collect rents due and made loans without interest which dissipated the corporations' assets; opposed efforts to settle an IRS claim; and filed for reorganization under Chapter X when the reorganization was not needed.

The second, third and fourth causes of action in each complaint allege that the co-receivers Doby and Bahner (individually) and the trustees Rogers and Herbert (individually) did one or more of the following: (1) negligently failed to take inventories; (2) failed to collect money due as interest on loans; (3) failed to collect rents; (4) made loans to other corporations without security or interest; (5) allowed the physical assets to deteriorate; (6) hired incompetent personnel; and (7) negligently handled an IRS claim against the Mills and Hatcheries corporations.

None of the defendants filed answers and all filed motions to dismiss the five complaints. By orders entered 13 May 1983 the Honorable Edwin S. Preston, Jr., judge presiding in the Superior Court, Stanly County, allowed defendants' motions in *Lowder v. Doby*, 81CVS438, and *Hudson v. All Star Mills, Inc.*, 81CVS512. The plaintiffs appealed the dismissals to this court. The motions to dismiss the remaining three complaints were held in abeyance pending the outcome of the appeals. In *Hudson v. All Star Mills*, 68 N.C. App. 447, 315 S.E. 2d 514 (1984), and *Lowder v. Doby*, 68 N.C. App. 491, 315 S.E. 2d 517 (1984) this court affirmed Judge

Preston's dismissals. Plaintiffs' petitions for discretionary review to the Supreme Court were denied, *Hudson v. All Star Mills*, 311 N.C. 755, 321 S.E. 2d 134 (1984) and *Lowder v. Doby*, 311 N.C. 759, 321 S.E. 2d 138 (1984). Subsequently, on 31 January 1985 the Honorable W. Douglas Albright entered orders dismissing the remaining three complaints in *Lowder v. All Star Foods, Inc.* (81CVS655), *Lowder v. Lowder Farms, Inc.* (82CVS166) and *Lowder v. All Star Hatcheries, Inc.* (82CVS167).

At a hearing before Judge Albright on 28 January 1985, each defendant moved for attorneys fees pursuant to G.S. 55-55(e). The motions were allowed and on 31 January 1985 Judge Albright entered 39 separate orders awarding reasonable attorneys fees and expenses to each of the defendants in the five derivative actions. As to some of the defendants, Judge Albright apportioned their fees among the five cases.

From the final orders awarding defendants' attorneys fees and expenses, plaintiffs appeal.

Boyce, Mitchell, Burns & Smith, by Lacy M. Presnell, III, and Susan K. Burkhart for the plaintiffs.

Moore, Van Allen, Allen & Thigpen, by Randel E. Phillips for defendants Malcolm M. Lowder and Patty S. Lowder.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews for defendant Moore & Van Allen.

Jones, Hewson & Woolard, by Harry C. Hewson for defendants Henry C. Doby, Jr. and John M. Bahner.

Brackett and Sitton, by William L. Sitton, Jr. for defendant Brown, Brown and Brown.

Hartsell, Hartsell & Mills, by Elizabeth C. Richardson and W. Erwin Spainhour for defendant John P. Rogers.

Wade and Carmichael, by R. C. Carmichael, Jr. for defendants Coble, Morton, Grigg & Odom; Morton & Grigg and Ernest H. Morton, Jr.

Nichols, Caffrey, Hill, Evans & Murrelle, by Everett B. Saslow, Jr. for defendant Charles E. Herbert.

Walker, Palmer & Miller, by James E. Walker for defendants Billings, Burns and Wells and Donald R. Billings.

EAGLES, Judge.

This appeal essentially involves two issues. First, did the trial court err in charging plaintiffs with defendants' attorneys fees under G.S. 55-55(e)? Second, even if attorney fees may be charged against plaintiffs here under G.S. 55-55(e), did the trial court err by setting attorney fees in unreasonable amounts and in apportioning some of the defendants' attorneys fees among the five actions? For the reasons stated, we affirm the trial court.

I

G.S. 55-55 sets forth two distinct standards for awarding attorney fees to successful litigants and taxing unsuccessful litigants with their opponent's attorney fees. Under G.S. 55-55(d) the court may award attorneys fees to a successful litigant who obtains a compromise and settlement or judgment. Under G.S. 55-55(e) the court may assess attorneys fees against an unsuccessful litigant in certain cases. G.S. 55-55(e) states:

> In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action.

[1] As to the first issue plaintiffs contend that the trial court erred in two respects: (1) by taxing plaintiffs with attorneys fees under circumstances where there had been no adjudication on the merits and (2) in finding that each action was brought "without reasonable cause" where there was insufficient evidence to support that finding. We disagree with plaintiffs' contentions and hold that the trial court properly awarded attorneys fees pursuant to G.S. 55-55(e).

The award of reasonable attorneys fees under subsection (e) is clearly permissive and within the trial judge's discretion, Robinson, North Carolina Corporation Law and Practice Section 14-14 (3d ed. 1983), subject, however, to two requirements: (1) entry of a final judgment and (2) a finding that the action was brought "without reasonable cause." G.S. 55-55(e). In the instant case the trial judge's dismissal of plaintiffs' complaints constituted a final judgment on the merits. He dismissed the complaints on defendants' motions made pursuant to G.S. 1A-1, Rule 12(b)(6) of the

Rules of Civil Procedure. However, in so doing, he considered matters that were outside the pleadings. Plaintiffs appealed the dismissals to this court. In *Hudson v. All Star Mills*, 68 N.C. App. 447, 315 S.E. 2d 514, *cert. denied*, 311 N.C. 755, 321 S.E. 2d 134 (1984) and *Lowder v. Doby*, 68 N.C. App. 491, 315 S.E. 2d 517, *cert. denied*, 311 N.C. 759, 321 S.E. 2d 138 (1984) we treated the trial court's orders as constituting entry of summary judgment. The purpose of summary judgment is to bring the case to a decision on the merits without the expense of trial where only questions of law are involved and a fatal weakness in a party's claim or defense is exposed. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981); *Rippy v. Blackwell*, 62 N.C. App. 135, 302 S.E. 2d 14 (1983). The grant of summary judgment operates as a final judgment on the merits, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), and plaintiffs' argument to the contrary is without merit.

The record on appeal in the instant case contains 39 separate orders in which Judge Albright, exercising his discretion under G.S. 55-55(e), awarded to defendants their expenses and attorneys fees incurred in defense of these actions at the trial court and appellate levels. Plaintiffs contend that Judge Albright's actions constitute an abuse of discretion. A trial judge may be reversed for abuse of discretion only when "the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980). In each of the 39 orders Judge Albright found that the five actions constituted "an attempt to circumvent a receivership action, *Lowder v. All Star Mills, Inc.*, 79CVS015, pending in [Stanly County Superior] Court; an impermissible collateral attack on the receivership court's jurisdiction; and one of a series of vexatious collateral attacks on a corporate receivership." Further, Judge Albright found that the actions were "brought without reasonable cause." We have reviewed the record on appeal and find no abuse of discretion on the part of Judge Albright; his findings are manifestly supported by reason and the law.

In *Lowder v. Doby*, 68 N.C. App. 491, 315 S.E. 2d 517, *cert. denied*, 311 N.C. 759, 321 S.E. 2d 138 (1984) we held that the first action, 81CVS438, filed by Horace Lowder on behalf of All Star Industries, Inc., constituted "an impermissible attack on the receivership court's jurisdiction." *Id.* at 493, 315 S.E. 2d at 519. We

described plaintiff's conduct in bringing that action as "vexatious." *Id.* at 492, 315 S.E. 2d at 518. As to the specific allegations contained in the complaint we held:

> Plaintiff's suit alleging a failure to collect properly the funds owed to All Star Industries, Inc., is clearly a collateral attack on the receivership court's jurisdiction; therefore, it is not proper and the trial court correctly dismissed the action.
>
> Even if plaintiff could have properly filed the action, the pleadings reveal two further bars to recovery. First, plaintiff is attempting to sue the federal bankruptcy trustees and their attorneys in state court. This they could not do. Secondly, plaintiff is attempting to bring an action for failure to prosecute an action to recover the debt when the public record clearly shows that an action to collect the alleged debt is now pending.
>
> Having determined that this action is an impermissible attack on the receivership court's jurisdiction, we, therefore, hold that the trial court's judgment must be and hereby is affirmed.

Id. at 493, 315 S.E. 2d at 519.

In *Hudson v. All Star Mills*, 68 N.C. App. 447, 315 S.E. 2d 514, *cert. denied*, 311 N.C. 755, 321 S.E. 2d 134 (1984) we held that the allegations of plaintiffs' second complaint, 81CVS512, "reflect attempts to circumvent the pending receivership action through collateral attacks. Attacks on the validity of receiverships by collateral actions are not permissible under North Carolina law." *Id.* at 451, 315 S.E. 2d at 516. The allegations in this second complaint are virtually identical to the allegations in the remaining three complaints brought on behalf of All Star Foods, Lowder Farms and All Star Hatcheries. As to the specific allegations in the complaint, we held that:

> First, plaintiffs contend that the Brown firm obtained confidential information from Horace and communicated it to Malcolm and Peggy Lowder and Moore and Van Allen. This matter was previously at issue in the receivership action and is therefore not subject to collateral attack. [*See Lowder v. Mills, Inc.*, 60 N.C. App. 275, 300 S.E. 2d 230, *aff'd in part and reversed in part*, 309 N.C. 695, 309 S.E. 2d 193 (1983).] Next,

plaintiffs attempt to attack the appointment of the receivers because Horace was not represented by counsel. Under the rule established in *Hall v. Shippers Express, supra*, this is clearly not permitted.

Plaintiffs further complain about the receivers having enjoined Horace from participating in the business and about their alleged attempts to create unnecessary attorney and accounting fees. These matters are clearly within the purview of the receivership action and cannot be collaterally attacked. Plaintiffs further object to the tax settlement entered into by the receivers and contend the receivers have otherwise mismanaged the subject companies. Here again, the tax matters were at issue in [*Lowder, supra*], and the other issues are clearly ancillary to the receivership proceeding and must be raised there.

Finally, plaintiffs attempt to attack the receivers' and bankruptcy trustees' actions relating to the bankruptcy proceeding. Again, these actions may be properly addressed only in the receivership and bankruptcy proceeding.

Having determined that all plaintiffs' allegations are properly subject to the jurisdiction of the receivership action over which Judge Seay retained jurisdiction, we, therefore, hold that the trial court properly entered summary judgment for defendants.

Id. at 451-52, 315 S.E. 2d at 517.

Despite our decisions in *Hudson, supra*, and *Lowder v. Doby, supra*, plaintiffs argue that the actions were not "brought without reasonable cause." In their argument plaintiffs analogize the "without reasonable cause" standard to the "lack of probable cause" standard in malicious prosecution actions and rely on the Restatement (Second) of Torts Section 675, comment f (1977) which states in part:

If the legal validity of a claim is uncertain, the person who initiates the civil proceeding may believe that his claim is meritorious, but he can have no more than an opinion that the chances are good that the court might decide to uphold it. The question is not whether he is correct in believing that the court would sustain the claim, but whether his opinion

that there was a sound chance that the claim might be sustained was a reasonable one.

Plaintiffs contend that G.S. 55-55(e) does not require that plaintiffs instituting shareholder derivative actions possess absolute certainty of the legal validity of their claims but that they need only have a "reasonable belief" that there is a "sound chance" that their claims may be sustained. Our research reveals no North Carolina cases that define or explain the "brought without reasonable cause" standard of G.S. 55-55(e). There are five other jurisdictions which have shareholder derivative statutes with language substantially similar to our G.S. 55-55(e). Ariz. Rev. Stat. Ann. Section 10-049(B); Ga. Code Ann. Section 14-2-123(f); N.D. Cent. Code Section 10-19.1-86(1); Tex. Bus. Corp. Act Ann. art. 5.14(F); and Wash. Rev. Code Ann. Section 23A.08.460. However, we find no appellate court decisions from these jurisdictions that define or explain the standard "brought without reasonable cause." Assuming *arguendo* that plaintiffs are correct that they need have only a reasonable belief that there is a sound chance that their claims may be sustained, we find, nevertheless, that plaintiffs' actions were brought without reasonable cause. Based on the record before us, it is clear that both the United States Bankruptcy Court and our state receivership court had previously, either in the Chapter X reorganization proceeding or the receivership proceeding, dealt with the merits of the allegations made by the plaintiffs in their five complaints. The record reveals that: the bankruptcy court considered the merits regarding transfer from one corporation to another, farm operations, alleged attorneys' conflict of interest, tax claims and inventories; the state receivership court made decisions on the merits regarding alleged improper communication of confidential information, tax settlement matters, Horace Lowder's exclusion from management, attorneys' fees, receivers' fees, proceedings in bankruptcy court and various management decisions. The record is devoid of evidence that supports any reasonable belief that there was a sound chance that plaintiffs' claims in this litigation might be sustained.

Plaintiffs also argue that their choice of forum, i.e. a court of concurrent jurisdiction, was "reasonable" in light of the "unsettled state of the law" prior to our decisions in *Hudson, supra* and *Lowder v. Doby, supra.* This argument is without merit. In both *Hudson, supra,* and *Lowder v. Doby, supra,* we relied on *Hall v.*

Shippers Express, 234 N.C. 38, 65 S.E. 2d 333, *petition for reh'g dismissed*, 234 N.C. 747, 66 S.E. 2d 640 (1951), and held that "where a receivership court has jurisdiction over a matter the only remedy is through the receivership proceeding." *Hudson, supra* at 451, 315 S.E. 2d at 517. *Lowder v. Doby, supra* at 493, 315 S.E. 2d at 518. Our holdings were simply a restatement of the rules set out in *Hall.*

In *Hall, supra*, the plaintiff instituted an action in the Superior Court of Mecklenburg County seeking, among other things, to have a pending receivership proceeding in Superior Court of Mecklenburg County declared null and void. The plaintiff alleged that the pending receivership proceeding was fraudulent and void, instituted for the purpose of defrauding creditors of the defendant corporation. Our Supreme Court held:

> The proceeding in the Superior Court of Mecklenburg County appears to be regular on its face, and the court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of co-ordinate authority. 14 Am. Jur., Courts, Sec. 243, p. 435 *et seq.* "That court which first takes cognizance of the controversy is entitled to retain jurisdiction until the end of the litigation, to the exclusion of all interference by other courts of concurrent jurisdiction," Gluck & Becker on Rec., Sec. 430, and quoted with approval by *Clark, J.* (later *Chief Justice*) in the case of *Worth v. Bank*, 121 N.C. 343, 28 S.E. 2d 488.
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> * * *
>
> The appointment of a Receiver under a consent decree does not render his authority subject to collateral attack. 45 Am. Jur., Receivers, Sec. 117, p. 99.
>
> In the case of *Rousseau v. Call*, 169 N.C. 173, 85 S.E. 414, where the Receiver instituted an action and the legality of his appointment was challenged, *Hoke, J.*, in speaking for the Court, said: "The court, in the exercise of its jurisdiction, having entered judgment appointing plaintiff receiver, its judgment is not open to collateral attack, and, even if the order was improvidently made, its propriety is not open to question in this suit."

> Where there is just ground for it, a Receiver can always be removed upon application to the proper judge. *Mitchell v. Realty Co.*, 169 N.C. 516, 86 S.E. 358; *Fisher v. Trust Co.*, 138 N.C. 90, 50 S.E. 592.
>
> This Court, in *Surety Corp. v. Sharpe*, 232 N.C. 98, 59 S.E. 2d 593, speaking through *Ervin, J.*, said: "The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed, except in the infrequent instances where the appointing court, for good cause shown, grants leave to a claimant to bring an independent action against the receiver," citing *Black v. Power Co.*, 158 N.C. 468, 74 S.E. 468.

Hall, supra, at 40-41, 65 S.E. 2d at 335-36. The principles established in *Hall* were known or reasonably should have been known to plaintiffs when they instituted these collateral attacks on the pending receivership proceeding. The record reveals that the only reason given by plaintiffs for filing these five actions was to avoid the statute of limitations defense. That reason does not provide reasonable cause for bringing these impermissible, "vexatious," collateral attacks.

The findings by the trial court in awarding defendants' attorney fees are supported by competent evidence which reveals that the actions were "vexatious" and "brought without reasonable cause." The trial judge did not abuse his discretion in awarding defendants' attorneys fees because his actions are manifestly supported by reason and the law.

II

[2] Having determined that the trial court did not err in awarding defendants' attorneys fees and expenses under G.S. 55-55(e), we now address plaintiffs' second argument that the amounts awarded were not reasonable and that the trial court erred in apportioning some of the fees. G.S. 55-55(e) allows the trial court, in its discretion, to charge plaintiffs with defendants' *reasonable* expenses, including attorneys fees, incurred in defense of the actions. Plaintiffs argue that the orders allowing attorneys fees "contain scant findings of fact on the 'reasonableness' of the fees, and little or no evidence appears in the record to support the findings," and that the "trial court abused its discretion in enter-

ing orders not supported by sufficient evidence." We have carefully reviewed the record in light of plaintiffs' arguments and disagree.

The evidence in the record, which includes motions, affidavits and the billing records of some of the attorneys, supports the trial court's findings that the fees and expense incurred were reasonable. Altogether, in these five actions, there are twelve individual defendants each represented by counsel. The attorneys for defendants Donald R. Billings, Billings, Burns and Wells, Henry C. Doby, Jr. and John M. Bahner submitted precise, detailed, itemized time and expense statements which are made part of the record on appeal. These statements support the trial court's findings that the fees and expenses incurred by these defendants were reasonable.

The record reveals that the attorneys for defendants Coble, Morton, Grigg & Odom (formerly Coble, Morton & Grigg) and Ernest H. Morton, Jr. maintained separate files for each of the five actions and submitted to their clients detailed, itemized statements of the time expended and expenses incurred in representing these defendants. The affidavit reveals that counsel for the defendants submitted interim statements with all time and expenses charged together and that most of the interim statements had been paid by the defendants. However, because the attorneys kept separate files in each action, the fees were not apportioned. While copies of the interim statements submitted by these attorneys are not contained in the record on appeal, the evidence in the record, nevertheless, supports the trial court's findings that the fees and expenses incurred by these defendants were reasonable.

As to defendant Brown, Brown & Brown, Judge Albright entered five separate orders allowing defendant's attorneys fees. Each order contains a finding by Judge Albright that:

> [T]he defendant, Brown, Brown & Brown, a partnership, has incurred substantial legal expenses in defending against plaintiffs' collateral attack including investigating and conferring with the client; correspondence and conferences with other attorneys of record; preparation of responsive motions; preparations of briefs and appearances in court; arguments of motions; preparation and briefing of the case on appeal; that

these services have been performed by defendant's counsel at the hourly rate of $60.00 which is a reasonable hourly rate.

The fees in the five cases were not apportioned. There are no itemized statements in the record detailing the exact services performed by the attorneys for defendant Brown, Brown & Brown; however, the record contains an affidavit by counsel which: explains the services rendered, gives the total number of hours expended and the customary, usual rate charged per hour and separately itemizes the fees and expenses incurred by the defendant in each of the five actions. This evidence supports the trial court's findings that the fees and expenses incurred by this defendant were reasonable.

The evidence in the record reveals that counsel for defendant Charles E. Herbert submitted periodic statements to the defendant for all five actions without breaking the statement down into subparts. The record further shows that the amounts incurred and billed had been paid by the defendant. The trial court in finding that the amounts billed and paid were reasonable considered: the complexity of the facts; the legal issues involved; the work required and completed at the trial court level; the extent of the pleadings at the appellate level; the briefs filed; the aggregate fees sought by the other defendants; the type of proceedings involved; and the amounts actually paid by the defendant. These factors were properly considered by the trial court and support the court's findings that the fees and expenses were reasonable.

As to defendants Moore, Van Allen, Allen & Thigpen (formerly Moore and Van Allen), John P. Rogers, Malcolm M. Lowder and Patty S. Lowder, the trial court found that their attorneys maintained precise records of the time expended and expenses incurred and apportioned the total amounts among the five cases. While the record does not contain copies of these precise records, the verified motions submitted by counsel support findings that the fees and expenses were reasonable.

We note that the better practice is to include in the record on appeal copies of any records kept by counsel indicating the time expended and the expenses incurred or otherwise detailing the services rendered. Here, however, where commercially sophisticated individuals are dealing at arm's length, most of the bills submitted having already been paid by the defendants, and where

the trial court's orders contain findings that precise time records had been kept by counsel; the trial court's orders will be sustained on appeal, in the absence of collusion between the defendants and their attorneys. We have compared the aggregate fees awarded and find that they are substantially similar. Further, plaintiffs have offered no basis for their conclusory assertion that the fees awarded are not reasonable. Here, the findings of reasonableness are supported by competent evidence contained in the record.

Plaintiffs also argue that the fees which were apportioned should not have been. Given the circumstances, the apportionment of fees in these cases was reasonable. The record shows that the five lawsuits involved substantially overlapping contentions of law and fact; four of the lawsuits were virtually identical and were linked together for purposes of appeal; the legal principles applicable at the trial court and appellate levels were substantially the same; the underlying factual background from the receivership and bankruptcy proceedings were substantially the same; most of the hearings at the trial court level occurred contemporaneously; the motions made and the orders entered generally were identical or consolidated; and that while precise records were kept as to the actual time and expenses incurred, it was difficult to attribute particular tasks to a particular matter with complete precision. The difficulty encountered is the result of plaintiffs' decision to file four virtually identical lawsuits. Plaintiffs created the situation and cannot now complain that the fees and expenses apportioned by the court to each of these nominally separate proceedings are not calculated with precision.

Accordingly, the orders entered by Judge Albright pursuant to G.S. 55-55(e) are

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

JULIUS ROBERT SMITH, JR. AND WIFE, NANCY MULLINS SMITH v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 8526SC979

(Filed 4 March 1986)

1. **Eminent Domain § 13— applicability of N.C.G.S. Ch. 40A to private landowners**

Even though private landowners are not specifically mentioned in N.C.G.S. 40A-3, they are bound by the provisions of Ch. 40A.

2. **Eminent Domain § 13— inverse condemnation**

No general common law right of action for inverse condemnation exists where there is no underlying statutory condemnation authority.

3. **Aviation § 2; Eminent Domain § 13— airplane overflights—inverse condemnation—procedure provided by N.C.G.S. 40A-51**

N.C.G.S. 40A-51 provides the sole procedure by which plaintiffs may bring an inverse condemnation action against a city for the alleged taking of their land resulting from the city's operation of its airport.

4. **Aviation § 2; Eminent Domain § 13— airplane overflights—inverse condemnation action—N.C.G.S. Ch. 40A—different procedures not allowed by city charter**

A city charter amendment permitting a city to use the provisions of N.C.G.S. Ch. 136 to exercise its power of eminent domain did not give plaintiff landowners the right to use procedures other than those set forth in N.C.G.S. Ch. 40A in bringing an inverse condemnation action against the city based on airplane overflights.

5. **Limitation of Actions § 4; Aviation § 2; Eminent Domain § 13— inverse condemnation—enactment of statute of limitations—constitutionality of grace period**

A grace period of five months and three weeks between enactment of the two-year statute of limitations of N.C.G.S. 40A-51 for inverse condemnation actions and the effective date of the statute afforded landowners a reasonable time within which to bring an action on an existing inverse condemnation claim so as to comply with due process.

6. **Aviation § 2; Eminent Domain § 13— inverse condemnation—claim barred by statute of limitations**

Plaintiffs' claim filed on 23 November 1983 for inverse condemnation allegedly resulting from defendant city's opening of a new airport runway on 19 June 1979 was barred by the two-year statute of limitations of N.C.G.S. 40A-51.

7. **Aviation § 2— inverse condemnation—flight easement—additional taking from increased air traffic**

Once a flight easement has been established, a further compensable taking may occur upon increases in operations or introduction of new aircraft within

the easement acquired with consequent decreases in land values significantly beyond the diminution resulting from the initial taking.

8. Rules of Civil Procedure § 12— failure to state claim for relief—allowance of motion to dismiss

A motion to dismiss for failure to state a claim for relief generally should not be allowed unless the pleadings disclose the absence of facts sufficient to make a good claim or some other insurmountable bar to recovery.

9. Aviation § 2; Eminent Domain § 13— inverse condemnation action—allegation of date of taking

The requirement of N.C.G.S. 40A-51 that a plaintiff in an inverse condemnation action state the dates of the alleged taking does not impose any stringent standard of specificity.

10. Aviation § 2; Eminent Domain § 13— inverse condemnation—increase in air traffic—date of taking—remand for more definite statement

Plaintiffs' complaint in an inverse condemnation action alleging the taking of a further flight easement "within the past two years" resulting from increased air traffic failed to allege with reasonable specificity when the alleged taking occurred. However, the complaint will not be dismissed but the cause will be remanded to permit plaintiffs to respond to defendant's motion under N.C.G.S. 1A-1, Rule 12(e) for a more definite statement.

APPEAL by plaintiffs from *Snepp, Judge*. Judgment entered 2 July 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 January 1986.

Plaintiff landowners, by complaint filed 23 November 1983, seek money damages for the alleged taking of their land resulting from defendant City's operation of its airport. The trial court dismissed their claims and they appeal.

Plaintiffs alleged that they are the owners of land in Mecklenburg County, near defendant's Charlotte/Douglas International Airport. On 19 June 1979 defendant opened a new runway, Runway 18R/36L. Aircraft using the new runway overfly plaintiffs' land at heights as low as approximately 100 feet. The overflights, plaintiffs allege, result in intense noise, vibration and pollution, greatly diminishing plaintiffs' enjoyment of their land and the value thereof.

Plaintiffs presented two claims for relief. In the first, they alleged a taking of their property beginning when Runway 18R/36L opened in June 1979. In their second claim, they realleged *verbatim* the first claim, simply changing the relevant dates from

"[s]ince June 19, 1979" to "[w]ithin the past two years," and adding that defendant allowed "substantially increased numbers" of aircraft to use the airport in that time. Plaintiffs claimed damages of $50,000 plus attorney fees. Plaintiffs filed a "Memorandum of Action" with the Register of Deeds, giving record notice of the action involving their property. The memorandum alleged that the taking occurred "at the opening of Runway 18R/36L with the taking of a further easement occurring within 2 years prior to the filing of the Memorandum and resulting from the substantial increase in flights over or near plaintiffs' property within the two years preceding the filing of this Memorandum."

Defendant responded by filing motions to dismiss pursuant to G.S. 1A-1, R. Civ. P. 12(b)(6) and for a more definite statement of when the taking alleged in plaintiffs' second claim occurred, G.S. 1A-1, R. Civ. P. 12(e). Defendant asserted the 24-month statute of limitations in G.S. 40A-51(a) as a defense. (G.S. Chapter 40A had been enacted in July 1981, 1981 N.C. Sess. Laws c. 919, and became effective 1 January 1982.) The trial court granted defendant's motion to dismiss both claims, with prejudice. Plaintiffs appeal.

Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, by L. Holmes Eleazer, Jr. and T. LaFontine Odom, for plaintiff-appellants.

Underwood, Kinsey & Warren, by C. Ralph Kinsey, Jr. and Kenneth S. Cannaday, for defendant-appellee.

EAGLES, Judge.

G.S. Chapter 40A, urged by defendant as a bar to plaintiffs' first claim, became effective 1 January 1982. This lawsuit is one of 44 airport inverse condemnation actions filed against defendant after 1 January 1982. Defendant has filed similar motions to dismiss in each case. The parties in the other actions have stipulated to continuances pending the outcome of this appeal.

Numerous other actions involving takings occurring as a result of construction and operation of Runway 18R/36L have already reached the appellate courts. *See Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982); *Robinson v. City of Charlotte*, 306 N.C. 213, 293 S.E. 2d 117 (1982); *Bandy v. City of Charlotte*, 72

N.C. App. 604, 325 S.E. 2d 17, *disc. rev. denied*, 313 N.C. 596, 330 S.E. 2d 605 (1985); *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E. 2d 179 (1981), *disc. rev. denied*, 304 N.C. 725, 288 N.C. 380 (1982).

I

We consider first the effect of G.S. 40A-51(a) as it relates to plaintiffs' first claim for relief. G.S. 40A-51(a) appears to bar as untimely all claims filed more than 24 months after "the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later." *Id.* Plaintiffs' first claim alleges a taking occurring when Runway 18R/36L opened in June 1979. They did not file their lawsuit until November 1983. The statute, if applied literally, would bar the claim. Plaintiffs' arguments raise two decisive questions: (1) Does G.S. Chapter 40A provide the exclusive means for determining these inverse condemnation claims? (2) If so, may the time limit in G.S. 40A-51(a) be constitutionally applied to these plaintiffs?

A

Chapter 40A was enacted by the General Assembly in 1981 to revise and consolidate existing laws governing eminent domain. 1981 N.C. Sess. Laws c. 919, s. 1. The legislature expressly declared that the chapter's provisions provided the exclusive means of condemnation:

> It is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors. All other provisions in laws, charters, or local acts authorizing the use of other procedures by municipal or county governments or agencies or political subdivisions thereof, or by corporations, associations or other persons are hereby repealed effective January 1, 1982. Provided, that any condemnation proceeding initiated prior to January 1, 1982, may be lawfully completed pursuant to the provisions previously existing.

G.S. 40A-1.

The cited language does not expressly state that Chapter 40A is the sole means for bringing inverse condemnation actions. The term "inverse condemnation" is not mentioned in the chapter but G.S. 40A-51, which provides for actions by private property owners where their property has been taken by governmental action without compensation, is clearly the relevant statute. Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E. 2d 1 (1970). It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. *See City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E. 2d 341 (1965). G.S. 40A-51 provides the private property owner with a means to compel government action. If Chapter 40A provides the sole means for the City to condemn aviation easements over plaintiffs' land, it follows that plaintiffs' sole inverse condemnation remedy would lie under G.S. 40A-51.

B

[1] Plaintiffs argue that because G.S. 40A-3 does not specifically mention private landowners, they are not limited to the statutory remedies of Chapter 40A. It has been established that they no longer have any private common law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation. *Long v. City of Charlotte, supra.* Plaintiffs' action here is not directly for money damages, but to compel the exercise of defendant's power of eminent domain, in which damages, if any, will be determined. G.S. 40A-51(a) ("The procedure hereinbefore set out . . . shall be followed for the . . . determination of just compensation."); G.S. 40A-47, -48, 40A-62 *et seq.* G.S. 40A-1 makes clear the legislative intent that defendant's exercise of its power of eminent domain, unless specifically excepted, should occur exclusively under the provisions of that chapter. Even though private landowners are not specifically mentioned in G.S. 40A-3, we hold that they are bound by the provisions of Chapter 40A.

C

Some of the uncertainty on this issue arises from the discussion in *Long* of "common law" inverse condemnation actions. Defendant City is an agency created by the State, and has no

authority other than that granted by the legislature, either expressly or by necessary implication. *State v. Furio*, 267 N.C. 353, 148 S.E. 2d 275 (1966). Defendant may exercise its delegated right of eminent domain only as authorized to do so by statute or its charter. *Town of Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E. 2d 525 (1952). If there is no legislative authorization, there is no power to condemn. *See State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 167 S.E. 2d 385 (1969). If an inverse condemnation action is only a procedure to compel the exercise of this statutory power, a "common law" inverse condemnation action could only be an action to compel its exercise where the statute, unlike G.S. Chapter 40A, did not establish such procedure.

[2] This was the result reached in *Long*: there the court defined a "common law" inverse condemnation action as interference with private property under color of legal authority *for a public purpose*. 306 N.C. at 199, 293 S.E. 2d at 109, *citing Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817 (1950). Public purpose is defined if at all by statute. *State v. Core Banks Club Properties, Inc., supra.* The *Long* court accordingly recognized a common law action arising out of the condemnation authority of G.S. Chapter 160A. The *Long* court did not, nor do we, recognize the existence of any *general* common law right of action where there is no underlying statutory condemnation authority.

D

Our interpretation is consistent with the interpretation of other statutory procedures governing inverse condemnation. In *Harwood v. City of Concord*, 201 N.C. 781, 161 S.E. 534 (1931), a street right-of-way case, the Supreme Court held that a statute providing for appraisal and assessment of damages and a right of appeal for street condemnation was the exclusive remedy for recovery by private landowners. The court affirmed a directed verdict that plaintiff take nothing in his common law action for damages. *See also* 1 Am. Jur. 2d Actions Sections 75-76 (1962). Similarly, in *Wilcox v. N.C. State Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971) the court affirmed a ruling that the two-year statute of limitations constituted a "complete defense" to the action for inverse condemnation, notwithstanding the fact that plaintiff had filed his action within the limitations periods set by other statutes of limitations.

E

One exception to this rule has been recognized in *Midgett v. N.C. State Highway Comm.*, 260 N.C. 241, 132 S.E. 2d 599 (1963). There the court relied on *Harwood* for the general proposition that the statutory remedy for recovery of damages for governmental takings is ordinarily exclusive. However, in *Midgett* flood damage to plaintiff's land occurred well after the statute of limitations had run. The statute then in effect provided that the limitation period commenced when the project in question was completed. No damage occurred at the time the highway was built, although injury was foreseeable then and plaintiff pointed this out to defendant. The court held that since plaintiff was constitutionally protected from the taking *or damage*, and no statute afforded him a remedy under that particular fact situation, he had a common law right of action. The key aspect of *Midgett*, absent here, is that plaintiff did not seek compensation for a permanent taking for a public use, but for *damages from a nuisance arising from public activity* adjacent to his land. The North Carolina cases cited in *Midgett* follow this logic: a statute of limitations for seeking compensation for a taking for a public purpose project would not apply to actions for negative nuisance damages. *Eller v. Bd. of Educ.*, 242 N.C. 584, 89 S.E. 2d 144 (1955); *City of Raleigh v. Edwards*, 235 N.C. 671, 71 S.E. 2d 396 (1952). *See Lea Co. v. N.C. Bd. of Trans.*, 308 N.C. 603, 304 S.E. 2d 164 (1983) (recognizing underlying nuisance theory).

The result of the *Midgett* case has since been incorporated into both G.S. 136-111 and G.S. 40A-51: the statutory time begins to run on completion of the project or the taking, *whichever is later*. Because of the statutory amendments, it is not clear that *Midgett* would apply today, even on identical facts, where a private landowner filed after expiration of the statutory period. The facts of this case clearly are distinguishable from *Midgett*: plaintiffs incurred damage beginning in 1979, by their own allegation. They offer no explanation for their delay in filing this action, nor does it appear legally excusable, in light of the ongoing nature of the airport operations.

[3] We note that the *Long* court expressly rejected any nuisance or trespass theory of recovery for interference with private property resulting from municipal airport operations. 306 N.C. at

196-98, 202 n. 9, 293 S.E. 2d at 108-9, 111 n. 9 [expressly disapproving contrary *dicta* in *Long v. Bond*, No. C-C-79-356 (W.D.N.C. March 18, 1980)]. For these reasons, we conclude that the *Midgett* exception does not apply here and that G.S. 40A-51 provides the sole procedure by which plaintiffs may bring their inverse condemnation action.

II

[4] Plaintiffs point to a 1983 amendment to defendant's city charter which allows it to use the provisions of Article 9 of Chapter 136 of the General Statutes to exercise its eminent domain powers, notwithstanding the "exclusive remedy" provisions of G.S. 40A-1 (1983 N.C. Sess. Laws c. 437, s. 1). Plaintiffs argue that they should not be restricted to the procedures of Chapter 40A, since the city is not.

A similar contention was discussed in *Long*. There the court held that under the existing statutory structure, plaintiff property owners were not bound to use the statutory inverse condemnation procedures in G.S. 136-111. In rejecting defendant City's contention that plaintiffs were required to use the Chapter 136 procedure, the court relied on the provisions of G.S. 160A-243 and 160A-243.1. The court held that the separate provisions of Chapter 160A clearly contemplated a common law inverse condemnation action. 306 N.C. at 210-11, 293 S.E. 2d at 115-16.

Though *Long* was decided 13 July 1982, after the effective date of the present Chapter 40A, it dealt solely with the law existing in 1981 when the Longs' complaint was dismissed. The *Long* opinion does not discuss the effect, if any, of the new enactments. The permissive language of G.S. 160A-243, on which the *Long* court relied, was repealed when the "exclusive" provisions of Chapter 40A went into effect. 1981 N.C. Sess. Laws c. 919, s. 28. The provisions of Chapter 40A now control cities' eminent domain actions with respect to airports. G.S. 40A-3(b)(2); G.S. 160A-311(9).

We find nothing in the amendment to the charter suggesting restoration of the broad remedies allowed by *Long* under the pre-1981 statute. Rather, the charter amendment simply allows the City a single alternative procedure. That alternative procedure, including G.S. 136-111 and its two year limitation period,

is for all practical purposes the same as G.S. 40A-51. Accordingly, plaintiffs' position is not affected by the 1983 amendment to defendant's city charter.

III

Plaintiffs contend next that G.S. 40A-51 is unconstitutional *as applied* to these particular facts. Plaintiffs argue that the enactment of the statute terminated their valid right to action without sufficient opportunity for them to exercise it. Both sides rely on *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981).

A

In *Flippin* the court recognized the general rule that the legislature may, without affecting vested interests, shorten or extend pre-existing periods of limitation. If the new limitation shortens the existing period, however, to comport with due process it must provide a reasonable "grace period" for filing actions which have accrued but have not been filed when the new limitation takes effect. *Id.* at 113, 270 S.E. 2d at 486. The *Flippin* court did not look merely at the statutory grace period, but also at the time between accrual of the action and the cutoff date under the new limitation. As *applied* in *Flippin* the statute allowed plaintiff only 39 days between accrual and the filing deadline. This was constitutionally insufficient, even though the time between passage of the amending act and its effective date was eight months.

Here, however, plaintiffs' first claim accrued in June 1979. Over two years later, in July 1981, the new Chapter 40A was enacted. 1981 N.C. Sess. Laws c. 919. Plaintiffs suffered no disability during that period, and could have filed their action at any time, as other local landowners did. *See Long* (complaint filed June 1980). Therefore the ultimate question presented in *Flippin*, of interval between accrual of the action and the new statutory cutoff date, does not arise. The only question is whether the period between enactment and the cutoff date, five months and three weeks (10 July 1981 to 1 January 1982), was itself so unreasonably short as to deny plaintiffs due process of law.

B

[5] What constitutes a reasonable grace period generally is a legislative and not a judicial issue and the courts should not interfere unless the time allowed is so manifestly insufficient as to effectively deny justice. *Flippin, citing Barnhardt v. Morrison,* 178 N.C. 563, 101 S.E. 218 (1919). The *Flippin* court started with *Matthews v. Peterson,* 150 N.C. 132, 63 S.E. 722 (1909), in which a five month grace period between ratification and effect was approved. It then examined only cases in which grace periods less than five months were considered. 301 N.C. at 115-16, 270 S.E. 2d at 487-88. This focus on periods of five months or less suggests approval of that grace period as a constitutional minimum. *But see Blevins v. Northwest Carolina Utilities, Inc.,* 209 N.C. 683, 184 S.E. 517 (1936) (shortening limitation from twenty years to six months unreasonable). Courts of other jurisdictions have held periods of as little as thirty days reasonable. 51 Am. Jur. 2d, Limitation of Actions, Section 39 (1970).

In light of the stringent standard of review, the standard implicit in *Flippin,* and the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period, we cannot say that the five month grace period of 1981 N.C. Sess. Laws c. 919 is so unreasonable as to amount to a denial of justice.

IV

[6] Having determined that the two year statute of limitations of G.S. 40A-51 (or G.S. 136-111) applies, that *Midgett v. N.C. State Highway Comm., supra,* does not relieve plaintiffs of the statute of limitations' effect, and that the five month grace period in 1981 N.C. Sess. Laws c. 919 comported with due process, we hold that plaintiffs' first claim was not timely filed and that the trial court correctly dismissed it.

V

We now consider plaintiffs' second claim, for a taking occurring within two years of the filing of their action as a result of alleged substantial increases in numbers of planes using the airport.

A

[7] Defendant raises the threat of recurring litigation if claims for such "additional takings" are allowed. It is true that once an easement is taken, the condemnor ordinarily enjoys the right to use it without incurring further liability to the landowners and successors. *Lea Co. v. N.C. Bd. of Trans.*, *supra*. That insulation from further liability extends only to the "defined portion" of property actually taken, however. *Id.* at 625, 304 S.E. 2d at 179. We have recognized that once a flight easement has been established, further compensable takings may occur "upon increases in operations or introduction of new aircraft within the easements acquired with consequent decreases in land values significantly beyond the diminutions resulting from the initial takings." *Cochran v. City of Charlotte*, *supra*, 53 N.C. App. at 396, 281 S.E. 2d at 185. We relied in *Cochran* on *Avery v. United States*, 330 F. 2d 640 (Ct. Cl. 1964), in which the court rejected the government's contention that an aviation easement, once taken, extended to all types and quantities of aircraft and precluded recovery. In *Avery*, plaintiffs prevailed on their claim that the use of an air station as a training base, together with extension of runways, the introduction of heavy jet bombers and a sharp decrease in land values, combined to cause a new taking beyond that inherent in original use of the air station as a jet fighter base. *See also Adams v. United States*, 680 F. 2d 746 (Ct. Cl. 1982) (F-4 fighters stationed at existing base; finding of additional taking affirmed without discussion); *A. J. Hodges Industries, Inc. v. United States*, 355 F. 2d 592 (Ct. Cl. 1966) (introduction of B-52 bombers, twice as large as planes used formerly; additional taking). Our law clearly recognizes the concept of additional takings of aviation easements due to increases in air traffic.

The question before us now is a pleading question: Did plaintiffs allege an additional taking sufficient to withstand defendant's motion to dismiss?

B

[8] Detailed fact pleading is no longer required under our Rules of Civil Procedure. G.S. 1A-1, R. Civ. P. 8; *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Rule 8 did not remove all requirements of particularity, however; mere assertion of a grievance will not suffice, but the pleader must plead with sufficient

particularity to identify the legal issues and allow the other party to frame a responsive pleading. *Id.* A motion to dismiss for failure to state a claim for relief generally should not be allowed unless the pleadings disclose the absence of facts sufficient to make a good claim or some other insurmountable bar to recovery. *See Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690, *cert. denied*, 277 N.C. 251 (1970). The policy behind the notice theory of the present rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading. *Sutton v. Duke, supra.* Consequently, our courts have exercised great restraint in ruling on the factual sufficiency of pleadings.

C

[9] For the purposes of testing the timeliness of a complaint, averments of time and place are material. G.S. 1A-1, R. Civ. P. 9(f). This allows early consideration of statute of limitations defenses, which are appropriately raised by motions to dismiss. *Id.*, Comment; *see Fed. Deposit Ins. Corp. v. Loft Apartments Ltd. Partnership*, 39 N.C. App. 473, 250 S.E. 2d 693, *disc. rev. denied*, 297 N.C. 176, 254 S.E. 2d 39 (1979). We note also that G.S. 40A-51 specifically requires that a plaintiff in an inverse condemnation action state the dates of the alleged taking, although it does not require "particularity." *Compare* G.S. 1A-1, R. Civ. P. 9(b). When a taking occurs cannot always be determined with precision, however, particularly where as here the alleged taking at issue is additional to existing government interference with plaintiffs' property. No simple test exists for determining *when* a taking occurs by aircraft overflights; rather a particularized judgment of the facts of the individual case is necessary. *Jensen v. United States*, 305 F. 2d 444 (Ct. Cl. 1962). We therefore do not read the date requirement of G.S. 40A-51 to impose any stringent standard of specificity.

[10] Nevertheless, what plaintiffs have done here, alleging a very general taking "within the past two years," would if allowed foreclose any testing of the sufficiency of the complaint, effectively depriving defendant of its remedies under Civ. P. 12. This should not be permitted. *Compare Fed. Deposit Ins. Corp. v. Loft Apartments Ltd. Partnership, supra* (complaint alleged action arising after statutory cutoff date, but only 25 days possible

overlap; sufficient). Our Supreme Court has recommended before that plaintiffs, in this type of action, should "allege with reasonable specificity when the alleged appropriation or taking occurred." *Hoyle v. City of Charlotte, supra*, 276 N.C. at 306, 172 S.E. 2d at 10.

D

We do not believe, however, that total dismissal of the complaint was the proper remedy. Defendant made a motion for a more definite statement. G.S. 1A-1, R. Civ. P. 12(e). Rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward and plead the facts they possessed. The court could then rule on their timeliness and sufficiency. We reached a similar result in *Schloss Outdoor Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 272 S.E. 2d 920 (1980). There we held that a conclusory statement that defendant city "cut down and removed" a sign sufficed to state a claim in inverse condemnation. Mere vagueness of the complaint did not entitle defendant to dismissal, but rather should have been tested by a Rule 12(e) motion. We note that motions for a more definite statement may frequently be interposed for delay, *see Ross v. Ross*, 33 N.C. App. 447, 235 S.E. 2d 405 (1977), and should be scrutinized with care. Nevertheless, this appears to be an appropriate case for allowing a Rule 12(e) motion.

Practice under the similar provisions of the federal rules supports this result. Fed. R. Civ. P. 9(f); Fed. R. Civ. P. 12(e).

> Ordinarily, motions under Rule 12(e) are not favored because of their dilatory effect. But if the motion will expedite the determination of a case, by compelling the plaintiff to more precisely plead matters which may determine whether the action is vulnerable to a motion to dismiss, it should be favored.

2A J. Moore, Moore's Federal Practice Section 12.18[4] (2d ed. 1985). *See also* 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil Section 1376 at 743-45 (1969).

E

While absolute precision in pleading is not necessary, plaintiffs may not simply state a generalized grievance and thereby

gain the right to go on a discovery fishing expedition. As they demonstrated in oral argument, they do have some knowledge of specific facts as to when the alleged additional taking occurred. On remand, they should respond to the Rule 12(e) motion with whatever clarity they can, listing the relevant dates and changes in circumstances constituting the alleged taking. The court may then rule on the timeliness and factual sufficiency of the complaint. On this record, however, a ruling would be premature.

CONCLUSION

The court ruled correctly in dismissing plaintiffs' first claim as barred by the statute of limitations. As to the second claim, however, dismissal was inappropriate and that portion of the order is reversed and remanded. Subsequent proceedings shall be consistent with this opinion and our Rules of Civil Procedure.

Affirmed in part; reversed and remanded in part.

Judges MARTIN and COZORT concur.

ANTONY WILLIAMS AMES, AS REPRESENTATIVE OF THOSE UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING LLOYD'S PROFESSIONAL INDEMNITY POLICY NUMBER 0110147/0146036, WALBROOK INSURANCE COMPANY, WINTERTHUR SWISS INSURANCE COMPANY, SOUTHERN AMERICAN INSURANCE COMPANY, MUTUAL REINSURANCE COMPANY LIMITED, ST. KATHERINE INSURANCE COMPANY LIMITED, LONDON & EDINBURGH GENERAL INSURANCE COMPANY LIMITED, BERMUDA FIRE & MARINE INSURANCE COMPANY LIMITED, EXCESS INSURANCE COMPANY LIMITED, TUREGUM INSURANCE COMPANY, UNIONAMERICA INSURANCE COMPANY LIMITED, YASUDA FIRE & MARINE INSURANCE COMPANY (U.K.) LIMITED, GUARDIAN ROYAL EXCHANGE ASSURANCE, TRIDENT GENERAL INSURANCE COMPANY LIMITED, BELLEFONTE INSURANCE COMPANY, TERRA NOVA INSURANCE COMPANY LIMITED, ASSICURAZIONI GENERALI, T. FRANK BOOTH, CLARK C. BURRITT, JR., THOMAS J. CRIBBIN, ROBERT E. EDMONDS, JIMMY D. GAMBILL, OBA T. HANNA, JR., CHRISTOPHER J. MORAN, JOHN R. PUGH, C. ROBERT SURRATT, HARRY L. LAING, BILLY G. CLODFELTER, BOBBY R. CURTIS, KENNETH H. EIDSON, BILLY E. GREEN, STERLING L. HUDSON, ASHLEY S. JAMES, JR., FREDERICK E. LEWIS, RICHARD H. LLEWELLYN, MILDRED MASHBURN, JOHN L. MATTHEWS, BERNARD B. MORELAND, WILLIAM H. STONE, JR., THOMAS R. WOODARD, BILLY MITTELSTADT, H. JAMES TOLAND, JR., S. BEN HERBERT, GEORGE H. ROGERS, JR., JAMES A. SHAVER, C.

EDWARD BARGER, CHARLES L. EZELL, III, JAMES D. FUSSELL, ROBERT P. McNAIRY, JOE F. OGBURN, EARL H. WARD, CLAUDE F. PHILLIPS, GALE D. EIDSON, M. T. DANIEL, O. KENNETH SPAINHOUR, BENNY F. STROUPE, GORRELL L. TATE, DICK R. WARFFORD, JULIAN C. KNOTT, SAM B. ANDREWS, SAMUEL R. HENDERSON, D. FREDERICK WEIR, JR., KENNETH F. WINTON, THOMAS G. HORNE, JOHN S. TOLBERT, GERALD C. BURKE, RALPH M. HUNGERPILLER, W. GLENN JENKINS, PAUL R. OKEN, JOE M. KNOWLES, BRICE L. HOLLAND, GEORGE D. HARRIS, JAMES D. MOULTON, CARLTON E. TAYLOR, JAMES L. DALLAS, WESLEY W. TAYLOR, A. K. ANDERSON, MARLIN P. ALT, MENSEL D. DEAN, JR., JAMES G. SPRINKEL, MERVIN B. STICKLEY, ROBERT C. PEERY, C. PHILIP AVERY, JR., FORREST W. BROWN, JR., CARL R. ELLENBURG, JAMES E. HARRIS, JOHN W. INMAN, C. FOSTER JENNINGS, O. RALPH PUCCINELLI, JR., JOHN W. SANDERSON, JAMES A. SATTERWHITE, JESSE W. TURNER, J. GORDON HARMAN, CARROLL N. PEARSON, ROBERT L. CARMODY, JUDAH H. EVER, JAMES WILSON, MELVIN FANCHER, ALBERT H. CRIPPEN, JR., ORIAN P. WELLS, JR., CARL R. BRUNO, JOSEPH N. GUARIGLIA, JAMES H. MULLER, FRANK BAUERSCHMIDT, WILLIAM J. CRAVEN, JAMES C. NEILL, M. ROSS LANE, CHARLES M. BRABSON, CLIFFORD S. ENGLISH, JR., ROBERT E. LEECH, GEORGE F. McKNIGHT, WILLIAM H. TERRY, MARY G. WEINSTEIN, AND A. M. PULLEN AND COMPANY, A GENERAL PARTNERSHIP v. CONTINENTAL CASUALTY COMPANY, DEFENDANT

No. 8518SC587

(Filed 4 March 1986)

1. Insurance § 150— accounting malpractice—occurrence policy—canceled 1971—valid

In an action to determine which of two insurance companies was required to provide coverage for a professional malpractice claim based on acts and omissions before 1971, the trial court properly concluded that exclusions for other insurance providing payment in Lloyd's subsequent policy was applicable because Continental's occurrence policy was still valid and existing even though no premiums were being paid and the lack of payment of the claim under the Continental policy was due to Continental's wrongful and unjustified refusal to pay.

2. Insurance § 96.1— duty to defend—timely notice

Continental was not relieved of its duty to defend by untimely notice where Pullen, the insured, allowed attorneys for Travelers to examine certain work papers in 1976 which pertained to financial statements issued between 1967 and 1973; Pullen notified Lloyd's of a possible suit by Travelers on 4 January 1977; Travelers filed suit on 14 January 1977; Pullen became aware that Continental policies might also cover the Travelers claims; Pullen notified Travelers on 15 September 1977; there was at most a nine-month delay in giving Continental notice; the Continental policy had been canceled for over five

years and no premiums had been paid since cancellation; the managing partner responsible for insurance at Pullen had become managing partner after the Continental policy was canceled; the Travelers suit was a very complex case of alleged professional malpractice involving large numbers of documents; discovery lasted for months; and Pullen sent written notification of the Travelers suit to Continental immediately upon becoming aware of the possible coverage.

3. **Insurance § 150— unjustified refusal to defend—estopped from denying coverage**

Continental was estopped from denying coverage and was obligated to pay an amount in settlement where it had had the opportunity to raise defenses during litigation but unjustifiably refused to defend.

4. **Insurance § 150— action between two insurance companies—settlement of underlying claim by one company—conclusion that settlement reasonable—supported by evidence**

In an action between two insurance companies to determine who was responsible for a claim by Travelers Indemnity Company against Pullen and Company, there was ample evidence to support the conclusion of the trial court that the settlement of the Travelers action by Lloyd's was reasonable and made in good faith where Travelers brought suit claiming 80 million dollars in losses suffered in reliance upon allegedly false and misleading financial statements issued by Pullen between 1967 and 1973; Continental stated in its brief that the losses attributable to 1971, the last year of Continental's coverage, totaled 11.6 million dollars; Lloyd's settled the claim for 5.25 million dollars; there was no evidence of any bad faith by Lloyd's; and all the evidence showed that Lloyd's vigorously pursued the defense of Pullen.

5. **Insurance § 150— action between two insurance companies—court's division of obligations—no error**

In an action to determine coverage under professional malpractice insurance policies in which Lloyd's had settled the underlying claim, the trial court did not err by failing to pro-rate Continental's obligations at one-eleventh of the losses attributable to acts or omissions occurring in 1971 where Lloyd's policy only provided excess coverage for acts and omissions occurring before December 1971, so that Continental provided primary coverage for that period, and Continental acknowledged that the losses attributable to 1971 could reasonably total 11.6 million dollars.

6. **Insurance § 150— professional malpractice claim—action between two insurance companies—defense costs equally divided**

In an action between two insurance companies to determine responsibility for a professional malpractice claim which had been settled by Lloyd's, the trial court erred in its apportionment of defense costs where the complaint against the insured alleged damages as a result of financial statements produced by the insured during the coverage period of Continental's policy and also alleged damages arising from the period of Lloyd's policy coverage. Both insurers had a duty to defend and equity dictates that the defense costs be shared equally.

APPEAL by defendant and cross-appeal by plaintiffs from *DeRamus, Judge.* Judgment entered 23 October 1984 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 November 1985.

This appeal arises out of a declaratory judgment action filed on 3 June 1980 to determine coverage under professional malpractice insurance policies issued by defendant Continental Casualty Company (Continental) to plaintiff A. M. Pullen and Company, certified public accountants (Pullen).

Continental issued to Pullen a series of professional liability policies with a liability limit of one million dollars ($1,000,000.00). Pullen terminated its coverage with Continental effective 30 November 1971. Pullen replaced the Continental coverage with a professional indemnity policy issued by underwriters at Lloyd's, London (referred to collectively as Lloyd's). The Lloyd's policy carried a policy limit of ten million dollars ($10,000,000.00) and it remained in effect from 1 December 1971 throughout all relevant periods in the lawsuit.

The Continental policy is known generally as an "occurrence" policy. Continental agreed to pay all sums which Pullen became legally obligated to pay as damages because of any act or omission which occurred during the policy period.

Upon cancellation of the Continental policy, Lloyd's issued to Pullen what is known generally as a "claims made" policy. Lloyd's agreed to indemnify Pullen against any claim made against it during the coverage period regardless of when the alleged cause of action arose.

On 14 January 1977 Travelers Indemnity Company (Travelers) filed a civil action in the Superior Court of Fulton County, Georgia. In that action, Travelers alleged it had relied to its detriment upon false and misleading financial statements issued by Pullen between 1967 and 1973.

Pullen and Lloyd's filed a complaint on 3 June 1980 instituting the present action. In that complaint plaintiffs alleged that the policies Continental issued to Pullen covered acts or omissions forming the basis of the Travelers' lawsuit. Plaintiffs sought a declaration that Continental had an obligation to defend

the Travelers' action and to pay any judgment rendered against Pullen to the full extent of the Continental policy limits.

The Travelers' action was settled in September 1982 upon the payment of $5,250,000.00 to Travelers. Lloyd's defense costs totalled $724,659.52. Continental did not participate in the defense or settlement of the Travelers' action.

On 23 October 1984, after a trial without a jury, the court entered judgment in the present action ordering Continental to pay plaintiffs the full amount of its policy limits ($1,000,000.00, minus the $1,000.00 deductible). The court also ordered Continental to pay Lloyd's $138,030.40 as contribution toward defense costs of the Travelers' suit.

From the order of the trial court, defendant appeals and plaintiffs cross-appeal.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr. and John L. Sarratt, for plaintiffs.

Henson, Henson & Bayliss, by Perry C. Henson and Paul D. Coates, for defendant.

ARNOLD, Judge.

I.

[1] Continental first contends that the trial court erred in concluding that the Lloyd's policy provided "excess" coverage for acts and omissions occurring before December 1971. Assuming its policies covered Travelers' underlying claims, Continental does not dispute that it is a primary insurer for occurrences in 1971. Continental argues instead that Lloyd's is also a primary carrier for acts and omissions occurring in 1971, and that any obligations owed to Pullen should have been shared on a *pro rata* basis by Continental and Lloyd's. We disagree.

The controversy centers upon the following section of the Lloyd's policy:

III. EXCLUSIONS

This policy excludes:

. . . .

2. any claim which is insured by any other existing valid policy under which payment of the claim is actually made, except in respect of any excess beyond the amount or amounts of such payments under such other policy. . . .

Continental alleges the facts in this case do not trigger the exclusion, and therefore Lloyd's cannot claim benefit under this clause. Continental asserts that its policy is not "existing" within the meaning of the exclusion, claiming that its policy was "a previously existing policy" rather than an "existing valid policy." This is not a proper distinction. Continental's policy provided coverage if the act or omission occurred during the policy period. Continental's expert witness Mr. Perry Fuller testified that theoretically an "occurrence" policy would provide coverage forever, subject of course to any applicable statute of limitations. So, even though premiums were no longer being paid toward the Continental policy, that policy was still providing coverage for acts or omissions occurring before December 1971. Thus, that policy is valid and "existing" within the meaning of the exclusion.

Continental also asserts its policy is not one "under which payment of the claim was actually made." Payment has not been made under the Continental policy simply because Continental has denied coverage and refused to pay. For reasons stated later in this opinion, the trial court properly found that this denial of coverage was wrongful and unjustified. An insurer cannot avoid its liability by refusing to defend or pay a claim for which it is liable under the terms of its policy. An insurer cannot profit at the expense of another by its own breach of contract. *See Maryland Casualty Co. v. Marquette Casualty Co.*, 143 So. 2d 249 (La. App. 1962). The trial court properly concluded that the exclusion in the Lloyd's policy is applicable to this action. Under that exclusion, Lloyd's provides only "excess" coverage for acts and omissions occurring before December 1971.

II.

[2] Continental next contends that the trial court erred in retroactively applying the decision of *Great American Insurance Co. v. Tate Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981), to the facts in this case. In *Great American* the court rejected a strict contract construction of the notice requirement contained in insurance policies and overruled the *Peeler-Muncie-Fleming* line

of cases. *Fleming v. Insurance Co.*, 261 N.C. 303, 134 S.E. 2d 614 (1964); *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960); *Peeler v. Casualty Company*, 197 N.C. 286, 148 S.E. 261 (1929). Plaintiffs argue in rebuttal, among other things, that even under the law prior to *Great American*, Continental was not relieved of its obligation to defend Pullen. We need not address the question of the retroactive application of *Great American*. We agree with plaintiffs that even under the more restrictive prior law Continental was obligated to defend Pullen, and its denial of coverage was wrongful and unjustified.

The Continental policy required that notice of any act or omission which might be expected to be the basis of a claim or suit be given by the insured "as soon as practicable." "As soon as practicable" under the *Muncie* line of cases means to give notice within a reasonable time. *Muncie*, 253 N.C. at 82, 116 S.E. 2d at 480 (Parker, J., concurring); *Trust Co. v. Insurance Co.*, 44 N.C. App. 414, 261 S.E. 2d 242 (1980). Continental claims the notice it received was untimely, thus relieving it from any alleged duty to defend.

What constitutes a reasonable time depends upon the facts and circumstances of each particular case. *Harris v. Insurance Co.*, 261 N.C. 499, 135 S.E. 2d 209 (1964); *see also* Annot., 18 A.L.R. 2d 443, § 16 (1951). The facts relating to the notice given Continental are not in dispute. In December 1976 Pullen allowed attorneys for Travelers to examine certain work papers pertaining to financial statements issued between 1967 and 1973. Pullen notified Lloyd's of a possible suit by Travelers in a letter dated 4 January 1977. Travelers filed and served its complaint in the Fulton County Superior Court in Atlanta, Georgia on 14 January 1977. During discovery in that case, Pullen became aware that the Continental policies might also cover the Travelers' claims. Pullen notified Continental of the Travelers' action by letter dated 15 September 1977.

What is a reasonable time, when the facts are not in dispute, as here, is a question of law to be decided by the Court. *Muncie*, 253 N.C. at 83, 116 S.E. 2d at 480 (Parker, J., concurring); *Trust Co.*, 44 N.C. App. at 421, 261 S.E. 2d at 246. The trial court found that the notice given Continental was untimely, stating that Pullen negligently failed to investigate Continental's possible

coverage and exhibited a lack of diligence in failing to comply with the requirements of timely notice. The evidence does not support the trial court's finding of negligence and lack of diligence. The conclusion of untimely notice was error.

The evidence indicates that at the earliest, Pullen was aware of a potential suit sometime in December 1976—providing at most a nine-month delay in giving Continental notice. The Continental policy had been cancelled for over five years and no premiums had been paid on this policy since its cancellation. Mr. Thomas J. Cribbin, the managing partner of Pullen, was responsible for handling the firm's insurance matters. He did not become managing partner until 1 November 1976, and thus had had no contact with Continental. The Travelers' suit was a very complex case of alleged professional malpractice involving large numbers of documents. The discovery in that case lasted for months. During discovery Pullen learned that the Continental policy, though cancelled for over five years, might still provide coverage for the Travelers' action. Immediately upon becoming aware of the possible coverage, and within two days after having reviewed the Continental policies, Pullen sent written notification of the Travelers' suit to Continental. Pullen at all times acted in good faith.

Continental has cited several cases in which delays of less than eight or nine months have been held to be unreasonable. However, as noted, each case stands on its own particular facts and circumstances. *Harris*, 261 N.C. at 502, 135 S.E. 2d at 211; Annot., 18 A.L.R. 2d 443, § 16. This case does not involve a simple traffic accident; rather, it involves a complex and protracted matter of professional malpractice. Furthermore, none of the cases cited by Continental concerns an insurance policy which has been cancelled and on which no premiums have been paid for over five years.

In view of these circumstances and the evidence presented, we hold the trial court erred in failing to conclude that Continental was given notice within a reasonable time since the insured reasonably believed it was not covered by the Continental policies. *See generally Great American Insurance Co. v. Tate Construction Co.*, 315 N.C. 714, 340 S.E. 2d 743 (1986) (this is the second reported opinion involving these parties). The ultimate conclusion of the trial court is still correct however—Continental's denial of coverage was wrongful and unjustified.

III.

[3] Continental's policy provides that it is obligated "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" within the period of policy coverage. Continental argues that the trial court erred in finding that Pullen was "legally obligated" to Travelers for wrongful acts occurring in 1971. Continental also argues that if Pullen was "legally obligated," Lloyd's has failed to show that any amount of the settlement represents payment for wrongful acts occurring in 1971. Continental specifically asserts that any recovery by Travelers for such acts was barred: by the applicable statute of limitations, by a lack of privity between Pullen and Travelers, because Pullen had been released by Travelers, and because Travelers was contributorily negligent. These arguments are without merit.

For the reasons set forth in section VI of this opinion, Continental had a duty to defend Pullen where on the face of the complaint Pullen was being sued for acts which occurred during the period of Continental's coverage. Continental had the opportunity to raise these defenses during the Travelers' litigation, but as we have previously determined, Continental unjustifiably refused to defend Pullen in that action. When an insurer without justification refuses to defend its insured, the insurer is estopped from denying coverage and is obligated to pay the amount of any reasonable settlement made in good faith by the insured of the action brought against him by the injured party. *Nixon v. Insurance Co.*, 255 N.C. 106, 120 S.E. 2d 430 (1961); *Maneikis v. St. Paul Ins. Co. of Illinois*, 655 F. 2d 818 (7th Cir. 1981). By denying liability and refusing to defend claims covered by the insurance policy, the insurance company commits a breach of the policy contract and thereby waives the provisions defining the duties and obligations of the insured. *Nixon*, 255 N.C. at 111, 120 S.E. 2d at 435. The trial court was therefore not required to find that Pullen was "legally obligated" to pay damages to Travelers.

In view of Continental's wrongful breach of the policy contract we find it unnecessary to discuss whether Lloyd's has failed to show that any amount of the settlement represents payment for wrongful acts occurring in 1971.

IV.

[4] Continental next contends that the trial court erred in concluding that the settlement in the Travelers' action was reasonable and made in good faith. The court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The evidence showed Travelers brought suit claiming 80 million dollars in losses suffered in reliance upon allegedly false and misleading financial statements issued by Pullen between 1967 and 1973. Continental states in its brief that the losses attributable to 1971—the last year of Continental coverage—could reasonably total 11.6 million dollars. Lloyd's settled the claim for 5.25 million dollars. There is no evidence in the record of any bad faith on the part of Lloyd's in its efforts to settle the case. All the evidence shows Lloyd's vigorously pursued the defense of Pullen, while Continental denied coverage and refused to defend. In short, there is more than ample evidence in the record to support the findings and conclusions of the trial court, and we find no error.

V.

[5] Continental further contends that the trial court erred in failing to prorate Continental's obligation at one-eleventh of the losses which can be attributable to acts or omissions occurring in 1971. We disagree.

We have previously determined that the Lloyd's policy only provided excess coverage for acts and omissions occurring before December 1971, and therefore the Continental policy acts to provide primary coverage for that period. Also, we have pointed out that Continental acknowledges that the losses attributable to 1971 could reasonably total 11.6 million dollars. In view of these facts, we find the trial court properly ordered Continental to pay plaintiffs the full amount of its policy limits.

VI.

[6] The trial court awarded Lloyd's $138,030.40 for reimbursement of defense costs. This figure is equal to a 19% share of the settlement figure for which the trial court determined Continental was responsible. Continental contends it owes no obligation to

contribute to Lloyd's defense costs, claiming Lloyd's was obligated as a primary insurer to defend Pullen under its policy. Lloyd's in its cross-appeal contends the trial court erred in failing to reimburse Lloyd's for the full amount of its defense costs, claiming Continental was the primary insurer and thus obligated to defend Pullen.

We hold both parties had a duty to defend Pullen and thus the defense costs should be shared equally. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E. 2d 313, 318 (1968). Furthermore, "allegations of facts that describe a hybrid of covered and excluded events or pleadings that disclose a mere possibility that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insurer." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691 n. 2, 340 S.E. 2d 374, 377 (1986). We have determined Continental was the primary insurer for acts or omissions occurring on or before 30 November 1971. The Travelers' complaint alleged damages as a result of reliance upon financial statements produced by Pullen during the coverage period of the Continental policy. Lloyd's was the primary, and only, insurer for the period following 30 November 1971. The Travelers' complaint also alleged damages arising from the period of the Lloyd's policy coverage. Thus, under North Carolina law, both insurers had a duty to defend Pullen. 315 N.C. at 691, 340 S.E. 2d at 377. In view of this fact, we believe that equity dictates that the defense costs be shared equally among the two insurers.

This cause is remanded to the trial court for modification of the judgment consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT DEAN McCULLOUGH

No. 8526SC759

(Filed 4 March 1986)

1. **Robbery § 4.2— common law robbery—evidence sufficient**

There was sufficient evidence to withstand defendant's motion to dismiss the charge of common law robbery where defendant and his companion took the victim's watch and clothing with the intent to permanently deprive him of his property for the purpose of converting it to their use and left the victim bound and gagged dressed only in his undershorts. The fact that the victim was not conscious when defendant took his shoes did not negate the State's evidence.

2. **Robbery § 3— common law robbery—victim's cross-examination testimony—considered on motion to dismiss—no error**

The trial court did not err in a prosecution for common law robbery by considering the victim's testimony under cross-examination when ruling on defendant's motion to dismiss. Direct evidence and circumstantial evidence are properly considered when ruling on a motion to dismiss for insufficient evidence.

3. **Kidnapping § 1— indictment—insufficient for first degree kidnapping—sufficient for second degree**

An indictment for first degree kidnapping was insufficient where the indictment did not allege that the victim was not released in a safe place, seriously injured, or sexually assaulted. However, the indictment sufficiently alleged the elements of second degree kidnapping and the evidence was sufficient for second degree kidnapping; therefore, the conviction for first degree kidnapping was vacated and remanded for entry of a verdict for second degree kidnapping. N.C.G.S. 14-39, N.C. Rules of App. Procedure 10(a).

4. **Kidnapping § 1.3— instruction on theory not alleged in indictment—conviction reduced to second degree kidnapping—no prejudice**

A new trial was not necessary where the court erred by instructing the jury in a kidnapping prosecution that a guilty verdict should be returned if defendant restrained or removed the victim for the purpose of doing serious bodily harm to the victim even though that theory was not alleged in the indictment, but the first degree kidnapping conviction was remanded for entry of judgment for second degree kidnapping. The evidence admitted at trial supported the jury instructions and the indictment supported those portions of the jury instructions which supported a conviction for second degree kidnapping. N.C.G.S. 14-39.

5. **Criminal Law § 86.1— cross-examination regarding incarcerated friend—not outside scope of direct examination**

The trial court did not err in a kidnapping prosecution by denying defendant's objection to cross-examination questions the prosecutor asked defendant's father regarding the circumstances surrounding the incarceration

of defendant's friend. The testimony did not go outside the scope of the direct examination and formed a proper line of inquiry to explain the testimony given during direct examination.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 9 June 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 November 1985.

In 81CRS54177 defendant was tried upon indictment charging him with common law robbery, G.S. 14-3(b); in 81CRS054181 defendant was charged with kidnapping, G.S. 14-39.

The State's evidence tended to show the following: On 14 August 1981 at approximately 12:30 a.m., Daniel Lawrence McCall (McCall) was approached by defendant and another man as McCall exited the Jay Adult Book Store in Charlotte, North Carolina. McCall did not know either defendant or the person with defendant. Defendant asked McCall if he was going down Independence Boulevard and if so would he give them a ride. McCall agreed to give them a ride. McCall was operating a 1964 two-door Riviera automobile. Defendant occupied the front passenger seat and defendant's companion occupied the rear seat of McCall's automobile. McCall drove his automobile down Independence Boulevard heading away from the city until defendant said, "This is where we get off; turn in here so we won't back up traffic." McCall pulled to the side of the road, which was deserted, and left his motor running. McCall exited from his automobile to allow the rear occupant out of the automobile. Defendant exited from the automobile and came around to the driver's side of the automobile. As McCall turned to let his front bucket seat up so that the passenger could exit from the rear seat of his automobile, defendant struck McCall near the back of his neck, knocking him to the ground. McCall lost consciousness. When McCall regained consciousness he was on the rear floorboard of his automobile. Someone was on McCall's back and was pulling his hair. McCall asked where they were going and defendant replied, "I'll tell you when we get there."

The automobile was driven to a wooded area and parked, whereupon defendant ordered McCall out of the car. McCall was beaten and shoved to the ground. Defendant then pulled McCall up, forced him into the woods where defendant shoved him to the ground and kicked him. Defendant started pulling off McCall's

watch and said, "Give me that watch." After removing McCall's watch defendant kicked McCall in the face rendering him unconscious. When McCall regained consciousness he discovered that he was still in the custody of defendant and defendant's companion. All of McCall's clothing with the exception of his undershorts were missing. Defendant and his companion forced McCall onto the rear floorboard and stated to him, "You've got to have some more money somewhere." McCall told defendant that he had an uncle who would give him some more money if he would take McCall to his home. After some discussion between defendant and his companion, defendant told McCall that he was lying and the automobile was then driven until it ran out of gas. Defendant took a knife and poked it in McCall's back and said, "You better stay put or I'll run this knife clean through you." Defendant gagged McCall and tied him up with a "jumper cable." Sometime later McCall was discovered and taken to the hospital where he received treatment for his injuries.

On 30 November 1981, defendant was indicted for common law robbery (84CRS54177) and kidnapping (84CRS54181). Defendant was tried before a jury which returned guilty verdicts against defendant for common law robbery, G.S. 14-3(b), and first-degree kidnapping, G.S. 14-39. From the imposition of a three (3) year prison sentence for common law robbery and a twelve (12) year prison sentence for first-degree kidnapping defendant appeals.

Attorney General Lacy H. Thornburg, by J. Allen Jernigan, Assistant Attorney General, for the State.

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

JOHNSON, Judge.

[1] The first issue we are called upon to decide by way of defendant's appeal is whether there was sufficient evidence of a taking of the victim's property to withstand defendant's motion to dismiss the charge of common law robbery. We conclude that there was sufficient evidence of defendant's taking McCall's property, to wit: McCall's watch.

It is well settled that when a trial court rules on a defendant's motion to dismiss for insufficiency of the evidence the

trial court must view all the evidence in the light most favorable to the State, making all reasonable inferences in the State's favor. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981). All evidence admitted which is favorable to the State may be properly considered and any discrepancies are to be resolved in the State's favor. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The question of law for the court posed by a motion to dismiss is whether there is substantial evidence of defendant's guilt on every essential element of the offense a defendant is charged with. *Id.* Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion. *Id.* However, if the evidence is only sufficient to raise a suspicion or mere conjecture a defendant's motion to dismiss should be granted.

Common law robbery is not defined by statute in the State of North Carolina. It is an aggravated form of larceny. *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966). Common law robbery is the taking and carrying away personal property of another from his person or presence without his consent by violence or by putting him in fear and with the intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it. *Id.* The essential elements of the offense of common law robbery, which defendant argues were not established by the State was a taking with the felonious intent of defendant to permanently deprive the owner of his property and to convert the owner's property to his own use. *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965).

The evidence before the court in the case *sub judice* when considered in the light most favorable to the State tended to show that defendant and his companion took McCall's watch and clothing with the intent to permanently deprive McCall of his property for the purpose of converting it to their own use. McCall, dressed in only his undershorts, was left bound and gagged. The fact that McCall was not conscious when defendant took his pair of brown shoes does not negate the State's evidence against defendant. *See State v. Mathews*, 20 N.C. App. 297, 201 S.E. 2d 359 (1973), *cert. denied*, 284 N.C. 620, 202 S.E. 2d 276 (1974). During direct examination McCall testified that defendant pulled on his watch and elaborated on cross-examination that defendant took his watch.

[2] Defendant argues that McCall's testimony under cross-examination should not have been considered by the court when ruling on his motion to dismiss at the close of all the evidence. Although we find that there was sufficient evidence without the challenged testimony, we also conclude that the court could properly consider McCall's testimony elicited by defendant during his cross-examination of McCall. The testimony by McCall explaining his testimony during direct examination could be considered by the court when reviewing defendant's motion to dismiss. *See State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). Direct evidence and circumstantial evidence are properly considered when ruling on defendant's motion to dismiss for insufficiency of the evidence. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). Defendant's first Assignment of Error is overruled.

[3] Defendant's second Assignment of Error is that the indictment returned against him was insufficient to sustain a first-degree kidnapping conviction wherein the indictment did not allege that the victim was not released in a safe place, seriously injured or sexually assaulted. We agree.

G.S. 14-39 proscribes the offenses of first-degree and second-degree kidnapping as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any person 16 years of age or over without the consent of such person, or any person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). *If the person kidnapped either was not re-*

leased by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. *If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree* and is punishable as a Class E felony.

(Emphasis ours.) Defendant did not challenge the sufficiency of the kidnapping indictment by moving the court to quash the indictment or arrest the judgment. However, on appeal defendant has properly raised in his brief the question of whether the criminal charge against him was sufficient in law. Rule 10(a), N.C. Rules App. P. Therefore, pursuant to Rule 10(a), N.C. Rules App. P., we now address ourselves to defendant's second Assignment of Error.

The kidnapping indictment, upon which defendant was convicted for first-degree kidnapping, is as follows:

INDICTMENT — No. 81CRS54181

STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE Superior Court Division November 30, 1981

THE STATE OF NORTH CAROLINA

vs.

Robert Dean McCullough
Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 14th day of August, 1981, in Mecklenburg County, Robert Dean McCullough, did unlawfully, wilfully and feloniously kidnap Daniel Lawrence McCall, a person who had attained the age of 16 years, by unlawfully restraining, confining and removing him from one place to another, without his consent, and for the purpose of facilitating the commission of a felony, robbery.

Prior to the 1979 amendment to G.S. 14-39(b) which was effective 1 July 1980, the indictment of defendant would have been sufficient to sustain defendant's conviction of first-degree kidnapping.

See State v. Williams, 295 N.C. 655, 249 S.E. 2d 709 (1978). However, the date of defendant's kidnapping of McCall was 14 August 1981, and G.S. 14-39(b), as amended, was in effect. In *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983), the Court held that G.S. 14-39, as amended, expressed the General Assembly's intent for an indictment for first-degree kidnapping to allege the applicable elements of both subsections (a) and (b) of G.S. 14-39. *Jerrett*, at 261, 307 S.E. 2d at 351.

The language of G.S. 14-39(a) merely creates and defines the offense of kidnapping. It is uncontested that the indictment in the case *sub judice* is sufficient when evaluated according to subsection (a). Conversely, defendant strongly argues that the indictment does not allege the elements necessary for a conviction of first-degree kidnapping as set forth in subsection (b). We agree. Pursuant to *Jerrett, supra*, we hold that the indictment returned against defendant is insufficient to support defendant's conviction for first-degree kidnapping. We agree with the State and appreciate the State's candor with respect to the fact that *Jerrett, supra*, is indistinguishable from the case *sub judice*.

As discussed hereinabove the indictment sufficiently alleges the elements set forth in G.S. 14-39(a), which are necessary to sustain a conviction for second-degree kidnapping. In the case *sub judice* the evidence was not only sufficient to convict for the lesser included offense, but the higher offense as well. We therefore vacate the conviction for first-degree kidnapping and remand for an entry of a verdict for second-degree kidnapping upon which defendant is to be resentenced. This Court has previously taken such a course. *See State v. Jackson*, 77 N.C. App. 492, 335 S.E. 2d 903 (1985); *State v. Baldwin*, 61 N.C. App. 688, 301 S.E. 2d 725 (1983).

[4] In a related Assignment of Error defendant argues that the trial court committed plain error by instructing the jurors that a guilty verdict should be returned on the kidnapping charge if the jury found that defendant restrained or removed the victim "for the purpose of facilitating the commission of common law robbery; *doing serious bodily injury to McCall. . . .*" (Emphasis ours.) Defendant failed to object to the jury instructions so that he may assign error to the jury charge. *See* Rule 10(b)(2), N.C. Rules App. P. We are urged by defendant to review his Assignment of Error

pursuant to the plain error rule. *See generally State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The thrust of defendant's argument is that it was prejudicial error for the court to instruct the jury on a theory not alleged in the indictment (or doing serious bodily injury to McCall) and therefore is entitled to a new trial. *See State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984). In the case *sub judice* we are vacating the first-degree kidnapping conviction and remanding for entry of judgment on second-degree kidnapping whereby defendant will be resentenced consistent with our ruling. Defendant's guilt will not be predicated on theories of a crime not charged in the indictment. We conclude that the trial court's jury instructions had no prejudicial impact on a conviction of defendant for second-degree kidnapping. The evidence admitted at trial supports the jury instructions and the indictment supports those portions of the jury instruction which support a conviction of defendant for second-degree kidnapping. The evidence showed that defendant removed and confined McCall for the facilitation of a felony, to wit: common law robbery. *See* G.S. 14-3.

Defendant heavily relies on *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984), for support of his argument that he is entitled to a new trial. In *Brown*, the trial court's instructions to the jury were not based on the theory alleged in the indictment. In the case *sub judice*, the court's instruction on first-degree kidnapping to the jury that they must find "that defendant restrained or removed McCall for the purpose of facilitating the commission of common law robbery . . ." has a basis in the kidnapping indictment. Moreover, the court's charge to the jury with respect to second-degree kidnapping was as follows:

> If you do not find the defendant 'Guilty of first degree kidnapping,' you must determine whether the defendant is guilty of second degree kidnapping.
>
> Second degree kidnapping differs from first degree kidnapping only in that it was not necessary for the State to prove that McCall was not released by the defendant in a safe place; or had been seriously injured.
>
> So, I charge that if you find from the evidence, beyond a reasonable doubt; that on or about August 14, 1981, Robert

> Dean McCullough, unlawfully held, struck, tied up McCall; or, removed McCall from an area on near East Independence Boulevard to Linda Lake Road; and, that McCall did not consent to this restraint or removal; and that this was done for the purpose of facilitating the commission of common law robbery or doing serious bodily injury to McCall; and that these acts of striking, holding and tying up McCall were a complete act independent and apart of common law robbery, it would be your duty to return a verdict of 'Guilty of second degree kidnapping.'

The court's instruction requires the additional element of serious bodily injury, but does not require less than was alleged in the indictment or required by G.S. 14-39, for a conviction of second-degree kidnapping. The holding of *Brown, supra,* was expressly based on the "factual circumstances" of that case in which there was no evidence directed toward proof of a "terrorism" theory. *Brown,* at 249, 321 S.E. 2d at 863. Defendant's Assignment of Error is overruled.

[5] Defendant's final Assignment of Error forwarded on appeal is that the trial court erred in denying his objection to questions posed by the prosecutor during cross-examination. It is argued by defendant that questions asked of defendant's father regarding the circumstances surrounding the incarceration of defendant's friend was an improper impeachment of defendant's credibility. We disagree.

The rule of law dispositive of defendant's final Assignment of Error is that once the "door is opened" on a particular subject matter during direct examination of a witness, that witness may be cross-examined on the same matter. *State v. Taylor,* 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied,* 463 U.S. 1213, 77 L.Ed. 2d 1398, 103 S.Ct. 3552, *reh. denied,* 463 U.S. 1249, 77 L.Ed. 2d 1456, 104 S.Ct. 37 (1983). The line of questioning during defendant's direct examination of the witness was as follows:

> Q. Do you know this person named Sidney Morrow?
>
> A. Yes; I do.
>
> Q. Do you know where he is right now?
>
> A. Yes; I do; supposed to be.

Q. Where is that?

A. He's in jail.

Q. Here?

A. Yes; over here in jail.

The prosecutor cross-examined the witness as follows:

Q. Mr. McCullough, you know Sidney Morrow is in jail because he got in trouble with your boy. Is that right?

A. That's right.

MR. CLARKSON: OBJECTION.

THE COURT: OBJECTION OVERRULED.

Q. Now, that was after the 14th of August, 1981; wasn't it?

A. Yes; it was.

The testimony elicited by the prosecutor did not go into matters outside the scope of the direct examination of the witness. The question formed a proper line of inquiry to explain the testimony given during direct examination. Defendant's final Assignment of Error is overruled.

Case No. 81CRS54181 conviction for first-degree kidnapping vacated and case remanded for entry of judgment and sentencing for second-degree kidnapping.

Case No. 81CRS54177 no error.

Chief Judge HEDRICK and Judge WHICHARD concur.

ALAN DAVID CROWDER v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 8524SC872

(Filed 4 March 1986)

1. **Insurance § 69— underinsured motorist coverage—injury while riding in nonowned vehicle**

Under both the terms of an automobile insurance policy issued to plaintiff's father and N.C.G.S. 20-279.21, the underinsured motorist coverage of the policy extended to injuries received by plaintiff while riding in a nonowned vehicle not insured under his father's policy.

2. **Evidence § 29; Insurance § 69— uninsurance or underinsurance—admissibility of insurer's written statement**

By establishing a prima facie presumption of uninsurance or underinsurance for a written statement by a liability insurer, N.C.G.S. 20-279.21(b)(3) and (4) implicitly make such statements admissible into evidence in order to trigger the operation of the presumption. Furthermore, N.C.G.S. 20-279.21(b)(3) and (4) come within the "except as otherwise provided . . . by statute" exception to the hearsay and best evidence rules, Rules of Evidence 802 and 1002, so as to allow admission of a liability insurer's written statement that might otherwise be inadmissible under those rules.

3. **Automobiles and Other Vehicles § 94.7— riding with intoxicated driver—contributory negligence—insufficient evidence**

The evidence was insufficient to require the trial court to submit an issue of plaintiff's contributory negligence in riding with an intoxicated driver where it tended to show that the accident in question occurred after 4:00 p.m.; the driver had been drinking liquor and riding horses between 9:00 a.m. and 12:00 noon and plaintiff was aware of this when he accepted a ride with the driver; prior to the accident, plaintiff had ridden with the driver four miles to the driver's girlfriend's house, but there was no evidence of any improper driving on this trip; there was no evidence that the driver consumed any alcohol while at his girlfriend's house or that he had any alcohol content in his system after 4:00 p.m.; and there was no evidence of any improper driving on the return trip from the driver's girlfriend's house up until the time of the accident.

APPEAL by defendant from *Lewis, Robert D., Judge.* Judgment entered 2 May 1985 in Superior Court, MADISON County. Heard in the Court of Appeals 12 December 1985.

Plaintiff was injured while riding as a passenger in a Jeep owned and operated by Ansel Sawyer, Jr. when the Jeep swerved off the road on which it was traveling into a creek. Plaintiff obtained a confession of judgment against Sawyer for $100,000 in damages. Sawyer's insurance company, United States Fire In-

surance Company, paid plaintiff $25,000, representing the full policy limit for automobile liability coverage on Sawyer's Jeep. An execution on the remainder of the judgment against Sawyer was returned unsatisfied.

Plaintiff's father had an insurance policy with defendant that included an uninsured/underinsured motorist endorsement. The only covered auto under the policy was a 1978 Dodge van. Plaintiff made a claim against defendant under the underinsured motorist endorsement for the amount by which the liability limits of the policy exceeded the amount collected from Sawyer and his insurance company. Defendant denied coverage, and plaintiff brought this action seeking payment from the underinsured motorist endorsement.

The court granted partial summary judgment in favor of plaintiff, ruling that plaintiff was covered by the policy. The court further ruled that the maximum plaintiff could recover from defendant was the uninsured motorist policy limit of $60,000 less the amount already recovered, $25,000, for a maximum possible recovery of $35,000.

The jury returned a verdict in favor of plaintiff, finding that he had suffered damages in excess of $60,000. From the judgment awarding plaintiff $35,000 plus interest and costs, defendant appeals.

Harrell and Leake, by Larry Leake, for plaintiff-appellee.

Morris, Golding, Phillips & Cloninger, by William C. Morris, Jr., William C. Morris, III, and Jeff Dunham, for defendant-appellant.

WHICHARD, Judge.

Defendant contends the court erred in granting partial summary judgment in favor of plaintiff. Specifically, defendant contends the court erroneously concluded as a matter of law that:

1. Unless otherwise excluded, the insurance policy provides coverage for Underinsured Motorists even though the insured is injured by the operation or use of an automobile which is not a "covered auto."

2. The Plaintiff is a "family member" as that term is defined in the insurance policy relating to Underinsured Motorist coverage.

3. Maximum coverage available to the Plaintiff is in the amount of $35,000, which represents the $60,000 maximum coverage for the Underinsured Motorist provision less the $25,000 received as a result of the liability insurance payment made on behalf of Ansel Junior Sawyer.

Regarding uninsured motorist coverage the policy here provides:

WHO IS INSURED

1. You or any family member.

2. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.

3. Anyone for damages he is entitled to recover because of bodily injury sustained by another insured.

"Family member" is defined earlier in this section as "a person related to you by blood, marriage, or adoption who is a resident of your household, including a ward or foster child." Defendant does not contend that plaintiff is not a "family member" under this definition and is thus not an insured under the policy. Rather, defendant contends that the policy only covers the vehicle designated in the policy, namely, plaintiff's father's 1978 Dodge van. The policy's underinsured motorist coverage, according to defendant, does not extend to injuries from an accident which does not involve the insured listed vehicle but some other vehicle, in this case Sawyer's Jeep.

[1] The issue is whether an insured person is covered by uninsured or underinsured motorist coverage when the insured or covered vehicle is not in any way involved in the insured's injuries. For reasons that follow, we hold that, under the particular circumstances of this case, coverage extends to those insured even though not in the covered vehicle at the time of injury.

"The avowed purpose of the Financial Responsibility Act, of which Sec. 279.21 is a part, is to compensate the innocent victims

of financially irresponsible motorists." *American Tours v. Liberty Mutual Insurance Company*, 315 N.C. 341, 346, 338 S.E. 2d 92, 96 (1986). "When a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in it." *Id.* at 344, 338 S.E. 2d at 95.

N.C. Gen. Stat. 20-279.21(b)(3) provides, in pertinent part:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

In essence, N.C. Gen. Stat. 20-279.21(b)(3) establishes two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle. *See Gulf American Fire & Casualty Co. v. McNeal*, 115 Ga. App. 286, 290-91, 154 S.E. 2d 411, 416 (1967). The latter class are "persons insured" under N.C. Gen. Stat. 20-279.21 only when the insured vehicle is involved. *Id.* The former class are "persons insured" even where the insured vehicle is not involved in the insured's injuries. *Id.* "[A]n exclusion which attempts to limit the protection available to those designated as insureds to only the insured vehicle would be contrary to [N.C. Gen. Stat. 20-279.21(b)(3)] and void." 8C J. Appleman, *Insurance Law and Practice*, Sec. 5078 at 177-78.

While defendant contends such an exclusion operates to deny plaintiff coverage here, plaintiff's father's policy clearly tracks N.C. Gen. Stat. 20-279.21(b)(3). The policy places no coverage limitation for "[the named insured] or any family member" but specifically requires "[a]nyone else [to be] occupying a covered auto or a temporary substitute for a covered auto" in order to be insured. The policy thus establishes the very two classes designated by the statute. Even if this policy's provisions attempted to

narrow the coverage classes established by N.C. Gen. Stat. 20-279.21(b)(3), since "[t]he provisions of the Financial Responsibility Act are 'written' into every automobile liability policy as a matter of law, . . . [these] terms of the policy [would] conflict with the statute, [and] the statute [would] prevail." *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E. 2d 597, 604 (1977).

Accordingly, we hold that under both the terms of plaintiff's father's policy and N.C. Gen. Stat. 20-279.21 the court correctly concluded that plaintiff was covered by this policy even though his injuries were unrelated to the use or operation of his father's 1978 Dodge van, which was the insured vehicle under the policy.

Our holding is expressly limited to allowing underinsured motorist coverage for insureds operating, or riding in, a *nonowned* vehicle. The facts do not present a question, and we expressly reserve deciding, whether an insured operating or riding in an *owned* but underinsured vehicle would be covered by the underinsured motorist provision in an owner's policy issued on another vehicle owned by the insured. *See* 8C J. Appleman, *Insurance Law and Practice*, Sec. 5078.15 at 179 ("It is scarcely the purpose of any insurer to write a single UM coverage upon one of a number of vehicles owned by an insured, or by others in the household, and extend the benefits of such coverage gratis upon all other vehicles . . . .").

[2] Defendant contends the court erred by admitting into evidence a letter from United States Fire Insurance Company to Ansel Sawyer, Jr. because this letter was inadmissible hearsay. Defendant also contends this letter was inadmissible under the "best evidence rule," now codified as N.C. Gen. Stat. 8C-1, Rule 1002. Plaintiff offered this letter as evidence of Sawyer's statutory liability coverage. Defendant contends that plaintiff was required under the Rules of Evidence to offer the original policy issued to Sawyer, instead of this letter, in order to establish this coverage. We disagree.

We hold, for reasons following, that the court properly admitted this letter under N.C. Gen. Stat. 20-279.21(b)(3) and (4). N.C. Gen. Stat. 20-279.21(b)(3) specifically provides that

> a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by

> the owner of any vehicle involved in an accident with the insured, that such other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of such other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy.

N.C. Gen. Stat. 20-279.21(b)(4), which requires the offering of underinsured motorist coverage, makes applicable to this coverage all of the statutory provisions for uninsured motorist coverage, including the above-quoted portion of N.C. Gen. Stat. 20-279.21(b)(3). Accordingly, a written statement by the liability insurer creates a prima facie presumption of an operator's underinsurance as well as uninsurance. By establishing a prima facie presumption of underinsurance for written statements like the Sawyer letter, N.C. Gen. Stat. 20-279.21(b)(3) and (4) implicitly make such statements admissible into evidence in order to trigger the operation of the presumption.

In general, "[e]xcept as modified by statute, the general rules which govern the competency, relevancy, and materiality of the evidence in civil actions apply in an action on an insurance policy in determining whether certain evidence offered is admissible or inadmissible." 46 C.J.S. Insurance Sec. 1322 at 461. Further,

> [i]t is also a rule of statutory construction that "[w]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted." 7 Strong, N.C. Index 2d, Statutes, Sec. 5, p. 73.

Utilities Comm. v. Electric Membership Corp., 3 N.C. App. 309, 314, 164 S.E. 2d 889, 892 (1968). *See also Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E. 2d 274, 279 (1985).

N.C. Gen. Stat. 8C-1, Rule 802 specifically provides that "[h]earsay is not admissible except as provided by statute or by

these rules." Likewise N.C. Gen. Stat. 8C-1, Rule 1002 provides that "[t]o prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." The "except as otherwise provided . . . by statute" exception under both Rule 802 and Rule 1002 clearly covers written statements under N.C. Gen. Stat. 20-279.21(b)(3). N.C. Gen. Stat. 20-279.21(b)(3) "deals with the subject matter in detail with reference to a particular situation," *Utility Comm.*, 3 N.C. App. at 314, 164 S.E. 2d at 892, and effectively modifies the general rules stated in Rule 802 and Rule 1002 by allowing admission of written statements that might otherwise be inadmissible under these general rules.

Defendant also contends that the court erred by admitting the *voir dire* testimony of Sawyer that he had liability coverage in the amount of $25,000. Assuming error, *arguendo*, we hold it harmless since such testimony was merely corroborative of the letter from United States Fire Insurance Company to Sawyer, which letter, as held above, was properly admissible. *See Hudson v. Hudson*, 21 N.C. App. 412, 413-14, 204 S.E. 2d 697, 698-99 (1974).

[3] Defendant finally contends the court erred in refusing to submit the issue of plaintiff's contributory negligence to the jury. Plaintiff, in turn, contends that neither the pleadings nor the evidence supported submission of this issue.

Citing *Lawson v. Benton*, 272 N.C. 627, 158 S.E. 2d 805 (1968), plaintiff maintains that an issue of contributory negligence based upon plaintiff's alleged knowledge of Sawyer's alleged intoxication could not be submitted to the jury unless specifically raised in the pleadings. "However, the record discloses that [plaintiff] never objected to [evidence of Sawyer's intoxication] on the specific grounds that the evidence offered was not within the issues raised by the pleadings." *McRae v. Moore*, 33 N.C. App. 116, 123, 234 S.E. 2d 419, 422-23 (1977). Accordingly, the rule of "litigation by consent" under N.C. Gen. Stat. 1A-1, Rule 15(b) applies to permit adjudication of this issue even though it was not formally raised by the pleadings. *Id.*

We further hold, however, that the evidence was insufficient to require the court to submit the issue of plaintiff's contributory negligence. In general, the test is whether the evidence, "considered in the light most favorable to the defendant, contains any

inference that the plaintiff himself was guilty of contributory negligence." *Howell v. Lawless*, 260 N.C. 670, 671, 133 S.E. 2d 508, 509 (1963). "If there is more than a scintilla of such evidence, it is a matter for the jury." *Id.* "The issue of contributory negligence should not be submitted to the jury, however, if the evidence reveals that plaintiff was not on notice as to [the driver's] negligent behavior or, having notice, had insufficient time or opportunity to react." *Watson v. Storie*, 70 N.C. App. 327, 329, 318 S.E. 2d 910, 911 (1984).

> A passenger or guest has a right to assume that the driver of the automobile will exercise proper care and caution, until he has notice to the contrary. His acceptance of the driver's manner of operating the vehicle ordinarily is not contributory negligence unless the driver's fault or incompetence is so obvious as to demand effort on the passenger's part to abate danger.

Dinkins v. Carlton and Williams v. Carlton, 255 N.C. 137, 140, 120 S.E. 2d 543, 544 (1961), *quoting* 5A Am. Jur., Automobiles and Highway Traffic Sec. 789.

Considering the evidence here in the light most favorable to defendant, we conclude that it contains no permissible inference that plaintiff was guilty of contributory negligence. The only pertinent evidence was that the driver, Sawyer, had been drinking liquor and riding horses between 9:00 a.m. and 12:00 noon on the day of the accident and that plaintiff was aware of this at the time he accepted a ride home with Sawyer from Sawyer's girlfriend's house. However, there was no evidence that Sawyer had any alcohol content in his system after 4:00 p.m. that afternoon when the accident occurred. Prior to the accident, plaintiff had ridden with Sawyer four miles to Sawyer's girlfriend's house. There was no evidence of any improper driving on this trip. Plaintiff and Sawyer stayed there for a period in which there was no evidence Sawyer consumed any alcohol. There was also no evidence of any improper driving on the return trip from Sawyer's girlfriend's house up until the time of the accident.

As in *Watson, supra*, we hold the evidence of Sawyer's drinking in the morning "too remote as a matter of law . . . and insufficient to raise an inference of [plaintiff's] contributory negligence." *Watson*, 70 N.C. App. at 330, 318 S.E. 2d at 912 (citation omitted).

Accordingly, we hold that the court did not err in refusing to submit this issue to the jury.

No error.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. LORETTA JANE BAYNARD

No. 8527SC860

(Filed 4 March 1986)

1. **Narcotics § 2— obtaining narcotics by forged prescription—indictment sufficient**

Indictments for obtaining and attempting to obtain a controlled substance by fraud and forgery were sufficient even without specific allegations that defendant presented the forged prescriptions with knowledge that they were forged where both indictments alleged that the offense was done intentionally and contained the words "misrepresentation, fraud, deception, and subterfuge," implying that the person committing the acts knew the prescriptions were forged and had the specific intent to deceive. N.C.G.S. 90-108(a)(10); N.C. G.S. 14-120.

2. **Criminal Law § 126— request to poll jury denied—no error**

The trial court did not err by failing to grant defendant's request to poll the jury where defendant's motion was made after the jury dispersed; defendant let pass an opportunity to request a polling when there was a delay as the clerk delivered the verdict sheets to the judge; and the judge on his own initiative conducted an informal poll by asking that the jurors who voted guilty on each offense to raise their hands. N.C.G.S. 15A-1238.

3. **Criminal Law § 138.15— obtaining narcotics by forged prescription—seriousness of offense—not considered as aggravating factor**

The trial court did not improperly consider the seriousness of the offense as an aggravating factor when sentencing defendant for obtaining and attempting to obtain a controlled substance by fraud and forgery where the judge commented that he would not consider evidence of the street value and street use of the drugs as an aggravating factor but would consider it in determining the seriousness of the crime and as to whether to impose the presumptive sentence. The isolated comment and the fact that the evidence was received do not necessarily lead to the conclusion that the trial judge improperly considered the seriousness of the crime as an aggravating factor; no such finding appears in the record; and the judge specifically stated that he did not consider the evidence to constitute an aggravating circumstance.

4. Criminal Law § 138.23— attempting to obtain narcotics by forged prescription —armed accomplices aggravating factor—evidence not sufficient

A new sentencing hearing was required for a conviction for attempting to obtain a controlled substance by fraud and forgery where the trial judge found in aggravation that defendant knew that a person accompanying her was armed and that the shooting of a deputy was committed to aid defendant in escaping. There was no evidence that defendant knew that her companion was armed or intended to use the weapon, and there was evidence that showed that defendant never posed any threat to the police and was generally a person of good character without a criminal record.

APPEAL by defendant from *Stephens, Judge*. Judgment entered 24 April 1985 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 12 December 1985.

Defendant was charged with obtaining a controlled substance by fraud and forgery and attempting to obtain a controlled substance by fraud and forgery. After the jury returned a verdict of guilty, defendant was sentenced to the presumptive term of two years for the conviction on the completed offense and to the maximum term of five years for the attempt conviction. The terms were set to run consecutively.

The evidence presented at trial showed the following essential facts. On 6 January 1985, defendant walked into a Revco drugstore in Shelby and presented the pharmacist with a prescription to be filled. The prescription was for Carbrital, a Schedule III controlled substance, made out to a Vernon Epley and signed by Dr. Archie McIntosh of Marion. The pharmacist filled the prescription; defendant paid for the drugs and left. Less than one hour later, a white male entered the store and presented the pharmacist with a prescription to be filled from the same doctor in Marion. The patient's name on this prescription was George Mace and the drug was Dilaudid, a Schedule II controlled substance. The pharmacist informed the man that that particular store did not stock Dilaudid and the man left. The pharmacist, now suspicious that the prescriptions were forged, called the police and informed them of the incidents.

Later that afternoon, at another Revco drugstore across town, defendant presented a prescription for Dilaudid which was made out for George Mace by Dr. McIntosh. The pharmacist, aware of the earlier incident at the other store, called the police and "stalled." There was a male accompanying defendant who

matched the description of the man who had presented the same prescription at the other store. Evidently made suspicious by the long wait, the man and the defendant left just as the police were arriving. Deputy Eddie Barkley of the Cleveland County Sheriff's Department was the first to arrive, and the pharmacist signalled him that the defendant had just left. The deputy went back outside, saw the defendant and her companion walking toward a white Mustang and shouted for them to stop. Instead, the pair ran to the car and got in, the male pulling a gun from his jacket. The deputy pulled his gun and ordered the two out of the car. Both got out but the male reached back in for the gun. Shots were exchanged and the male suspect, who was defendant's husband, was killed and the deputy was wounded.

Dr. McIntosh testified that defendant was a patient of his in Marion and that the last time she had been in his office for a check-up, he had been forced to leave her alone in the office when he was called to the hospital emergency room to treat an accident victim. He also testified that he had no patient by the name Vernon Epley or George Mace and that he had not signed the prescription forms nor authorized anyone to sign them for him. Defendant presented no evidence. The jury convicted defendant of both counts and she appeals.

Attorney General Lacy H. Thornburg by Assistant Attorney General W. F. Briley for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Louis D. Bilionis for defendant-appellant.

PARKER, Judge.

[1] Defendant first assigns as error the form of the indictments in these cases, alleging that they were insufficient to charge the crimes of obtaining and attempting to obtain a controlled substance by fraud and forgery. The indictments read, in essential part, as follows: "that . . . defendant . . . unlawfully, willfully and feloniously did intentionally acquire (and attempt to acquire) a controlled substance . . . by misrepresentation, fraud, deception and subterfuge in that [she] presented a prescription which was . . . a false or forged prescription." Defendant contends this in-

dictment is insufficient because it fails to allege that defendant presented the prescription with knowledge that it was forged.

An indictment in this State must allege all the essential elements of the offense with sufficient clarity to (i) identify the offense, (ii) protect the accused from being twice put in jeopardy for the same offense, (iii) enable the accused to prepare for trial, and (iv) support judgment upon conviction. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). Knowledge that the prescription is false or forged is an essential element of the offense under G.S. 90-108(a)(10). *State v. Church*, 73 N.C. App. 645, 327 S.E. 2d 33 (1985).

Even though the indictments do not specifically state that defendant presented the forged prescriptions with knowledge that they were forged, the language of the indictments is sufficient to meet the requirements of *Sparrow, supra.* First, both indictments allege that the offense was done "intentionally." This allegation implies that the defendant knew the prescriptions were forged when she attempted to have them filled. Second, the indictments contained the words "misrepresentation, fraud, deception and subterfuge," all of which imply that the person committing the acts had the specific intent to misrepresent, deceive, etc. *See Church* at 646, 327 S.E. 2d at 34.

Also noteworthy is that two previous decisions of this Court have upheld indictments under this statute which followed the same language. *See State v. Fleming*, 52 N.C. App. 563, 279 S.E. 2d 29 (1981); *State v. Booze*, 29 N.C. App. 397, 224 S.E. 2d 298 (1976). While neither case addressed the specific question of the need to allege knowledge of the falsity of the prescription, both cases involved similar indictments which were upheld against challenge.

Defendant argues by analogy to the forgery and uttering statute, G.S. 14-120. To support a conviction for a violation of that statute, the indictment must allege that the defendant actually knew of the falsity of the instrument. *State v. Daye*, 23 N.C. App. 267, 208 S.E. 2d 891 (1974). However, G.S. 14-120 is distinguishable from G.S. 90-108(a)(10), the statute at issue here. General Statute 14-120 specifically states that the person violates the statute if he publishes or utters a forged instrument "knowing the same to be falsely forged or counterfeited." No such language appears in G.S.

90-108(a)(10). Because the indictment alleged that the offense was done "intentionally" and because the terms used in the indictment imply a specific intent to deceive, we hold that an indictment charging an offense under G.S. 90-108(a)(10) need not specifically allege that the defendant presented the false prescription knowing it was false. This assignment of error is overruled.

[2] Defendant next assigns as error the failure of the trial judge to poll the jury after a request by the defendant. General Statute 15A-1238 gives any party the right to have the jury polled after a verdict is returned but "before the jury has dispersed." The defendant's motion in this case was made after the jury had dispersed and, therefore, her right to have the jury polled is deemed waived. *State v. Froneberger*, 55 N.C. App. 148, 285 S.E. 2d 119 (1981), *appeal dismissed and cert. denied*, 305 N.C. 397, 290 S.E. 2d 367 (1982). Defendant contends, however, that the trial judge did not give her the opportunity to request a polling by dismissing the jury without allowing time for motions or requests.

The transcript shows that the clerk read the verdicts and asked the jurors collectively if the verdict was unanimous. All appeared to respond in the affirmative. Then, there was a delay as the clerk delivered the verdict sheets up to the judge. The opportunity to request a polling was then presented. However, defendant let the opportunity pass and the trial judge, on his own initiative, conducted an informal poll by asking, for each charge, that the jurors who voted guilty to raise their right hands. All the jurors did so. The jury was then dismissed. Defendant argues that the polling and comments by the trial judge precluded her opportunity to request a formal poll. We do not agree as the time to request a poll had been available earlier and, in any event, in light of the trial judge's own informal poll, any error was harmless beyond a reasonable doubt.

[3] Defendant next assigns as error that the trial judge improperly considered the seriousness of the offense as an aggravating factor in sentencing her. It is assumed that the legislature took such factors as the seriousness of the offense and the need to deter others into consideration when setting the presumptive term and they are not proper factors for aggravation of a sentence. *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). The record shows that the trial judge did not find that the

seriousness of the crime aggravated defendant's sentence. Instead, defendant argues that evidence admitted and comments made by the trial judge during the sentencing hearing indicates that he did consider the seriousness of the crime to be an aggravating factor, regardless of whether he formally found such to be in rendering judgment. The evidence challenged by defendant was the testimony of a Shelby police officer concerning the street value and "street use" of the drugs defendant bought and attempted to buy. In response to defendant's objection to this testimony, Judge Stephens replied:

> I understand that and I will not consider that as an aggravating circumstance. I do not consider that as an aggravating circumstance.
>
> However, it is some evidence as it relates to a possible motive in commission of this type of crime and the seriousness of this type of crime—the type of drugs that are the subject of this crime—and, therefore, I will consider that in determining the seriousness of the crime, how I evaluate that as to whether or not to impose the presumptive sentence, and for that purpose only.

Defendant contends that these comments show Judge Stephens' belief that the seriousness of defendant's crime would be an aggravating factor to consider in imposing greater than the presumptive sentence. This isolated comment and the fact that the evidence was received do not necessarily lead to the conclusion that the trial judge improperly considered the seriousness of the crime as an aggravating factor. In fact, no such finding appears in the record and, in the quoted statement above, the judge specifically stated that he did not consider the evidence to constitute an aggravating circumstance. This assignment of error is overruled.

[4] However, we do believe that a new sentencing hearing is required in 85CRS66, in which the trial judge used a non-statutory aggravating circumstance to elevate the sentence to the maximum of five years. The trial judge found in aggravation:

> That the defendant acted with and was aided by a white male person in the commission of this crime; that such white male person was present during the prepetration [sic] of this

crime; that this white male person was armed with a pistol and that he shot a police officer with that pistol when the officer attempted to question the defendant at the scene of this crime and attempted to prevent the defendant from escaping; that the defendant knew that this white male person aiding her was armed with a deadly weapon and that this shooting was committed to aid the defendant in escaping after the commission of this crime.

This relates to the gun battle between Deputy Barkley and the "white male person," who was defendant's husband, which occurred outside the Revco where defendant had attempted to buy Dilaudid. Defendant's husband was killed and the deputy was wounded. However, there was no evidence presented that the defendant knew her husband was armed or that he intended to use a weapon. In fact, the evidence showed defendant never posed any threat to the police and that she was generally a person of good character and had no criminal record.

In order to be valid, an aggravating factor must be supported by evidence sufficient to allow a reasonable judge to find its existence by a preponderance of the evidence. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). As no evidence was presented which tended to show defendant knew her accomplice was armed, the non-statutory aggravating factor as found by the trial judge was improper and a new sentencing hearing is required.

No. 85CRS169—No error.

No. 85CRS66—New sentencing hearing.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. HOWARD WESLEY HELTON

No. 8512SC816

(Filed 4 March 1986)

1. **Burglary and Unlawful Breakings § 5— second degree burglary—failure to instruct on acting in concert or constructive breaking—necessity for breaking by defendant**

Where the trial court in a second degree burglary case failed to instruct the jury with respect to acting in concert or constructive breaking, the State was required to prove that defendant personally committed each essential element of the offense of burglary, including an actual breaking. Therefore, the evidence was insufficient to sustain defendant's conviction of second degree burglary where it failed to show that defendant personally committed a breaking on any of the occasions when he accompanied two accomplices to the victim's residence and stole property therefrom.

2. **Burglary and Unlawful Breakings § 7.1— second degree burglary verdict unsupported by evidence—treatment as verdict of felonious breaking or entering**

In finding defendant guilty of second degree burglary, the jury necessarily found defendant's guilt of all of the elements of the lesser-included offense of felonious breaking or entering, and where the evidence was insufficient under the court's instructions to support the burglary verdict but was sufficient to establish all of the elements of felonious breaking or entering, the verdict will be treated as a verdict of guilty of felonious breaking or entering.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 19 March 1985 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 11 December 1985.

Defendant was indicted for five counts of second degree burglary and five counts of felonious larceny. A jury found him guilty of four counts of second degree burglary and three counts of felonious larceny. The trial court consolidated the offenses and imposed an active fourteen year prison sentence. Defendant appeals.

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

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David W. Dorey for defendant appellant.

MARTIN, Judge.

Defendant's contention on appeal is that the evidence was insufficient to support his convictions for second degree burglary under the instructions submitted to the jury by the trial court. He argues that the State failed to present evidence to show that he actually committed a breaking and that the trial court did not submit instructions with respect to his guilt under the theory of acting in concert. We find merit in defendant's argument.

Jean Stites' residence was located at 5441 Tempe Court in Fayetteville, next door to defendant's residence. During November and early December, 1983, Mrs. Stites was away from her home for an extended period. While Mrs. Stites was away, Lucia Centell periodically checked on her house. On 6 December 1983, Mrs. Centell discovered that a windowpane in the kitchen door had been broken and that the house had been ransacked. Numerous items, including two refrigerators, a washer and dryer, a heater and a color television, had been taken.

On the night of 24 November 1983, Eric Brooks, Vincent Havlick and defendant had been together, drinking and smoking marijuana, in a storage building behind defendant's house. Brooks and Havlick decided to spend the night in the storage building; defendant went into his house and went to sleep. At some point during the night, Brooks and Havlick went to the Stites house, where Havlick broke out a glass in the back door and entered the house. Unable to see in the darkness, Havlick went back to defendant's house and woke him. Defendant accompanied Havlick back to the Stites house where Brooks was waiting and the three of them entered the house. Defendant removed items from the house. On the three succeeding nights, Havlick and defendant went back to the Stites house, entering through the broken kitchen door. On each occasion, defendant removed other items from the house. Both Brooks and Havlick testified for the State. Aside from the first instance, when Havlick broke the glass and opened the kitchen door, there was no evidence as to who opened the door on the subsequent occasions when Havlick and defendant entered the house, or as to whether the door had even been closed between entries.

As to each of the counts charging burglary, the trial court instructed the jurors that they could find defendant guilty of sec-

ond degree burglary or not guilty; felonious breaking or entering was not submitted as a lesser included offense. The jurors were not instructed on the law of acting in concert or with respect to the law of constructive breaking. The only theory of defendant's guilt of second degree burglary submitted to the jury was that defendant actually committed every element of that offense on each occasion. The State's request for an instruction on the law of acting in concert was denied.

Second degree burglary is the breaking and entering of an unoccupied dwelling house during the nighttime with the intent to commit a felony therein. *State v. Simons*, 65 N.C. App. 164, 308 S.E. 2d 502 (1983). The breaking required for conviction of burglary may be actual or constructive. *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). A defendant commits a constructive breaking when the opening is made by a person other than the defendant, if that person is acting at the direction of, or in concert with, the defendant. *State v. Smith*, 311 N.C. 145, 316 S.E. 2d 75 (1984).

[1] The State argues that its evidence was sufficient to support the defendant's convictions of burglary upon the theories of constructive breaking and acting in concert. We agree. However, "a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury." *State v. Smith*, 65 N.C. App. 770, 773, 310 S.E. 2d 115, 117, *modified and aff'd*, 311 N.C. 145, 316 S.E. 2d 75 (1984). Had the trial court instructed the jury with respect to the law of acting in concert or as to the law of constructive breaking, the defendant's conviction of burglary could be sustained upon the evidence showing that he and Havlick acted together on each occasion when they went to the Stites residence. Since the trial court failed to instruct with respect to those theories, the State was required to prove that defendant personally committed each essential element of the offense of burglary, including an actual breaking. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981).

The evidence offered by the State fails to show that defendant personally committed a breaking on any of the occasions when he accompanied Havlick to the Stites residence. While it is possible that defendant himself may have opened the broken kitchen door on one or more of these occasions, the evidence was insufficient to take this possibility beyond the realm of conjecture or

suspicion and, therefore, insufficient to support a reasonable inference of defendant's commission of a breaking. His convictions for second degree burglary must be vacated.

[2] Defendant is not, however, entitled to a dismissal of the burglary charges, as he contends. Felonious breaking or entering is a lesser included offense of burglary. *State v. Jolly, supra.* For conviction of felonious breaking or entering, a violation of G.S. 14-54(a), it is not necessary that the State show both a breaking and an entering; proof of either is sufficient if committed with the requisite felonious intent. *State v. Myrick,* 306 N.C. 110, 291 S.E. 2d 577 (1982). In finding defendant guilty of second degree burglary, the jury necessarily had to find the defendant entered another's building, without her consent, and with the intent to commit the felony of larceny, elements sufficient to establish defendant's guilt of felonious breaking or entering. There is substantial evidence in the record to support a finding of each of these elements. Since there was insufficient evidence from which the jury could find that defendant committed an actual breaking under the court's instructions, the verdicts returned by the jury must be considered verdicts of guilty of felonious breaking or entering. *See State v. Jolly, supra.* Thus, we will not disturb the verdicts, but we vacate the judgments entered upon verdicts of guilty of second degree burglary and remand these cases to the Superior Court of Cumberland County for entry of judgment as upon verdicts of guilty of felonious breaking or entering.

We do not disturb the verdicts of guilty of felonious larceny. Larceny is a felony, without regard to the value of the property taken, when committed pursuant to a burglary or a breaking or entering. G.S. 14-72(b)(2). However, since the larceny counts were consolidated with the burglary counts for judgment, defendant must also be resentenced upon those convictions.

Judgment vacated. Remanded for entry of judgment as upon Verdicts of Guilty of Felonious Breaking or Entering and New Sentencing Hearing on all counts.

Judges EAGLES and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 MARCH 1986

BIGELOW v. THE CITY OF GRAHAM No. 8515SC944	Alamance (84CVS470)	Affirmed
BROWN v. THE PANTRY, INC. No. 8511SC1107	Lee (85CVS61)	Affirmed
CRAWFORD v. THE PANTRY, INC. No. 8511SC1108	Lee (85CVS42)	Affirmed
CRUMP v. ROBINSON No. 8520DC1012	Union (84CVD1025)	New Trial
DAVIS v. SELLERS ENTERPRISES, INC. No. 8527SC892	Cleveland (84CVS549)	No Error
DUTTON v. THE PANTRY, INC. No. 8522SC928	Iredell (85CVS93)	Affirmed
FIRST-CITIZENS v. KORNEGAY No. 854SC901	Duplin (83CVS13)	Dismissed
FREEMAN v. SPINNAKER POINT, LTD. No. 855SC840	New Hanover (85CVS271)	Affirmed
GILLIKIN v. GILLIKIN No. 8510SC956	Wake (84CVS7313)	Affirmed
IN RE FORECLOSURE OF PARDUE No. 8523SC641	Wilkes (82SP66)	Affirmed
JOHNSON v. THE PANTRY, INC. No. 8522SC929	Iredell (84CVS786)	Affirmed
LEWIS v. LEWIS No. 8518DC994	Guilford (83CVD644)	Affirmed
MITCHELL TRACTOR & EQUIP. CO. v. HEATH No. 852SC731	Beaufort (84CVS206)	Affirmed
MORGAN v. BECK No. 8518SC1016	Guilford (83CVS6707)	No Error
PERRILL v. CANADY No. 8516SC722	Robeson (82CVS646)	No Error
SHAPIRO v. SHAPIRO No. 8510DC569	Wake (84CVD6154)	Dismissed

SHAPIRO v. SHAPIRO No. 8510DC949	Wake (84CVD6154)	No Error
STATE v. BRASWELL No. 858SC1098	Wayne (84CRS15459)	No Error
STATE v. COMBS No. 8517SC1119	Rockingham (85CRS1240)	No Error
STATE v. GRAHAM No. 8523SC715	Wilkes (84CRS6709) (85CRS41) (85CRS42) (85CRS43)	No Error
STATE v. McDOUGAL No. 8510SC977	Wake (84CRS47891-93) (84CRS50041-43)	New Hearing
STATE v. MARRERO-ALDAMA No. 8514SC843	Durham (84CRS38755)	No Error
STATE v. OVERBY No. 8514SC1063	Durham (83CRS37963)	No Error
STATE v. SMITH No. 8512SC915	Cumberland (82CRS26264)	No Error
STATE v. SMITH No. 8526SC948	Mecklenburg (85CRS4312) (85CRS4315)	New Trial
STEM v. HILBURN No. 857SC472	Wilson (82CVS1343)	Affirmed
TEIXEIRA v. HENNIS No. 8518SC823	Guilford (81CVS7688)	No Error
WATSON v. WRIGHT No. 858SC937	Wayne (84CVS1987)	Affirmed in part; vacated in part
WILLIAMS-BOWEN v. WACHOVIA BANK & TRUST CO. No. 8521SC895	Forsyth (85CVS933)	Reversed & Remanded

Torain v. Fordham Drug Co.

MARC ANTHONY TORAIN, JULIET V. TORAIN, DAVID W. TORAIN, JR., AND CHARLES TORAIN, CHILDREN OF DAVID WILLIAM TORAIN (DECEASED EMPLOYEE), PLAINTIFFS v. FORDHAM DRUG COMPANY, INC., EMPLOYER AND HOME INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC657

(Filed 4 March 1986)

1. **Evidence § 51— intoxication two hours before blood test—opinion testimony**

A medical witness was competent to state his opinion as to decedent's intoxication at 2:50 p.m. based upon the results of a blood alcohol test administered to decedent at 5:00 p.m. and the effect on decedent's blood alcohol level of having had his stomach emptied and having been administered an intravenous lactate solution shortly after he arrived at the hospital at 3:30 p.m.

2. **Master and Servant § 58— workers' compensation—intoxication as cause of death**

Findings by the Industrial Commission that deceased employee was intoxicated at the time of a one-car accident and that his intoxication was a proximate cause of his death were supported by evidence with respect to the manner in which deceased was driving immediately before the accident, the presence of an odor of alcohol about his person, deceased's statement at the hospital that he had been drinking, evidence that his blood alcohol level was .13 percent some two hours after the accident, and evidence negating brake failure or other vehicle defect as the cause of the accident. N.C.G.S. 97-12.

APPEAL by plaintiffs from opinion and award of the North Carolina Industrial Commission filed 6 February 1985. Heard in the Court of Appeals 2 December 1985.

David William Torain was employed by Fordham Drug Company, Inc. in Greensboro as a delivery man. He was provided a 1977 Toyota automobile by his employer with which to make his deliveries. At approximately 2:50 p.m. on 9 October 1982, while making the deliveries, Mr. Torain was involved in a one-car automobile accident when the 1977 Toyota he was operating passed through a stop sign at the intersection of Lexington and Lee Streets in Greensboro, struck a fire hydrant, and rolled over, landing on its top. Mr. Torain was taken to Wesley Long Hospital where he was initially treated under the supervision of Dr. Ronald Joyner (Director of Emergency Services at Wesley Long Hospital) and, subsequently, Dr. Peter Young (general surgeon). On 10 October 1982, Mr. Torain died due to injuries sustained in the accident.

Plaintiffs, Mr. Torain's adult children, commenced this proceeding, under the Workers' Compensation Act, to recover compensation and benefits for his death. On 14 September 1983, the case was heard by the deputy commissioner. The stipulated issues for decision were:

(1) Whether the injury resulted in death, and

(2) Whether the injury was proximately caused by deceased employee's intoxication.

In an opinion and award filed 31 May 1983, the deputy commissioner concluded that Mr. Torain's death proximately resulted from an injury by accident arising out of and in the course of his employment, and that his death was not proximately caused by intoxication. Defendants appealed to the Full Commission.

On 9 January 1985, the Full Commission, with Commissioner Vance dissenting, reversed the decision of the deputy commissioner and denied the claim. The majority of the Commission found and concluded that the deceased employee was intoxicated at the time he sustained an injury by accident arising out of and in the course of employment and that his intoxication was one of the proximate causes of his injury and death. Plaintiffs appeal.

Alexander Ralston, Pell & Speckhard, Elreta M. Alexander Ralston and Donald K. Speckhard, for plaintiff appellants.

Tuggle, Duggins, Meschan & Elrod, P.A., by Richard L. Vanore and Frederick K. Sharpless, for defendant appellees.

MARTIN, Judge.

The sole issue presented by this appeal is whether there was sufficient competent evidence to support the Commission's findings that the deceased employee was intoxicated at the time of the accident and that his intoxication was a proximate cause of his death due to injuries sustained therein. Our review of the record discloses ample evidence to support the Commission's findings. We affirm.

Upon appeal from a decision of the Industrial Commission, our review is limited to resolving: (1) Whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's findings of fact

support its conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 296 S.E. 2d 456 (1982); *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 314 S.E. 2d 833 (1984). The findings of fact are conclusive on appeal if supported by competent evidence although there exists evidence which would support contrary findings of fact. *McLean, supra.*

Defendants contested plaintiffs' right to compensation based upon the provisions of G.S. 97-12. That statute provides in pertinent part:

> § 97-12. No compensation shall be payable if the injury or death to the employee was proximately caused by:
>
> (1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee.

An employer has the burden of proving intoxication as an affirmative defense. *Id.* He must prove not only that the employee was intoxicated at the time of the accident causing the injury or death, but also that the accident was proximately caused by the employee's intoxication. *Anderson v. Century Data Systems*, 71 N.C. App. 540, 322 S.E. 2d 638 (1984). However, the employer need not disprove all other possible causes of the accident and injury nor that intoxication was the *sole* proximate cause; he is required to prove only that the employee's intoxication was more probably than not a proximate cause of the accident and resulting injury. *Rorie v. Holly Farms*, 306 N.C. 706, 295 S.E. 2d 458 (1982), *Anderson, supra.*

The Commission made the following findings of fact pertinent to the deceased employee's intoxication:

> 11. The deceased was transported by ambulance to Wesley Long Hospital and admitted in the emergency room at 3:30 p.m. with obvious contusions and abraisions [sic] and a small hematoma on the left forehead. He was conscious, but communication was difficult. It was noted that he smelled of alcohol. At 3:38 p.m. the deceased was examined by Dr. Ronald Freeman Joyner who diagnosed an abdominal injury.
>
> . . .

13. Dr. Joyner drew blood for a blood alcohol test at 5:00 p.m. The blood test showed .13% of blood alcohol.

. . .

17. The collision in question was witnessed by one Anthony Maloni. Mr. Maloni was in a position to observe the employee as he traveled through a stop sign at the intersection of Lexington Avenue and West Lee Street, striking a fire hydrant, and then rolling the vehicle over on its top one and one-half to two and one-half times. During this period of time the employee failed to stop and never slowed down at any point until the vehicle came to rest.

18. Patrolman Davis of the Greensboro Police Department investigated the collision. He inspected the 1977 Toyota automobile and determined there were no vehicular defects which produced the accident. Patrolman Davis charged the employee with driving under the influence.

19. When the employee arrived at the hospital a history was obtained that he had "blacked out" prior to the collision. Past medical history was obtained from the family which indicated that he was a severe drinker.

. . .

21. At the time complained of the employee was intoxicated, and the accident which produced his death was proximately caused by his intoxication.

Plaintiffs except and assign error to the last four of the above stated findings of fact, contending that the evidence was insufficient to support those findings. We have examined each of the findings of fact in the light of the evidence presented and find that there was competent evidence before the Commission to support each of them.

Findings of Fact 17, 18 and 19 are evidentiary findings of fact, and are based on the testimony of Anthony Maloni, an eyewitness to the accident, and upon the investigating officer's Traffic Accident Report, the autopsy report and the hospital records of the deceased employee. The reports and hospital records were admitted pursuant to a stipulation by the parties that they could "be accepted as *substantive* evidence" (emphasis ours) by the

Commission. The effect of the stipulation was to render the information contained in the reports and records competent for the Commission's consideration. Each of the facts found by the Commission in its Findings of Fact 17, 18 and 19 is reflected in the testimony of Mr. Maloni or in the accident report and hospital records.

Plaintiffs argue, however, that portions of the facts found in Findings of Fact 18 and 19 are incompetent to support the Commission's conclusion that Mr. Torain was intoxicated at the time of the accident. Specifically, they direct our attention to that portion of Finding of Fact 18, in which the Commission found that "Patrolman Davis charged the employee with driving under the influence," and that portion of Finding of Fact 19 in which the Commission found that "[p]ast medical history was obtained from the family which indicated that he was a severe drinker." We need not address the propriety of these specific findings because even if we were to conclude that they are erroneous, the outcome of this case would not be altered. Where, after erroneous factual findings have been excluded, there remain sufficient findings of fact based on competent evidence to support the Commission's conclusions, its ruling will not be disturbed. *Wachovia Bank and Trust Co. v. Bounous*, 53 N.C. App. 700, 281 S.E. 2d 712 (1981).

The Commission's ultimate findings of fact are contained in Finding of Fact 21. Evidence before the Commission revealed that Anthony Maloni observed Mr. Torain's automobile as it approached the intersection and estimated its speed at 35 to 40 miles per hour. The automobile never decreased its speed as it passed the stop sign and as Mr. Torain attempted to make a right hand turn. The investigating officer noted on the accident report an opinion that Mr. Torain had been drinking, although the officer was unable to determine the degree of impairment. The hospital records reflect that when Mr. Torain arrived at the emergency room at approximately 3:30 p.m., he stated that he had been drinking and that he had the odor of alcohol about his person. Dr. Joyner testified that Mr. Torain's stomach was emptied by means of a nasogastric tube shortly after his arrival at the hospital and that he was administered Ringer's lactate intravenously. An effect of these treatments would be a reduction in Mr. Torain's blood alcohol content. Nevertheless, when a blood sample was taken at approximately 5:00 p.m., it showed that Mr. Torain's

blood alcohol level was 130 milligrams percent, which in Dr. Joyner's opinion, was a sufficient level to have caused Mr. Torain to have been intoxicated. He also rendered an opinion, based on the blood alcohol level at 5:00 p.m. and the treatment rendered at the hospital, that Mr. Torain could have been intoxicated approximately two hours earlier, at the time of the accident.

[1] Plaintiffs contend that Dr. Joyner was not competent to state his opinion as to Mr. Torain's intoxication at 2:50 p.m. based upon the results of the blood alcohol test administered at 5:00 p.m. We disagree. The Industrial Commission possesses the powers of a court. *Hanks v. Southern Public Utilities Co.*, 210 N.C. 312, 186 S.E. 252 (1936). The issue of whether a witness is qualified to testify as an expert is a question addressed to the court, in its discretion, and its decision will not be disturbed absent a showing of abuse of discretion. *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548 (1956). We find no abuse here.

At the hearing in the case *sub judice*, Dr. Joyner was found to be an expert in medicine and emergency room medicine. Rule 702 of the North Carolina Rules of Evidence, G.S. 8C-1 (1985), provides that "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." Dr. Joyner testified as to Mr. Torain's blood alcohol level at 5:00 p.m.; the effect on Mr. Torain's blood alcohol level of having had his stomach emptied and having been administered Ringer's lactate; and his opinion, based on his medical knowledge and his knowledge of Mr. Torain's course and treatment in the hospital, that Mr. Torain could have been intoxicated at 2:50 p.m. The weight to be given his opinion was with the Commission who sat as the trier of fact. *Smith v. William Muirhead Constr. Co., Inc.*, 27 N.C. App. 286, 218 S.E. 2d 717 (1975). Moreover, evidence of Mr. Torain's blood alcohol level approximately two hours after the accident, under the circumstances of this case where he had had no opportunity to consume alcohol from the time of the accident until the time of the blood alcohol test, is sufficiently relevant circumstantial evidence of his intoxication at the time of the accident to support the Commission's finding. *See State v. Catoe*, 78 N.C. App. 167, 336 S.E. 2d 691 (1985).

Further evidence before the Commission indicated that Patrolman Davis noted no defects with respect to the vehicle which Mr. Torain was driving. Mr. Torain's employer testified that he had driven the Toyota earlier that day and had noted no problems with the brakes.

[2] When considered together, the evidence with respect to the manner in which Mr. Torain was driving, the presence of an odor of alcohol about his person, his statement that he had been drinking, and the level of alcohol found in his blood, support the Commission's finding of fact that Mr. Torain was intoxicated at the time of the accident. Its finding that his intoxication was a proximate cause of the accident and his resulting injuries and death is also supported by this evidence as well as the evidence negating brake failure as a cause of the accident. We are cognizant that plaintiffs presented considerable evidence tending to show that Mr. Torain was not intoxicated at the time of the accident. However, it is the province of the Commission, not this Court, to determine the credibility of the witnesses and the weight to be given to the evidence. We conclude that the Commission's Finding of Fact 21 is fully supported by competent evidence and it is therefore binding upon us. The findings contained therein are sufficient within themselves to support the Commission's conclusion as to the applicability of G.S. 97-12.

In summary, the Commission's finding of fact support its conclusions that Mr. Torain sustained an injury by accident arising out of and in the course of his employment, but that his intoxication was one of the proximate causes of his accidental injury and death. In such instances, G.S. 97-12 bars recovery of compensation. The Commission's order denying plaintiff's claim is

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

THOMAS B. BRUCE v. HARRIET B. BRUCE

No. 8510DC841

(Filed 4 March 1986)

Divorce and Alimony § 13— divorce based on separation—statute of limitations inapplicable

The general residuary ten-year statute of limitations of N.C.G.S. 1-56 does not apply in an action for absolute divorce under N.C.G.S. 50-6 based on separation for one year.

APPEAL by defendant from *Redwine, Judge.* Judgment entered 19 April 1985 in District Court, WAKE County. Heard in the Court of Appeals 15 January 1986.

On 25 January 1985 plaintiff husband filed a complaint for absolute divorce based on one year's separation, G.S. 50-6, and for equitable distribution of the marital properties. Defendant wife filed an answer and asserted as an affirmative defense the statute of limitations as a bar to plaintiff's action for absolute divorce.

Plaintiff and defendant were married on 17 December 1939 and separated 6 April 1973. A period of eleven years and approximately nine months elapsed between the date of separation and the filing of the complaint for absolute divorce. During that time, plaintiff and defendant continuously lived separate and apart.

The trial judge granted plaintiff an absolute divorce and retained jurisdiction for purposes of equitable distribution under G.S. 50-20. Defendant appeals.

Manning, Fulton & Skinner, by John B. McMillan and Robert S. Shields, Jr., and Carter W. Jones for plaintiff-appellee.

Tharrington, Smith & Hargrove by J. Harold Tharrington and Carlyn G. Poole for defendant-appellant.

EAGLES, Judge.

The sole issue on appeal is whether the ten year statute of limitations, G.S. 1-56, applies in an action for absolute divorce under G.S. 50-6. The defendant contends that it does and therefore bars both the claim for absolute divorce and the claim for equitable distribution. We disagree.

Chapter 50 of our General Statutes governing divorce and alimony does not provide for a statute of limitations in an action for absolute divorce based on one year's separation. Nor is there a provision in the statutes of limitation, G.S. 1-14 through 1-56, expressly applicable to divorce actions. G.S. 50-6 requires that the husband and wife have lived separate and apart for one year, and that the plaintiff or defendant has resided in the State for a period of six months. However, these are jurisdictional requirements. *Henderson v. Henderson*, 232 N.C. 1, 59 S.E. 2d 227 (1950). The requirement that parties live separate and apart for one year applies to the year prior to institution of the suit. *Myers v. Myers*, 62 N.C. App. 291, 302 S.E. 2d 476 (1983). Likewise, the six months residency requirement means the six months next preceding commencement of the action. *Denson v. Denson*, 255 N.C. 703, 122 S.E. 2d 507 (1961).

Our research reveals no North Carolina case where an action for divorce has been barred by a statute of limitations. Based on *Garris v. Garris*, 188 N.C. 321, 124 S.E. 314 (1924) and *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965), defendant attempts to apply the ten year statute of limitations provided for in G.S. 1-56: "An action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued." We believe that both *Garris* and *Fulp* are distinguishable.

In *Garris, supra* at 324, 124 S.E. at 315, our Supreme Court said: "Under our statute of limitations there is no provision which in express terms bars a divorce, and if such an action is barred with us it would be by C.S. 445 [now G.S. 1-56], barring all actions not otherwise provided for in ten years." We do not interpret this to mandate application of the ten year statute of limitations in G.S. 1-56. The court in *Garris* went on to say: "In *O'Connor v. O'Connor*, 109 N.C. 139, it seems to have been held that in proper instances the section referred to is applicable to actions for divorce." *Id.* We have carefully reviewed *O'Connor*, 109 N.C. 139, 13 S.E. 887 (1891), and find it to be distinguishable from the instant case. In *O'Connor* plaintiff wife brought an action for divorce *a mensa et thoro* on the ground of personal violence. One allegation of violence involved an assault which occurred more than ten years before the action was commenced. However, the evidence showed that during the ten years following the assault the wife

continued to live with her husband. As to this allegation of violence the Court said:

> It is intimated, rather than suggested, that the assault made in 1878, on account of the wife's condition amounted to such cruel and barbarous treatment as to endanger her life, and that therefore the plaintiff may rightfully insist that she has brought the case within the meaning of sub-sec. 3, sec. 1286. [Now G.S. 50-7(3).] To this we answer, first, that it is not found by the jury that her life was endangered, and the judgment cannot be predicated upon that view in the absence of such a finding; second, that she had lived with her husband for ten years after that assault and before this action was brought. The court will not allow a separation for an offense so long ago condoned.

109 N.C. at 144, 13 S.E. at 888-89. We interpret this holding in *O'Connor* to mean that our court should not consider acts of violence more than ten years old when the facts show that such conduct has been condoned, for condonation is a defense to an action for divorce from bed and board. *Cushing v. Cushing*, 263 N.C. 181, 139 S.E. 2d 217 (1964). We do not read *O'Connor* to mean that the 10 year statute of limitations in G.S. 1-56 applies to actions for absolute divorce. *See Page v. Page*, 167 N.C. 346, 83 S.E. 625 (1914) (evidence of indignities of more than ten years earlier admitted, because it was a part of the whole course of dealings).

Defendant also relies on *Fulp v. Fulp, supra*, for the proposition that "statutes of limitation run as well between spouses as between strangers." 264 N.C. at 26, 140 S.E. 2d at 713. In *Fulp* plaintiff wife sued her husband seeking a resulting or constructive trust in land or in the alternative to recover money allegedly invested in improvements. Defendant husband pleaded the three year statute of limitations applicable to actions based on an implied contract or breach of an express trust. G.S. 1-52. Our Supreme Court in holding that the trial court properly dismissed plaintiff's action, approved the then minority position that statutes of limitation run between spouses. *Fulp* was not an action for divorce and we do not find its holding dispositive on the issue before us.

While North Carolina has not done so, other states have at one time enacted statutes which expressly limit the time within

which a suit for divorce on grounds other than separation must be brought. *Smedley v. Smedley*, 30 Ala. 714 (1857) (divorce on ground of adultery, suit must be brought within one year after discovery of the adulterous act); *Wickliff v. Wickliff*, 191 Ark. 411, 86 S.W. 2d 553 (1935) (statute requiring proof that ground for divorce occurred within five years next preceding commencement of suit); *Berkley v. Berkley*, 142 N.Y.S. 2d 273 (1955) (divorce must be denied if action not commenced within five years after discovery of the offense charged). However, in the absence of an expressly applicable statute of limitations, it has been broadly stated that statutes of limitation should not be strictly applied in divorce actions. 27A C.J.S. *Divorce* Section 88 (1959); Lee, *North Carolina Family Law* Section 49 (4th ed. 1979). In looking to other jurisdictions for guidance we find a conflict on the issue. Some states have held that their general or residuary statutes of limitation do not apply. *Johnson v. Johnson*, 50 Mich. 293, 15 N.W. 462 (1883); *Tufts v. Tufts*, 8 Utah 142, 30 P. 309 (1892); *Flynn v. Flynn*, 149 Ga. 693, 101 S.E. 806 (1920); *Kittle v. Kittle*, 86 W. Va. 46, 102 S.E. 799 (1920); *Doe v. Doe*, 59 Del. 105, 214 A. 2d 558 (1965). Other states have held to the contrary. *Zlindra v. Zlindra*, 252 Wis. 606, 32 N.W. 2d 656 (1948); *Franzetti v. Franzetti*, 120 S.W. 2d 123 (Tex. Ct. Civ. App. 1938). It should be noted however that even in states having expressly applicable statutes of limitation as well as in states applying their general residuary statutes of limitation, it has been held that a continuing offense is not time barred. *Wickliff, supra; Franzetti, supra.*

Separation, as a ground for divorce, is a type of continuing offense. It begins on the date the parties physically separate with the requisite intention that the separation remain permanent and the cause of action under G.S. 50-6 accrues at the end of one year. However, the cause of action continues to accrue even after the one year period so long as the parties remain "separate and apart" within the meaning of the statute. G.S. 50-6 looks only at the year immediately preceding the filing of the complaint. We quote with approval Professor Lee's analysis of the application of G.S. 1-56 to an action for divorce:

> [I]t would seem that in offenses of a continuing nature (such as separation and the grounds listed for divorce from bed and board in North Carolina) the statute of limitations is concerned not with the time of the beginning of the conduct, but

rather with the time after the doing of the act complained of; and, accordingly, if the conduct has continued to within ten years of the commencement of the action, the divorce proceeding would not be barred in North Carolina.

Lee, *supra* at Section 49.

Balancing the reasons for having statutes of limitation against our State's public policies of endeavoring to maintain the marital state on the one hand and not denying divorce to parties who have demonstrated a ground for divorce on the other hand, we conclude that our general, residuary statute of limitations, G.S. 1-56, should not be applied to actions for absolute divorce under G.S. 50-6.

"The primary purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend." 51 Am. Jur. 2d *Limitation of Actions* Section 17 (1970). "In its immediate effect, a statute of limitations is, ordinarily, for the benefit of individuals rather than the securing of any general object of public policy." *Id.* at Section 18. Statutes of limitation have come into the law by legislation, not judicial process. They represent a public policy about the privilege to litigate. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 89 L.Ed. 1628, 65 S.Ct. 1137, *reh'g denied*, 325 U.S. 896, 89 L.Ed. 2006, 65 S.Ct. 1561 (1945). "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims. . . ." *Id.* at 314, 89 L.Ed. at 1635, 65 S.Ct. at 1142. They stimulate activity, punish negligence and promote repose by giving security and stability to human affairs. 51 Am. Jur. 2d at Section 18. However, this policy of repose is often outweighed "where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428, 13 L.Ed. 2d 941, 945, 85 S.Ct. 1050, 1055 (1965).

The State is a party to every marriage, *Ritchie v. White*, 222 N.C. 450, 35 S.E. 2d 414 (1945), and is therefore deeply concerned with the integrity and permanence of the marital status of its citizens. For this reason the State has an interest in every divorce. Lee, *supra* at Section 41. While a divorce proceeding is a

civil action, it is unlike any other civil action because it is not an ordinary adversary proceeding. Even with defendant's acquiescence, the plaintiff is strictly held to compliance with every statutory requirement. Judgment by default is not permitted though recent legislation makes the provisions of G.S. 1A-1, Rule 56 applicable to absolute divorce actions pursuant to G.S. 50-6. 1985 N.C. Adv. Legis. Serv. C. 140. Ordinarily the facts that constitute a ground for divorce must be pleaded, proved and found true even though uncontested. Lee, *supra* at Section 41.

> In recent years there has been an increasing recognition that little is to be gained, and much harm may result, from a denial of divorce when the parties have reached the point where they are wholly discordant and no longer living together. "It is accordingly held that public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed. Indeed, the enactment of a statute authorizing divorces on specified grounds shows that it is not the public policy to uphold the marriage relation where there can be no doubt that one of the grounds for divorce exists and there is little or no possibility of forgiveness or reconciliation; on the contrary, the public policy is to grant divorces in such cases since this promotes good morals and is for the good of society." [Quoting from 24 Am. Jur. 2d 184 (1966).] This public policy finds itself expressed in the ground of one year's separation for absolute divorce in North Carolina. As a matter of fact, in North Carolina it need not be alleged or proved that reconciliation is hopeless.
>
> Under our existing law, the trial judge has no alternative but to grant the divorce if a ground for divorce is sufficiently established.

Lee, *supra* at Section 41.

To obtain a divorce pursuant to G.S. 50-6 all that is required is proof that the parties "have lived separate and apart for one year" and that one of the parties has lived in this State for six months next preceding institution of the suit. G.S. 50-6 is a "no-fault" statute. Recriminatory defenses are not applicable. Divorce is permitted irrespective of fault. Lee, *supra* at Section 71. G.S. 50-6 "is an indication of the state's policy, as exhibited by legisla-

tion, that if the parties 'have lived separate and apart for one year,' the marriage is no longer viable and is not worth saving." *Id.* In interpreting a statutory ground for divorce our Supreme Court has said: "And the Legislature having thus formally and clearly expressed its will, the Court is not at liberty to interpolate or superimpose conditions and limitations which the statute itself does not contain." *Cooke v. Cooke*, 164 N.C. 272, 275, 80 S.E. 178, 179 (1913).

For the reasons stated we affirm the trial court's granting an absolute divorce and retaining jurisdiction over the marital property for purposes of equitable distribution.

Affirm.

Judges MARTIN and COZORT concur.

SANTORA, McKAY & RANIERI v. EUGENE FRANKLIN, AND WIFE, SOPHIA FRANKLIN

No. 8528SC559

(Filed 4 March 1986)

1. Evidence § 27— telephone conversation—admissible

The trial court did not err in an action on an account stated by a law firm against two clients by admitting testimony regarding the content of a telephone conversation allegedly placed by one defendant to an attorney within the firm. Information was conveyed by the caller regarding the lawsuit which disclosed knowledge of facts known peculiarly to defendant and thereafter used by the attorney to frame a motion to vacate a judgment; there was uncontradicted evidence of at least one and possibly two other telephone conversations between the witness and the same person identified as defendant regarding the same lawsuit; one of those calls was placed by the witness to defendant at one of the three numbers given to the attorney by the North Carolina lawyer who initially referred defendants to the New York firm; and correspondence between the witness and defendant which referred to the telephone conversations was admitted without objection.

2. Accounts § 2— action on account stated—testimony concerning underlying lawsuit—relevant background information

The trial court did not err in an action on an account stated by a New York law firm against a client by admitting testimony regarding the subject matter of the New York lawsuit. The testimony provided needed background

information pertaining to the dispute in issue and was not prejudicial. N.C.G.S. 8C-1, Rule 401.

3. **Accounts § 2— accounts stated by implied agreement—evidence sufficient to support instruction**

There was sufficient evidence to support an instruction on an account stated by implied agreement where defendants admitted receiving two statements sent by plaintiff law firm for fees in a New York lawsuit; the record reveals no objection by defendants prior to the institution of this action two and a half years after receipt of the first statement and one and one-fourth years after receipt of the second; one defendant's letters to an attorney in plaintiff law firm indicated a willingness to pay the amount shown as due; and defendant requested an extension of time to make the payment rather than objecting to the amount. N.C.G.S. 8-45.

4. **Accounts § 2— statement of account not verified—admissible as business record exception**

In an action on an account stated by a law firm against a client, the court erred by instructing the jury on an account stated pursuant to N.C.G.S. 8-45 where the two statements attached to the complaint were not properly verified. However, the error was harmless because the evidence was admissible under the business records exception to the hearsay rule and the jury was correctly instructed on the law pertaining to an account stated by implied agreement.

5. **Accounts § 2— account stated—admitted in complaint—failure to object to statements on account**

There was a basis for establishing an indebtedness against defendant Eugene Franklin where defendants' answer admitted that legal services were rendered for defendants, both statements on account were sent to Sophia and Eugene Franklin, and Eugene Franklin failed to object.

APPEAL by defendants from *Gaines, Robert E., Judge.* Judgment entered 4 February 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 November 1985.

On 2 March 1984, plaintiff instituted this action, alleging in its complaint as follows: that plaintiff is a partnership organized and existing under the laws of the State of New York; that plaintiff is the successor partnership to Santora, Shenkman & Kushel; that plaintiff, by and through its predecessor, rendered services in connection with a legal action, namely *Cooper Funding, Ltd. v. Eugene Franklin and Sophia Franklin*, in the United States District Court of the Southern District of New York; that predecessor law firm rendered services on behalf of defendants in connection with this legal action totaling $10,247.57; and that despite demand made upon defendants, defendants had refused to

pay; wherefore $10,247.57 constituted an account stated. Plaintiff attached two statements to the complaint: one dated 21 September 1981 for services from 22 May through 31 August 1981, totaling $8,429.17, minus $700.00 previously paid on account by defendants, for a total due of $7,729.17 and one dated 16 December 1982 for services from 1 September 1981 through 30 November 1982 for a total due of $2,518.40. In their answer defendants admitted that the firm of Santora, Shenkman & Kushel had rendered services on their behalf in regard to the New York action and admitted that the statements attached to plaintiff's complaint "appeared to be true copies of statements previously submitted to Defendants by the law firm of Santora, Shenkman & Kushel."

On 30 January 1985, the matter was tried before a jury. To the first issue submitted, "Was the account between Sophia and Eugene Franklin and Santora, McKay & Ranieri an account stated?" the jury answered yes. To the second issue regarding what amount, if any, was owed, the jury answered $10,247.57. On 4 February 1985, judgment was entered accordingly. Defendants appeal.

Shuford, Best, Rowe, Brondyke & Orr, by Robert F. Orr, for plaintiff appellee.

Baley, Baley, Clontz & Schumacher, P.A., by Stanford K. Clontz, for defendant appellants.

JOHNSON, Judge.

[1] In defendants' first Assignment of Error, defendants contend the court committed reversible error by admitting testimony regarding the content of a telephone conversation allegedly placed by defendant Sophia Franklin to witness Robert McKay, an attorney with plaintiff law firm. We agree with defendants that when there is no other evidence to authenticate the identity of the speaker who placed the call except that he states his name, the evidence is inadmissible as hearsay. *Everette v. Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959). However, it is not necessary that proof of the identification be made before the introduction of the evidence of the conversation. *Id.* Identity of the caller may be established by direct or circumstantial evidence, *id.*, anytime throughout the development of the case, *State v. Strickland*, 229

N.C. 201, 208, 49 S.E. 2d 469, 474 (1948). Identification of the caller can also be established by evidence that the caller disclosed knowledge of facts known peculiarly to him. Rule 901 commentary Example (4), N.C. Rules Evid.; 1 H. Brandis on N.C. Evidence, sec. 96 (Supp. 1983). The evidence is of course greatly strengthened when a combination of circumstances can be shown. 1 H. Brandis, *supra*, at sec. 96 (rev. 2d ed. 1982).

Applying these principles to the case at bar, there is ample circumstantial evidence throughout the development of the case to identify defendant Sophia Franklin as the caller in question. Information was conveyed by the caller regarding the lawsuit pending in New York which disclosed knowledge of facts known peculiarly to defendant Sophia Franklin and thereafter used by Robert McKay to frame the motion to vacate the judgment entered in New York. This circumstantial evidence regarding defendant Sophia Franklin's identity is strengthened by the uncontradicted testimony that at least one, and possibly two, other telephone conversations took place between the witness and the same person identified on the telephone as Sophia Franklin regarding the same New York lawsuit. Further, one of these calls was placed *by* witness McKay *to* defendant Sophia Franklin at one of three phone numbers given to Robert McKay by Robert Long, the North Carolina attorney who referred defendants to the New York law firm. Admitted into evidence with no objections was a correspondence that took place between the witness Robert McKay and defendant Sophia Franklin, which made reference to previous telephone conversations between the two. This Assignment of Error is overruled.

[2] Defendants next contend the court committed reversible error by admitting into evidence witness Robert McKay's testimony regarding the subject matter of the New York lawsuit. Specifically, defendants except to the following testimony as irrelevant:

> Q. Could you explain the situation in regard to the lawsuit against Mr. and Mrs. Franklin about which you were contacted?
>
> A. Yes. Mr. and Mrs. Franklin had signed what is called an equipment lease—
>
> MR. CLONTZ: Objection. I don't think that's relevant to anything that's alleged in this Complaint.

COURT: Overruled; go ahead.

A. —pursuant to which they were going to lease two Peterbilt tractors which they wanted to use for the purpose of hauling coal in their business, and the lease required them to make—

MR. CLONTZ: Objection, your Honor.

COURT: Overruled.

A. —required them to make monthly payments to this company in New York that had financed the purchase or the transaction.

Defendants objected for the first time on appeal in appellants' brief on the grounds of hearsay. A specific objection, if overruled, will be effective only to the extent of the ground specified. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977). Hence, on review we need inquire only as to whether the testimony admitted against objection was inadmissible on the grounds of relevancy.

A strong showing must be made to reverse if the only ground asserted is irrelevance. *Broyhill v. Coppage*, 79 N.C. App. 221, 339 S.E. 2d 32 (1986). *See* Rule 401, N.C. Rules Evid. Evidence which is essentially background in nature is universally offered and admitted as an aid to understanding. Rule 401 commentary, N.C. Rules Evid. The challenged testimony addressed the substance of the New York lawsuit from which this action for attorneys' fees arose and, as such, provided needed background information pertaining to the dispute at issue. Moreover, the testimony was not prejudicial. This Assignment of Error is overruled.

[3] Next defendants challenge the jury instructions tendered by the court to the jury on the issue of an account stated. Defendants contend that there was insufficient evidence to support an instruction on an account stated because neither the statements nor the computer printouts constitute a verified itemized statement of an account as required by G.S. 8-45. We have reviewed the jury charge in its entirety. The jury received instructions regarding two separate legal theories of an account stated, to wit: an account stated by an implied agreement and an account stated pursuant to G.S. 8-45.

"An account stated is a contract based on an agreement between two parties that an account rendered by one of them to the other is correct." *Greene v. Murdock*, 53 N.C. App. 552, 559, 281 S.E. 2d 443, 448 (1981). "The agreement may be either an express agreement or it may be an agreement implied by failure to object within a reasonable time after the other party has calculated the balance and submitted a statement of the account." *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 18, 243 S.E. 2d 793, 804, *disc. rev. allowed*, 295 N.C. 466, 246 S.E. 2d 9 (1978), *aff'd in part, rev'd in part*, 296 N.C. 357, 250 S.E. 2d 250 (1979). "Ordinarily what is a reasonable time is a question for the jury." *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 532, 126 S.E. 2d 500, 508 (1962).

In the case *sub judice*, the court's statement of the law contained in the jury instructions pertaining to this first theory submitted, the theory that an account stated can arise by an implied agreement, was correct. Further, there was sufficient evidence to warrant the submission of instructions under this theory to the jury. Defendants admit to receiving two statements sent by the law firm for fees totaling $10,247.57, one dated 21 September 1981 for $7,729.17 and one dated 16 December 1982 for $2,518.40. The record reveals no objection by defendants prior to the institution of this action by plaintiff law firm on 2 March 1984, approximately two and one half years after receipt of the first statement and one and one fourth years after receipt of the second statement. In defendant Sophia Franklin's letters to attorney Robert McKay she indicated a willingness to pay the amount shown as due. Rather than objecting to the amount, she requested an extension of time to make the payment. From the pleadings, correspondence and testimony there is ample evidence to show an account stated resulted from an implied agreement to pay by failure to object. This charge to the jury was proper.

[4] Defendants' specific objection pertains to the jury instruction under the second theory of an account stated, that is, an account stated pursuant to G.S. 8-45. The pertinent portion of the challenged jury charge is as follows:

> Now, members of the jury, the law provides in Chapter 8, Section 45 of the statutes of the State of North Carolina that in an action instituted in any court of this state upon an ac-

> count for services rendered, a verified, itemized statement of such account shall be deemed prima faci[e] evidence of its correctness. Now, prima faci[e] evidence is sufficient to justify, but does not compel a finding by the jury that the verified, itemized statement of the account is correct.

G.S. 8-45 was designed to facilitate the collection of accounts not in dispute. *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 230 S.E. 2d 576 (1976). G.S. 8-45 provides:

> In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

Defendants contend the evidence introduced to show the account was not a verified itemized statement; hence, the evidence was insufficient to warrant submission of a jury instruction regarding prima facie evidence under this statute. We agree, but hold the error is harmless.

To make out prima facie evidence under G.S. 8-45, the account must not only be properly verified and itemized, it must also be stated so as to show an indebtedness. *Kight v. Harris*, 33 N.C. App. 200, 203, 234 S.E. 2d 637, 639 (1977). The two statements attached to the complaint showing amounts due for services rendered are not properly verified. In court, plaintiff introduced evidence of eight pages of unverified computer printout, a computer tabulation of all work performed by the law firm on the action *Cooper Funding, Ltd. v. Eugene Franklin and Sophia Franklin* during the entire time at issue. The services shown are itemized by date, nature of service rendered, time worked and name of the attorney who performed the service. This computer tabulation was the firm's method of billing and was thus made in the regular course of business. Mr. McKay was familiar with the system and the particular pages of printout entered into evidence. The pages of printout were made near the time the work was done. The statements attached to the complaint were based upon the unverified computer printout. Hence, the statements and printout are not admissible as verified itemized statements under G.S. 8-45. It was error to instruct the jury on

an account stated pursuant to G.S. 8-45. However, this evidence was admissible under the business records exception to the hearsay rule. *Bond Park Truck Service, Inc. v. Hill*, 53 N.C. App. 443, 281 S.E. 2d 61 (1981). Because evidence of the account was admissible and because the jury was correctly instructed on the law pertaining to an account stated by an implied agreement, this error is rendered harmless.

[5] In defendants' last Assignment of Error defendants contend there is no basis for establishing the indebtedness as to defendant Eugene Franklin and that the judgment against him is error. Allegation No. 2 of defendants' answer stated, "It is admitted that legal services were rendered for Defendants by the law firm named Santora, Shenkman, and Kushel in regard to the civil action [in New York]." Admissions are binding upon the parties. *Crowder v. Jenkins*, 11 N.C. App. 57, 180 S.E. 2d 482 (1971). We deem this admission of receipt of legal services binding on defendant Eugene Franklin. Further, both statements on account were sent by the law firm to "Sophia and Eugene Franklin." Defendant Eugene Franklin failed to object to owing plaintiff for services rendered on his behalf. On both grounds, defendants' last Assignment of Error is overruled.

No error.

Chief Judge HEDRICK and Judge WHICHARD concur.

GWENDOLYN C. COBB v. KENTON L. COBB

No. 8521DC483

(Filed 4 March 1986)

1. Divorce and Alimony § 27— attorney fees—findings as to hours and value—evidence sufficient

The trial court did not err in a domestic action by finding that plaintiff's attorney had spent no less than 34.15 hours working on the case and that the value of those services was no less than $3,000 where plaintiff's attorney stated in his affidavit that he had represented plaintiff since December of 1982, but did not show an itemized entry for time spent on the case until 19 July 1983; he spent 3.3 hours on the case between 19 July 1983 and 3 May 1984; the balance of the 34.15 hours was accrued from 3 May 1984 on; plaintiff

filed her complaint on 15 June 1984; the attorney advanced plaintiff $123 for expenses; and the total amount expended by the attorney on plaintiff's account was $3,538.

2. **Divorce and Alimony § 27— attorney fees—finding that plaintiff lacked means to defray expenses—evidence sufficient**

The trial court did not err in an action for alimony, child support, and child custody by finding that plaintiff did not have the means to defray the expenses of the suit where plaintiff had spent approximately $3,147 for their son's college expenses; had paid a total of $4,412.77 in attorney fees to a California attorney to defend a suit initiated by defendant in California and to a South Carolina attorney to file a suit against defendant; plaintiff currently had no liquid assets and her actual current income had not met her living expenses; and forcing plaintiff to sell her only remaining asset, the former marital residence, in order to pay her attorney fees would constitute an unreasonable depletion of her separate estate. N.C.G.S. 50-13.6.

3. **Divorce and Alimony § 27— evidence that plaintiff acted in good faith and attorney fee reasonable—findings not sufficient—remanded**

The court's findings in a domestic action were not sufficient to support an award of attorney fees, even though there was evidence which could be interpreted to show plaintiff's good faith and the reasonableness of the attorney fee award, where there was no finding that plaintiff was an interested party acting in good faith and the Court of Appeals was unable to determine from the record the hourly rate of plaintiff's attorney for the services in issue. N.C.G.S. 50-13.6, App. Rule 28(b).

Chief Judge HEDRICK concurring.

APPEAL by defendant from *Harrill, James A., Jr., Judge.* Judgment entered 28 November 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 1 November 1985.

On 15 June 1984 plaintiff initiated this action seeking (1) recovery of alimony and child support due under a separation agreement entered between the parties 1 June 1983, (2) specific performance of the same separation agreement, (3) custody of the minor child born of the prior marriage and (4) an award of attorney's fees. The defendant answered and counterclaimed for a reduction of alimony and child support, alleging a substantial change of circumstances. On 19 November 1984, the parties entered into a consent judgment signed by Judge Harrill which disposed of all issues except plaintiff's request for attorney's fees. The consent judgment specifically ordered an individual determination of attorney's fees "in this action." Judge Harrill heard the evidence relating to attorney's fees and on 28 November 1984 entered an order granting the attorney for the plaintiff, Melvin F.

Wright, Jr., an attorney fee award of $3,000 to be paid by defendant. Defendant appeals.

Alexander, Wright, Parrish, Hinshaw, Tash and Newton, by Melvin F. Wright, Jr., for plaintiff appellee.

Leonard, Tanis and Cleland, by Robert K. Leonard, for defendant appellant.

JOHNSON, Judge.

[1] Defendant assigns as error the court finding as fact that the attorney for plaintiff spent no less than 34.15 hours working on this case and that the value for these services was no less than $3000. Defendant contends that many items shown in the affidavit for attorney's fees submitted by the attorney had no relation to this action, but included time spent on separate actions between plaintiff and defendant in California and South Carolina.

The trial court's findings of fact are conclusive if supported by any competent evidence. *Little v. Little*, 9 N.C. App. 361, 365, 176 S.E. 2d 521, 523-24 (1970). Bearing this principle in mind we now review the evidence in the case *sub judice* relative to this issue. Melvin F. Wright, Jr., the attorney of plaintiff, submitted an affidavit itemizing the services he rendered for plaintiff in connection with this case. He stated in his affidavit that he had represented plaintiff since December 1982, yet the attorney does not show an itemized entry for time spent on this case until 19 July 1983. According to his affidavit, between 19 July 1983 and 3 May 1984, he had spent 3.3 hours on this case. The balance of the 34.15 hours accrued from 3 May 1984 on. Plaintiff filed her complaint 15 June 1984. "All litigation inevitably involves certain precursory activity." *Whedon v. Whedon*, 58 N.C. App. 524, 530, 294 S.E. 2d 29, 33 (1982). Such legitimate work by counsel in precursory activity is allowable within an attorney fee award in connection with a domestic case. *Id.* We deem the time shown on the attorney fee affidavit as spent prior to the filing of plaintiff's complaint such legitimate precursory activity. The record shows sufficient evidence to support the court's finding that plaintiff's attorney spent 34.15 hours on this case. There is also evidence in the record to show that the attorney advanced on behalf of plaintiff $123 for expenses connected with this case. There is evidence to show that the total amount expended by Mr. Wright on behalf

of his client for services rendered and expenses incurred totaled $3538. The court's finding that the attorney spent no less than 34.15 hours on the case valued at no less than $3000 is supported by sufficient evidence. Defendant's first Assignment of Error is overruled.

Defendant's remaining Assignments of Error pertain to the following findings of fact regarding the court's order for attorney's fees:

> 1. Plaintiff's attorney, Melvin F. Wright, Jr., has rendered valuable legal services to the Plaintiff in this matter, including interviews, preparation of the Complaint, and the hearing of this action, and has spent, pursuant to the Affidavit for Counsel Fees filed herein, no less than 34.15 hours working on this case on the Plaintiff's behalf and has advanced the sum of $123.00 in direct expenses on her behalf and that the value for the services rendered to the Plaintiff in this matter is no less than $3000.00.
>
> 2. The Plaintiff does not have the means wherewith the [sic] defray the costs and expenses incurred as a result of the preparation, filing and hearing of this action, and the Plaintiff is therefore entitled to an award from the Defendant for counsel fees pursuant to North Carolina General Statutes 50-13.6.

An order for attorney's fees pursuant to G.S. 50-13.6 in an action for child custody or support, or both, must be supported by findings, required by the statute, that the party seeking the award is (1) an interested party acting in good faith and (2) has insufficient means to defray the expense of the suit. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). *See* G.S. 50-13.6. Because G.S. 50-13.6 allows for an award of *reasonable* attorney's fees, cases construing the statute have in effect annexed an additional requirement concerning reasonableness onto the express statutory ones. *Warner v. Latimer*, 68 N.C. App. 170, 176, 314 S.E. 2d 789, 793 (1984). Namely, the record must contain additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers. *Id.*; *Falls v. Falls*, 52 N.C. App. 203,

221, 278 S.E. 2d 546, 558, *cert. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981); *Austin v. Austin*, 12 N.C. App. 286, 296, 183 S.E. 2d 420, 427 (1971). The amount of the award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion. *Hudson v. Hudson, supra*, at 472, 263 S.E. 2d at 724.

[2] In his second Assignment of Error, defendant contends that the evidence is insufficient to support the court's finding that plaintiff did not have the means to defray the expenses of the suit. As stated above, since this statutory finding of fact should stand if supported by competent evidence, *Little, supra*, we will now review the evidence as to this issue. According to plaintiff's uncontradicted testimony her assets consisted of the following: the former marital residence valued at the time of separation at $175,000, with an outstanding mortgage of $54,000; a 1984 Honda Accord automobile, paid in full; a $1500 account at Dean Witter Reynolds, composed of funds borrowed by plaintiff for their son's college expenses. Plaintiff's income consisted of $800 per month from her employment. Plaintiff had an additional expected income of $1250 per month in alimony payments under the terms of the consent judgment (which defendant had not paid since April 1984) and $500 per month child support for the one remaining minor under the terms of the consent judgment (for which defendant was also substantially in arrears). The evidence tended to show that defendant's assets consisted of the following: a condominium in South Carolina valued at the time of separation at $68,500 and expected to yield $14,000 in net proceeds when sold in compliance with the consent judgment; four acres of land in Alleghany County, North Carolina; a 1983 Toyota automobile, paid in full; an IRA account valued at $3500. Defendant was previously employed as a staff attorney for R. J. Reynolds Tobacco Company with a salary of $125,000 per year. Defendant had voluntarily left his former employment. At the time of the hearing defendant was unemployed and had been offered a job with a California law firm for a salary of $60,000 per year, contingent upon his passing the California bar exam. Defendant received rents from the South Carolina condominium.

It would be contrary to what we perceive to be the intent of the legislature to require one seeking an award of attorney's fees to meet the expenses of litigation through the unreasonable

depletion of her separate estate where her separate estate is smaller than that of the other party. *Clark v. Clark*, 301 N.C. 123, 137, 271 S.E. 2d 58, 68 (1980). Plaintiff had spent approximately $3147 for their son's college expenses and had paid a total of $4412.77 in attorney's fees to a California attorney to defend a suit initiated by defendant in California and to a South Carolina attorney to file a suit against defendant. Plaintiff currently had no liquid assets and her actual current income had not met her living expenses. Under these circumstances we hold that to force plaintiff to sell her only remaining asset, the former marital residence, in order to pay her attorney's fees, would constitute an unreasonable depletion of her separate estate. The record reveals sufficient evidence to support the court's finding that plaintiff did not have the means to defray the costs and expenses incurred in the action. Defendant's second Assignment of Error is overruled.

[3] Next defendant contends in his third Assignment of Error that the facts found are insufficient to support an award of attorney's fees, namely there is no finding that plaintiff was an interested party acting in good faith and there are no findings upon which a determination of the requisite reasonableness of the award could be based as required by *Warner v. Latimer, Falls* and *Austin*. Without holding that the findings pertaining to the reasonableness of the fees in the case *sub judice* are sufficient, we note the better practice would be to include more findings than those made by the court. However, we find noticeably absent a finding that plaintiff is an interested party acting in good faith. Based on our review of the record, however, there is evidence which could be interpreted to show plaintiff's good faith. At the time the consent judgment was entered defendant was in arrears to plaintiff for alimony and child support in the amount of $15,050. Plaintiff was forced to defend in a California law suit when defendant sought to have the North Carolina separation agreement set aside. There is also evidence in the record pertaining to the reasonableness of the attorney fee award. The affidavit of the attorney that was submitted to the court showed the total value of his services rendered was $3538. Plaintiff testified that when Mr. Wright represented her in 1983 concerning a separation agreement and property settlement he quoted her a rate of $75.00 per hour. We are unable to determine from the record whether the court considered this to be Mr. Wright's hourly rate for the serv-

ices at issue. What this and other evidence before the court *does* show is a matter for the trial court to determine in appropriate factual findings. *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E. 2d 185, 190 (1980).

Defendant did not present and discuss his fourth Assignment of Error in his brief; therefore, it is deemed abandoned. Rule 28(a), N.C. Rules App. P.

Since the order does not contain sufficient findings of fact, the attorney fee award is reversed and the judgment vacated. This case is remanded for further findings consistent with this opinion.

Vacated and remanded.

Chief Judge HEDRICK and Judge WHICHARD concur.

Chief Judge HEDRICK concurring.

I concur in the decision of the majority to vacate the order awarding attorney's fees in the amount of $3,000.00 and to remand the cause to the district court for a further hearing, findings and conclusions with respect to the appropriate attorney's fees to be awarded. In cases such as this, it is the responsibility of the trial judge to determine first whether the party is entitled to have an award of attorney's fees and then the reasonableness of those fees. The amount of attorney's fees awarded is within the discretion of the trial judge, who should make sufficient findings to enable the reviewing court to determine whether the judge has or has not abused his discretion in the amount of the award. In making its decision about the amount of the award, the trial judge should take into consideration the nature and extent of the work performed, the skill and experience of the attorney, the amount of time required in the particular case, and the customary charges of attorneys practicing in that general area. I am not making a checklist for the district court judges to follow in every case. It is sufficient, in my opinion, if the judge makes sufficient findings to enable the reviewing court to determine whether the trial judge has abused his discretion in the particular case.

In the present case, the court awarded plaintiff attorney's fees in the amount of $3,000.00, based on a finding that the at-

torney had spent 34.15 hours working on the case. This fee of $3,000.00 seems excessive absent more detailed findings as to the amount charged by other attorneys practicing in the general area.

STATE OF NORTH CAROLINA v. PAUL DAVID HICKS

No. 8525SC936

(Filed 4 March 1986)

1. **Criminal Law § 66.20— identification testimony—motion to suppress—absence of formal ruling**

Defendant was not prejudiced by the trial court's failure to make a formal ruling on defendant's motion to suppress the victim's in-court identification of him where the record clearly reflects the court's decision to deny defendant's motion in that the court, after conducting a *voir dire*, recalled the jury while the victim was on the stand and allowed the State to proceed.

2. **Criminal Law § 66.20— denial of motion to suppress identification testimony—written order out of session**

Defendant was not prejudiced by the court's filing of a written order denying his motion to suppress an in-court identification out of session where the court orally ruled on the motion to suppress during the trial.

3. **Rape and Allied Offenses § 19— indecent liberties with child—sufficiency of evidence**

The State's evidence was sufficient to show that defendant took or attempted to take indecent liberties with a minor for the purpose of arousing or gratifying sexual desire in violation of N.C.G.S. 14-202.1(a)(1) where it tended to show that defendant followed alongside the ten-year-old victim and several times expressed a desire to have sexual intercourse with her, and that defendant exposed his penis and placed his hand on it while within several feet of the victim.

APPEAL by defendant from *Owens, Judge*. Judgment entered 14 June 1985 in Superior Court, CATAWBA County. Heard in the Court of Appeals 15 January 1986.

Defendant was indicted and tried on a charge of taking indecent liberties with a minor. The State's evidence tended to show the following. The victim, a ten-year-old, was walking home from school. Defendant approached her on his bicycle. He followed alongside her and several times said "I want to fuck you." The victim was frightened. The last time defendant said this, he had stopped his bicycle, with his feet on the ground. The victim saw

that defendant had his penis exposed and had his hand on his penis. She ran off; defendant did not follow. Defendant had come close to the victim, within two feet, but never actually touched her.

Defendant presented no evidence. The court denied his request for instructions on the lesser offense of indecent exposure. The jury found defendant guilty as charged. From a sentence in excess of the presumptive, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.

Harbinson, Harbinson & Parker, by Jason R. Parker, for defendant-appellant.

EAGLES, Judge.

Defendant brings forward two questions, arguing that the order denying his motion to suppress was invalid and that the evidence was insufficient to support the charge. We disagree.

I

Defendant moved at trial to suppress the victim's in-court identification of him as the perpetrator. (The record does not reflect any pre-trial or written motion to suppress.) Following a *voir dire* hearing, defendant argued that the identification should be suppressed because of an impermissibly suggestive photographic line-up. The court did not make a formal ruling but indicated it would make findings of fact. The court allowed the State to proceed with the identification testimony in the jury's presence. Sometime later, after the session had expired, the court entered a written order including findings of fact denying defendant's motion to suppress. Defendant now assigns error, arguing that the order was null and void, entitling him to a new trial.

A

Defendant here is in poor position to claim prejudice from failure to adhere to the letter of the law of criminal procedure. Motions to suppress evidence ordinarily must be made before trial and in writing, in the absence of circumstances not applicable here. G.S. 15A-975; G.S. 15A-977; *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). Failure to comply with G.S.

15A-975 can result in summary denial of the motion. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). In spite of the procedural failings, we consider this assignment on its merits.

B

[1] The failure of the court to make a formal ruling denying the motion or admitting the evidence does not by itself constitute reversible error. Substantial rights, not technical formality, are our concern here. G.S. 15A-1443. Ordinarily a party is entitled to a timely ruling on an objection to evidence. The failure to rule formally does not generally rise to the level of reversible error unless accompanied by other conduct of the trial judge evincing an opinion on the merits. *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977) (trial judge played "unusually active interrogational role," and did not rule on 13 of 43 defense objections; new trial); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971) (judge told reporter to put "overruled" after succeeding defense objections, then ignored them; new trial); *compare State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978) (failure to rule on six objections "abdication" of judicial function; but since objections of little merit, no prejudice). Where the court's decision is clear from the record, the absence of a formal ruling is not prejudicial. *State v. Locklear*, 26 N.C. App. 300, 215 S.E. 2d 859 (record "definitive"), *cert. denied*, 288 N.C. 248, 217 S.E. 2d 672 (1975); *see Moore v. New York Life Ins. Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966) (jury could have only interpreted ruling as requiring them to disregard evidence). In cases where a more definite ruling is desired, counsel should request the court to make the ruling more clear. 88 C.J.S. Trial Section 145c (1955). Here the court recalled the jury while the witness was on the stand and allowed the State to proceed. This record clearly reflects the court's decision to deny defendant's motion.

C

[2] The only question remaining is whether the court's filing of the written order out of session so prejudiced defendant as to require a new trial. Two recent cases of our Supreme Court have addressed this type of question. *State v. Boone*, 310 N.C. 284, 311 S.E. 2d 552 (1984); *State v. Horner*, 310 N.C. 274, 311 S.E. 2d 281 (1984) (both filed 2 February 1984). In *Boone*, a motion to suppress was heard before trial. The hearing judge did not rule on the mo-

tion in open court, but mailed a signed order from outside the district after the session had expired. Defendant renewed his motion to suppress at trial, arguing that the written order was invalid. The trial court denied the motion, and the Supreme Court held that this was prejudicial error, since the order was of no legal effect. The court noted that the "critical decision," the ruling on the motion, was neither made in open court nor made in session. *Id.* at 289, 311 S.E. 2d at 556. Defendant argues that we must follow *Boone*.

It appears that *Horner* provides the controlling rule for this case, however. There the judge ruled on the motion during trial and in open court. The judge's written order was not filed until two weeks later. The Supreme Court rejected defendant's argument that he was entitled to a new trial. The court reasoned that since written findings and conclusions are required to facilitate appellate review, that purpose is not hampered by an order entered subsequent to trial. Since the trial judge ruled on the motion to suppress during trial, defendant failed to show prejudice arising from entry of the order after the session. *Id.* at 279, 311 S.E. 2d at 285. (The court left open the question of *where* an order mailed to the clerk is entered.) We hold that *Horner* controls here and that there was no prejudicial error in the entry of the order out of session.

II

[3] Defendant's second question is whether the evidence in this case supports a charge of taking indecent liberties with a minor. The statute, G.S. 14-202.1(a)(1), reads:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire.

This statute has been upheld against challenges that it is unconstitutionally vague. *State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981); *State v. Maxwell*, 47 N.C. App. 658, 267 S.E. 2d 582, *disc. rev. denied and appeal dismissed*, 301 N.C. 102, 273 S.E. 2d

307 (1980). We note that the legislature may make attempts equally punishable with completed criminal acts. *See* G.S. 14-89.1 (safecracking); *State v. Sanders*, 280 N.C. 81, 185 S.E. 2d 158 (1971) (attempt properly made crime of equal dignity). The indictment and the court's instructions to the jury both tracked the statutory language concerning taking *or attempting to take* immoral, improper or indecent liberties. Therefore, the question is not, as defendant appears to frame it in his brief, whether defendant *completed* any sexual act or offensive touching of the victim, but whether the evidence showed that he took *or attempted to take* any immoral, improper or indecent liberties with the victim. (There is no dispute that defendant and the victim fit the statutory age classes.)

A

Beginning with *State v. Turman*, 52 N.C. App. 376, 278 S.E. 2d 574 (1981), this court has recognized that no actual touching of a child is necessary to complete the offense described in G.S. 14-202.1. In *Turman* we relied on the legislative policy, inherent in the statute, to provide broad protection to children from the sexual conduct of older persons, especially adults. *See State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965); *State v. Lance*, 244 N.C. 455, 94 S.E. 2d 335 (1956).

In *Turman* we upheld a conviction for taking indecent liberties with a child where the defendant masturbated in the presence of the child. In *State v. Kistle*, 59 N.C. App. 724, 297 S.E. 2d 626 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983), we upheld a conviction based on the photographing of a nude child in a sexually suggestive position. Most recently in *State v. Strickland*, 77 N.C. App. 454, 335 S.E. 2d 74 (1985), we upheld a conviction where defendant masturbated within sight of two boys who were some 60 feet away, and invited them to join him. In none of these cases did the State produce evidence of actual touching.

These decisions indicate the protective scope of the statute. Undoubtedly its breadth is in recognition of the significantly greater risk of psychological damage to an impressionable child from overt sexual acts. We also bear in mind the enhanced power and control that adults, even strangers, may exercise over children who are outside the protection of home or school.

B

Accordingly, we conclude that defendant's conduct here, taken in the light most favorable to the State, fell within the purview of the statute. Not only did defendant approach and menace the victim, but he did so with a repeatedly announced desire to engage in sexual activity. Defendant exposed his penis and placed his hand on it while within several feet of the victim. Undoubtedly, this constituted sexual conduct. *See State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985) (defendant fondled himself in victim's bedroom; burglary with intent to rape conviction upheld). Defendant's conduct went beyond mere preparation to engage in indecent sexual activity with the victim or in the victim's presence. *See State v. Moser*, 74 N.C. App. 216, 328 S.E. 2d 315 (1985). Defendant's intent to arouse or gratify sexual desire is readily inferable from his own words alone. *State v. Strickland, supra.* Under these circumstances, and in view of the broad scope of the statute, we do not think the State was required to prove that defendant actually masturbated, as defendant now contends. We hold that the State's evidence, taken in the light most favorable to the State, sufficed to show that defendant took or attempted to take an immoral liberty with the victim for the purpose of arousing or gratifying sexual desire.

C

Defendant argues that under *State v. Richmond*, 266 N.C. 357, 145 S.E. 2d 915 (1966), the State failed to prove the requisite criminal intent. We disagree. *Richmond* was decided under statutory language requiring intent "to commit an unnatural sexual act." That language no longer appears in G.S. 14-202.1. The State need now only prove a "purpose of arousing or gratifying sexual desire." That was sufficiently shown by the evidence.

III

Defendant's assignments of error relative to the sufficiency of the evidence are therefore overruled, as is his challenge to the validity of the order denying his motion to suppress. Defendant's assignments of error to the jury instructions are not argued and are therefore deemed abandoned. No error appears on the face of the record.

No error.

Judges MARTIN and COZORT concur.

JEAN S. TATUM v. FRANK TATUM

No. 8514SC714

(Filed 4 March 1986)

1. **Negligence § 34.1— unexpected starting of automobile—contributory negligence—evidence sufficient**

There was sufficient evidence to submit contributory negligence to the jury where defendant was plaintiff's husband; defendant owned a 1972 Datsun which did not have a battery hold-down or a functional hand brake; the battery sat in the car with nothing to hold it in place and had previously fallen; defendant was driving with plaintiff as a passenger when the car stalled; defendant left the car in second gear, left the switch on, and did not place anything under the wheels when he raised the hood; the car did not have a rod to hold the hood up, so defendant asked plaintiff to hold the hood while he put the battery back in place; plaintiff stood in front of the car to hold the hood; when defendant replaced the battery, the vehicle started, knocked plaintiff down, ran over her, and dragged her eight or ten feet; and there was nothing to prevent plaintiff from holding the hood from beside rather than in front of the car.

2. **Appeal and Error § 31.1— alleged error in instruction—App. Rule 10 not complied with**

Plaintiff failed to comply with the requirements of App. Rule 10(b) when arguing that the trial court erred by denying her motion to set aside the verdict based on its instructions on contributory negligence where error in the instructions was not the basis of the motion to set aside the verdict; no objection was made at trial to any portion of the jury instructions; plaintiff's attorney responded in the negative when asked if there were objections to the charge; plaintiff did not take any exception to the jury instructions or make any assignment of error to the charge as given; and the challenged portion of the charge was not clearly identified in the record on appeal.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Lee, Judge.* Judgment entered 28 March 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 December 1985.

Plaintiff appeals from a judgment for defendant entered upon a verdict finding that plaintiff was injured by defendant's negligence, but that plaintiff was contributorily negligent.

Arthur Vann for plaintiff appellant.

Bryant, Drew & Patterson, P.A., by Victor S. Bryant, Jr., for defendant appellee.

WHICHARD, Judge.

[1] Plaintiff's sole contention is that the court erred in denying her motion to set aside the verdict on the contributory negligence issue.

> Where no question of law or legal inference is involved, a motion to set aside the verdict is addressed to the sound discretion of the trial court and its ruling is not subject to review in the absence of an abuse of discretion. (Citations omitted.) But when a judge . . . grants or refuses to grant a new trial because of some question of law or legal inference which the judge decides, the decision may be appealed and the appellate court will review it.

In re Will of Herring, 19 N.C. App. 357, 359-60, 198 S.E. 2d 737, 739-40 (1973). The submission of a contributory negligence issue where there is no evidence of contributory negligence is error, and the court errs as a matter of law if it denies a motion to set aside the verdict under such circumstances. *Jacobs v. Locklear*, 310 N.C. 735, 314 S.E. 2d 544 (1984), *modifying and affirming*, 65 N.C. App. 147, 308 S.E. 2d 748 (1983). The issue thus is whether there was evidence from which the jury reasonably could conclude that plaintiff contributed to her injury by her own negligence. We hold that there was.

Our Supreme Court has stated the applicable legal principles as follows:

> An apt statement of the doctrine of contributory negligence for purposes of this appeal is found [in] *Clark v. Roberts*, 263 N.C. 336, 139 S.E. 2d 593 (1965):
>
> > "Every person having the capacity to exercise ordinary care for [her] own safety against injury is required by law to do so, and if [she] fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, [she] is guilty of contributory

> negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. [Citations omitted.]
>
> Plaintiff is subject to this universal rule, but [her] conduct on this occasion 'must be judged in the light of the general principle that the law does not require a person to shape [her] behavior by circumstances of which [she] is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless [she] acts or fails to act with knowledge and appreciation, *either actual or constructive*, of the danger of injury which [her] conduct involves.' [Citations omitted.]" (Emphasis added.)
>
> In order for contributory negligence to apply, it is not necessary that plaintiff be *actually aware* of the unreasonable danger of injury to which [her] conduct exposes [her]. Plaintiff may be contributorily negligent if [her] conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for [her] own safety. *See* Restatement (Second) of Torts Sec. 466(b) and Comment f, W. Prosser, [Law of Torts], Sec. 65 at 424 [(4th ed. 1971)]. *Accord, Clark v. Roberts, supra.* Simply put, the existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—"the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Clark v. Roberts, supra.*

Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E. 2d 504, 507 (1980). "If there is more than a scintilla of evidence, contributory negligence is for the jury." *Pearson v. Luther*, 212 N.C. 412, 421, 193 S.E. 739, 745 (1937).

Viewed in the light most favorable to defendant, *Smith*, 300 N.C. at 673, 268 S.E. 2d at 507, the evidence here pertinent to contributory negligence tends to show the following:

Defendant, plaintiff's husband, owned a "straight drive" 1972 Datsun automobile. The vehicle did not have a battery "hold-

down." Part of the hold-down had broken off, and defendant had never replaced it. The battery thus was "sitting there" with nothing to hold it in place. On prior occasions the battery "had fell off" and defendant "just picked it up and set it back up there." Defendant had let his brother use the battery out of the Datsun and had taken the battery from his other automobile and "set it in" the Datsun unsecured. Defendant knew the battery was unsecured.

On the evening in question defendant was driving the Datsun with plaintiff in the front passenger seat. The vehicle stalled. The hand brake had never worked, so defendant left the vehicle in second gear. He also left the "switch key" on. He did not place anything under the wheels to keep the vehicle from moving.

After he raised the hood, defendant told plaintiff that the battery "fell off." The vehicle did not have a rod to hold the hood up, so defendant asked plaintiff to come to the front of the vehicle and hold up the hood while he put the battery back in the box.

When defendant put the battery back in the box, the vehicle "started running again." It "pushed [him] back." It then knocked plaintiff down and ran over her, dragging her eight or ten feet. Plaintiff sustained extensive personal injuries.

Defendant testified that there was nothing to prevent plaintiff from holding the hood up from a position beside, rather than in front of the vehicle. The battery had tilted over on previous occasions, however, and the vehicle had not started when he set the battery upright. He thus did not expect the vehicle to start when he set the battery upright on this occasion.

An automobile mechanic testified that incidents of this type had occurred in his shop. He gave his opinion as to the cause.

Plaintiff testified that she had no automotive mechanical ability other than "driving one." When the vehicle "knocked off," defendant told her that the battery had tipped over. She could see that. She was holding up the vehicle's hood from the front when the vehicle started, knocked her down, ran over her, and dragged her. Defendant was on the driver's side of the vehicle. There was no reason she could not have gone around to the other side of the vehicle to hold up the hood, although it was "better" to hold it from the front. When she exited from the car she went

"straight around to the front." She knew before she went and stood in front of the vehicle that defendant had not put anything under the wheel and that there was nothing under the wheel to keep the vehicle from moving.

We find in the foregoing sufficient evidence from which a jury could conclude that by standing in front of the vehicle while defendant returned the battery to its box, plaintiff failed to use the care that an ordinarily prudent person would have exercised under similar circumstances to avoid injury. The evidence indicates that plaintiff could have held up the hood by standing to the side of the vehicle rather than in front of it. She knew that there was nothing under the wheels to keep the vehicle from moving. She could observe that the vehicle was in gear and the "switch key" was on.

While plaintiff testified that she had no automotive mechanical ability other than "driving one," "the existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, [it] consists of conduct which fails to conform to an *objective* standard of behavior—'the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.' " *Smith, supra.* We cannot say *as a matter of law* that an ordinarily prudent person under the same or similar circumstances as plaintiff would not have been aware of the potential danger and taken care to avoid injury. There was "more than a scintilla of evidence" of contributory negligence, which made the issue one for the jury. *Pearson, supra.* The court thus did not err in denying plaintiff's motion to set aside the verdict on the contributory negligence issue.

[2] As part of her argument that the court erred in denying her motion to set aside the verdict, plaintiff contends the court erred in its instructions on the issue of contributory negligence. Error in the instructions was not the basis of the motion to set aside the verdict, however. Further, no objection was made at trial to any portion of the jury instructions. On the contrary, plaintiff's attorney responded "No, Your Honor," when asked if there were objections to the charge or to omissions therefrom. Further still, plaintiff did not take any exception to the jury instructions or make any assignment of error to the charge as given. To preserve an issue for appellate review, there must be an exception in the

record which is brought forward in an appropriate assignment of error. N.C. R. App. P. 10. Otherwise, no question is presented to the appellate court. *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E. 2d 372, 377 (1984), citing *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Where a portion of the charge is challenged, it must be identified in the record on appeal by clear means of reference. *Id.*, citing N.C. R. App. P. 10(b)(2). Plaintiff has failed to do this and to comply with other requirements of N.C. R. App. P. 10(b)(2). While plaintiff has not asked us to apply "plain error," we note that this doctrine does not apply in appeals in civil cases. *Id.*

Because we find no error in plaintiff's appeal, we need not pass on defendant's cross appeal in which he contends that the court erred in denying his motion for directed verdict.

No error.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my view the evidence recorded does not support the finding that plaintiff was contributorily negligent, and a new trial should be ordered. The law does not require people to act on the premise that others have been or will be negligent; in the absence of circumstances indicating otherwise, every person has a right to assume that others have acted and will continue to act with due care. Not a word in the evidence suggests that plaintiff either knew or should have known that defendant had left the switch on and the car in gear; and that, under these circumstances, she stood in front of the car when holding up the hood is no proof whatever of negligence. People holding up the hoods of idle, unattended cars nearly always stand in front because it is the natural and convenient place to stand and there is no reason not to do so *if the ignition is not on and the car is not in gear.* That plaintiff "could have observed," as the opinion states, "that the vehicle was in gear and the 'switch key' was on" is no indication that she *should* have observed any such thing. Unless there is some indication of oversight or incompetence, the law permits car passengers

to trust their drivers to perform the simple act of parking the car safely; certainly it does not require them to verify that the driver cut off the ignition. The law, it is said, does not permit one to profit from his own wrong. Yet this decision permits defendant to escape liability on the brazen, unconscionable and legally absurd ground that plaintiff did precisely what he asked her to do, a seemingly innocuous thing, and did it in a manner entirely suitable to him, since he did not suggest that she stand elsewhere.

IN THE MATTER OF THE APPLICATION AND CLAIM OF MELVIN C. WALSH, JR., A MEMBER OF THE ASHEVILLE POLICE DEPARTMENT, FOR RETIREMENT FOR DISABILITY WHILE ACTING IN THE LINE OF DUTY

No. 8528SC824

(Filed 4 March 1986)

1. **Retirement Systems § 5— policemen's pension fund legislation—intent to preserve prior benefits**

In enacting Ch. 188 of the 1977 Session Laws which superseded the Asheville policeman's pension fund legislation then in effect, the Legislature intended to preserve an employee's entitlement to benefits under the previously enacted pension fund act regardless of whether those benefits in fact accrued before the effective date of the new act.

2. **Retirement Systems § 5— line-of-duty disability benefits—consideration of claim under wrong act**

Petitioner was entitled to have his claim for line-of-duty disability retirement benefits for disability from a heart attack considered under the pension fund act in effect at the time he was hired by the Asheville Police Department in 1960, and the city council committed prejudicial error in considering the claim under the 1977 pension fund act where the council, in denying petitioner's claim, relied on the narrow definition of "line of duty" in the 1977 act, and the council could have determined that petitioner was disabled "while acting in the line of duty" under the provisions of the pension fund legislation in effect when he was hired as a policeman.

APPEAL by petitioner from *Lewis, Robert D., Judge.* Judgment entered 26 April 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 10 December 1985.

During the early evening of 5 October 1983, while on duty as a member of the Asheville Police Department, petitioner began to

suffer chest and arm pains. During that evening petitioner's work consisted primarily of making investigative telephone calls from the police department.

At approximately 11:30 p.m. petitioner left the department to investigate the scene of a rape. At the scene a fellow officer observed that petitioner was pushing upward in the area of his diaphragm and that his face was discolored. Petitioner went home shortly thereafter. Early the next morning he awoke with increased chest pains and was taken to the hospital. He was diagnosed as having had an acute myocardial infarction (a heart attack of moderate severity).

On 31 May 1984 petitioner applied to the Board of Examiners and Board of Trustees of the Asheville Policemen's Pension and Disability Fund for retirement benefits by reason of having become disabled while acting in the line of duty. After a hearing the Board of Examiners determined that petitioner was disabled, but characterized his disability as having not been received in the line of duty. The Board of Trustees adopted the recommendation of the Board of Examiners. The Asheville City Council approved the Board's denial of petitioner's request for line-of-duty disability retirement.

On 31 December 1984 petitioner's Petition for Writ of Certiorari seeking judicial review of the city council's decision was granted pursuant to N.C. Gen. Stat. 1-269. By judgment entered 26 April 1985 the superior court upheld the council's denial of petitioner's request for line-of-duty disability benefits.

Petitioner appeals.

Roberts, Cogburn, McClure & Williams, by Max O. Cogburn, Isaac N. Northup, Jr., and Glenn S. Gentry, for petitioner appellant.

William F. Slawter for respondent appellee.

WHICHARD, Judge.

The scope of judicial review of a decision made by a town board sitting as a quasi-judicial body must include:

(1) Reviewing the record for errors in law,

(2) Insuring that the procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E. 2d 379, 383, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980); *Cannon v. Zoning Bd. of Adjustment of Wilmington*, 65 N.C. App. 44, 46, 308 S.E. 2d 735, 736-37 (1983). Both the superior court and the Court of Appeals are bound by the foregoing scope of review. *Concrete Co.*, 299 N.C. at 627, 265 S.E. 2d at 383.

The initial question for this Court is which of a series of amendments to the Asheville policemen's pension fund legislation applies to petitioner's claim for benefits. Petitioner began working for the Asheville Police Department 1 April 1960. At that time the pension fund provided for increased disability payments to any member of the Asheville Police Department who became "disabled while acting in the line of his police duties, and is unable to work . . . ." 1939 N.C. Public-Local Laws, ch. 242, sec. 7, as amended by 1955 N.C. Sess. Laws, ch. 322, sec. 2. Chapter 188 of the 1977 Session Laws superseded the Asheville policemen's pension fund legislation in effect when petitioner began working for the police department. Eligibility requirements for line-of-duty disability benefits were broadened by the provisions of the 1977 pension fund legislation. It provided that any member of the Asheville Police Department who becomes "disabled while acting in the line of his police duties or as a result of the performance of duties as a member of the Asheville Police Department, and is unable to work as a policeman," is entitled to line-of-duty disability benefits. 1977 N.C. Sess. Laws, ch. 188, sec. 9. The eligibility requirements for line-of-duty disability benefits were again amended in 1979. The 1979 amendments provided that any member of the Asheville Police Department who becomes "disabled while acting in the line of duty, as defined in this act, and

is unable to work as a policeman . . ." shall receive line-of-duty disability benefits. 1979 N.C. Sess. Laws, ch. 429, sec. 1(d), as amended by 1985 N.C. Sess. Laws, ch. 647, sec. 1. "Line of duty" is defined as follows:

> For purposes of this act, references to "line of duty" shall mean a disability or death which is the natural and proximate result of an accident occurring while in the actual performance of duty as a member of the Asheville Police Department, as defined in this act, at some definite time and place.

1979 N.C. Sess. Laws, ch. 429, sec. 1(d).

The city council denied petitioner's claim for line-of-duty disability benefits under the provisions of the 1977 pension fund legislation as amended by chapter 429 of the 1979 Session Laws. Petitioner maintains, however, that his claim for benefits should have been considered under the provisions of the pension fund legislation as they appeared 1 April 1960, the date he began working for the Asheville Police Department. He argues that any application of subsequent amendments to his claim constitutes a violation of his constitutional rights to due process and equal protection.

[1] We need not reach petitioner's constitutional arguments. Chapter 188, section 28 of the 1977 Session Laws, as amended by chapter 261, section 2 of the 1981 Session Laws, limits the effect of the 1977 pension fund legislation as follows:

> No provision of this act shall be construed so as to modify in any respect the benefits granted under Chapter 242, Public-Local Laws of 1939, amended by Chapter 311, Session Laws of 1945 and Chapter 322, Session Laws of 1955 *to employees of the Asheville Police Department assigned to said department prior to the effective date of this act* or to the effective date of any such employees' retirement and disability plan covering future employees of such department; provided, however, that employees of said department covered by this act may within one year after the effective date of any new plan, voluntarily and irrevocably elect in writing to withdraw from participation in said existing plan and to participate in and contribute to the new plan for their department, in which case they shall be entitled to no further

> benefits of said existing plan and shall be entitled to withdraw all contributions made by them into said plan. [Emphasis supplied.]

By using the phrase "benefits granted," the legislature arguably intended to preserve only those benefits which accrued under the previously enacted pension fund act as the result of a disability or retirement prior to the effective date of the new act. We believe the better interpretation, however, is that it intended to preserve the "benefits granted" under the previous act, regardless of whether those benefits in fact accrued before the effective date of the new act.

The language emphasized above supports such an interpretation. The legislature in essence provided that the provisions of the previously enacted plan continue to apply "*to employees of the Asheville Police Department assigned to said department prior to the effective date of [the 1977 pension fund act] . . .*," not just to those employees who actually had been disabled or had retired as of that date. The remaining portions of section 28 preserve an employee's entitlement to benefits under the newly enacted pension fund act in the event of subsequent pension fund legislation. It is reasonable to conclude that the legislature also intended to preserve an employee's entitlement to benefits under the previously enacted pension fund act. In enacting section 28 the legislature undoubtedly sought to avoid the constitutional questions raised by retroactive application of amendments to public pension fund legislation. *See e.g., Wagoner v. Gainer*, 279 S.E. 2d 636 (W.Va. 1981); *Blackwell v. Quarterly County Court*, 622 S.W. 2d 535 (Tenn. 1981); *Public Employees' Retirement Board v. Washoe County*, 96 Nev. 718, 615 P. 2d 972 (1980); *Taylor v. Public Employees' Retirement Ass'n*, 189 Colo. 486, 542 P. 2d 383 (1975).

[2] As petitioner was an employee of the Asheville Police Department prior to the effective date of the 1977 pension fund act, his claim to line-of-duty disability benefits must be considered under the provisions of "Chapter 242, Public-Local Laws of 1939, amended by Chapter 311, Session Laws of 1945 and Chapter 322, Session Laws of 1955 . . . ." 1977 N.C. Sess. Laws ch. 188, sec. 28, as amended by 1981 N.C. Sess. Laws, ch. 261, sec. 2. Thus, the council erred as a matter of law in applying chapter 188 of the

1977 Session Laws as amended by chapter 429 of the 1979 Session Laws.

The council's error clearly prejudiced petitioner's claim for line-of-duty disability benefits. While the provisions of both pension funds provide similar benefits for policemen disabled while acting in the "line of duty," chapter 429, section 1(d) of the 1979 Session Laws, quoted *supra*, narrowly defines line of duty. The following findings of fact indicate that the council relied heavily upon that narrow definition of "line of duty":

> 22. The heart attack sustained by Mr. Walsh on October 5 or October 6, 1983, does not constitute "an accident occurring while in the actual performance of duty . . . at some definite time and place" as required by Section 9(A) of the Policemen's Pension Fund Law (Chapter 429, 1979 Session Laws).
>
> 23. Even [if] it were conceded that the heart attack sustained by Mr. Walsh was "an accident" as required by Section 9(A), Mr. Walsh's disability is not the "natural and proximate result" of the heart attack per se.

Further, the definition of "line of duty" contained in chapter 429, section 1(d) of the 1979 Session Laws and relied upon by the council differs greatly from the Supreme Court's interpretation of what constitutes "acting in the line of duty" under the terms of the pension fund legislation in effect when petitioner was hired. *See In re Duckett*, 271 N.C. 430, 156 S.E. 2d 838.[1]

In *Duckett*, an Asheville fireman suffered a heart attack and died while on duty. Shortly before the fatal heart attack he had attempted to beat out a fire with a pine branch. There was no evidence, however, that he had been "overcome with smoke or anything of that sort." *Duckett*, 271 N.C. at 431, 156 S.E. 2d at 840. Moreover, testifying medical experts found "[no] real evidence that the exertion itself caused the infarction . . . ."

1. In *Duckett* the Court interpreted provisions of the "Asheville Firemen's Pension and Disability Fund," 1939 N.C. Public-Local Laws, ch. 243, sec. 7 as amended by 1955 N.C. Sess. Laws, ch. 320, sec. 2. *Duckett*, 271 N.C. at 434, 156 S.E. 2d at 842. The provisions of that fund exactly parallel the provisions of the Asheville policemen's pension fund legislation in effect at the time plaintiff was hired. 1939 N.C. Sess. Laws, ch. 242, sec. 7, as amended by 1955 N.C. Sess. Laws, ch. 322, sec. 2. Subsequently, the Asheville firemen's pension fund legislation has been repealed. 1981 N.C. Sess. Laws, ch. 261, sec. 2.

Duckett, 271 N.C. at 432, 156 S.E. 2d at 840. Concluding "[t]hat said heart attack was not caused and did not result from exertion or exhaustion related directly or indirectly to fire fighting, or line of duty, but rather resulted from some disease or condition or infirmity . . .," the Board of Examiners denied the fireman's widow line-of-duty disability benefits. *Duckett*, 271 N.C. at 432, 156 S.E. 2d at 841. The superior court granted a Writ of Certiorari, reversed the decision of the Board of Examiners, and awarded line-of-duty disability benefits to the widow.

In affirming the court's order the Supreme Court noted that " '[t]he right to a pension depends upon the statutory provision therefor, and the existence of such right in particular instances is determinable primarily from the terms of the statute under which the right or privilege is granted.' " *Duckett*, 271 N.C. at 434, 156 S.E. 2d at 842 *quoting* 40 Am. Jur. *Pensions* sec. 23, p. 980. The court applied the rule that "words of a statute must be given their natural or ordinary meaning," *Duckett*, 271 N.C. at 437, 156 S.E. 2d at 844, and concluded that:

> [A] person is acting 'while in the line of duty' when he acts at the time and place he is required to be at work and when he is engaged in the performance of his duties or is engaged in activities incidental to his duties. The term 'while in line of duty' is synonymous with 'while in the course of employment' or 'while in the discharge of duty.' . . .
>
> In order for appellant to prevail, we would have to read into the statute a requirement that there be a causal relation between his disability and his duties. This we cannot do.

Duckett, 271 N.C. at 437, 156 S.E. 2d at 844.

Thus, under the provisions of the pension fund legislation in effect when petitioner was hired, the council could have determined that he was disabled "while acting in the line of duty." The court erred in concluding that the council's decision was not affected by error of law. The judgment is therefore vacated, and the cause is remanded to the superior court with instructions to remand to the Asheville City Council for a determination in accord with this opinion.

Vacated and remanded.

Judges BECTON and PARKER concur.

SANDRA S. HOLTHUSEN (Now BURR) v. GREGORY G. HOLTHUSEN

No. 8521DC396

(Filed 4 March 1986)

1. **Divorce and Alimony § 24.2— child support—court's adoption of parties' agreement—changed circumstances necessary for modification**

When the court adopted the parties' agreement as to child support as its own determination of the amount of child support to be paid by defendant, this order of support became modifiable in the same manner as any other child support order, and the wife was thus required to show changed circumstances in order to obtain increased child support.

2. **Rules of Civil Procedure § 41— non-jury trial—motion for involuntary dismissal**

Defendant's motion to dismiss at the close of plaintiff's evidence in a non-jury trial should be treated as an N.C.G.S. 1A-1, Rule 41(b) motion for involuntary dismissal rather than an N.C.G.S. 1A-1, Rule 50 motion for a directed verdict.

3. **Divorce and Alimony § 24.8— child support—insufficient evidence of changed circumstances**

The trial court's findings of fact supported its conclusion that there had been no substantial change of circumstances affecting the welfare of a child which would warrant an increase in the amount of child support.

APPEAL by plaintiff from *Alexander, Judge*. Orders entered 17 January 1985 and 23 January 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 24 October 1985.

Peebles and Schramm by John J. Schramm, Jr., for plaintiff appellant.

Morrow & Reavis by John F. Morrow for defendant appellee.

COZORT, Judge.

Plaintiff appeals the district court's denial of her motion in the cause for increase in child support. We affirm.

Plaintiff and defendant separated on 3 May 1980 and entered into a written separation agreement on 12 December 1980. They subsequently divorced on 3 May 1982 and both have remarried. One minor child remains, Ann Holthusen, born 11 November 1969.

The separation agreement places custody of all the children with the plaintiff and the only remaining minor child has been in plaintiff's custody and residing with her since the separation of the parties. The agreement further provides for the support and maintenance of the minor children. The defendant is currently supporting the only remaining minor child in accordance with the terms of the agreement.

On 5 November 1984 plaintiff served upon defendant a motion in the cause for increase in child support. In paragraph VI of the motion plaintiff states:

> VI. Since the Separation Agreement was executed there *has occurred a substantial change in material circumstances which warrants an increase in child support.* The needs of the minor child have substantially increased and the Defendant has the ability and the capacity to meet the increased needs of the child. The Plaintiff's ability to provide support for the child has been substantially decreased.
>
> The amount of child support provided for in the Separation Agreement is inadequate to meet the needs of the minor child and the child support provisions contained in the Separation Agreement do not adequately protect the interests of and provide for the welfare of the minor child. [Emphasis added.]

Defendant denied the material allegations of the motion and the matter came on for hearing before Judge Abner Alexander on 7 January 1985. After the close of plaintiff's evidence defendant moved for a dismissal, which the trial court granted. On 17 January 1985 the trial court entered a written order denying the motion for an increase in child support on the ground that "there has not been a substantial change in the needs of the minor child of the parties . . . ." Plaintiff took no exception to any of the findings of fact or the conclusion of law of the court's order. Rather, plaintiff has only excepted to entry of the order.

Plaintiff first argues that the trial "court err[ed] by compelling [her] to show a substantial change in circumstance subsequent to May 3, 1982 which warranted an increase in child support rather than requiring [her] to show the needs of the minor child at the time of hearing and the defendant's ability to meet those needs." This argument is apparently based upon plaintiff's contention that "[t]he Separation Agreement which was incorporated into the absolute divorce judgment is nothing more than a contract between the parties and is not enforceable by or through the contempt powers of the Court nor is the Agreement modifiable without the consent of the parties."

In her absolute divorce complaint plaintiff prayed that the separation agreement be incorporated in the divorce judgment. In its absolute divorce judgment of 3 May 1982 the court "ordered, adjudged and decreed" that "[t]he terms of the separation agreement and property settlement executed by the parties on December 12, 1980, are hereby incorporated into this judgment by reference as if fully set forth herein, and attached to this judgment as Exhibit A." Plaintiff is correct that since the judgment incorporating the separation agreement in this case was entered prior to the decision in *Walters v. Walters*, the rule of the *Walters* case does not apply. 307 N.C. 381, 386, 298 S.E. 2d 338, 342 (1983). In *Walters* our Supreme Court established a rule that

> whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Id. Under this rule "every court approved separation agreement is considered to be part of a court ordered consent judgment." *Id.*

[1] While the rule in *Walters* does not apply in this case, the language used by the court in its absolute divorce judgment, incorporating the separation agreement into the judgment, is sufficient under the law as it existed prior to *Walters* to evidence the

court's intent to make the parties' separation agreement its own determination of their respective rights and obligations. *See Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978). Thus, when the court adopted the parties' agreement as to child support as its own determination of the amount of child support to be paid by defendant, this order of support became modifiable in the same manner as any other child support order. Under G.S. 50-13.7 (a) "[a]n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."

Even if there had been no prior order of support in this case, plaintiff would still have had to show a change of circumstances:

> [W]here parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. We further hold that the court upon motion for an increase in such allowance, is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase . . . .

Fuchs v. Fuchs, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963). This assignment of error is without merit.

Next we consider plaintiff's assignment of error that the trial court erred in granting defendant's motion to dismiss at the close of plaintiff's evidence.

[2] Plaintiff argues that (1) defendant's motion to dismiss can only be treated as a G.S. 1A-1, Rule 50 motion, and (2) in passing on such a motion, the trial court must determine whether the evidence, taken in the light most favorable to the party offering the same, is sufficient to withstand a motion to dismiss. While plaintiff has correctly summarized the legal standard for judging a Rule 50 motion for a directed verdict, her argument that the motion was a Rule 50 motion is incorrect. Rule 50 motions apply only to issues tried by a jury, not a judge. *Tanglewood Land Co., Inc. v. Wood*, 40 N.C. App. 133, 252 S.E. 2d 546 (1979). Defendant's motion should be treated as a G.S. 1A-1, Rule 41(b) motion for involuntary dismissal. *Id.* Since the court will determine the facts

anyway, the function of a judge on a motion to dismiss under G.S. 1A-1, Rule 41(b) is to evaluate the evidence without any limitations as to inferences in favor of the plaintiff. *Rogers v. City of Asheville*, 14 N.C. App. 514, 188 S.E. 2d 656 (1972).

[3] Plaintiff, as the movant, had the burden of proving that a substantial material change of circumstances affecting the welfare of the child has occurred. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974). The trial court found and concluded that "there has not been a substantial change in the needs of the minor child . . . ." While plaintiff excepted to the granting of the motion to dismiss she has not excepted to any of the findings of fact or the conclusion of law. Where appellant has taken no exceptions "to the findings of fact, the only question present for review is whether the findings support the conclusions of law, and it is not incumbent upon this Court to search the record in order to determine whether the findings of fact are supported by competent evidence." *In re Pierce*, 67 N.C. App. 257, 259, 312 S.E. 2d 900, 902 (1984). The findings support the conclusion. This assignment of error is overruled.

Plaintiff has set forth neither argument nor cited authority in support of her assignment of error concerning the trial court's denial of her motion for attorney's fees. Thus, plaintiff has abandoned this assignment of error. Rule 28(b)(5), N.C. Rules App. Proc.

We have reviewed plaintiff's remaining assignment of error and find it to be without merit. The order of the trial court denying plaintiff's motion for increase in child support and plaintiff's motion for attorney's fees are

Affirmed.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. THOMAS GORDON

No. 8526SC763

(Filed 4 March 1986)

Constitutional Law § 46— discharge of appointed counsel—defendant required to proceed pro se—error

In a prosecution for armed robbery in which defendant discharged his appointed counsel at an identification suppression hearing, the trial court erred by requiring defendant to proceed *pro se* without a clear indication that he desired to do so and without making the inquiries required by N.C.G.S. 15A-1242.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 4 October 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 December 1985.

Defendant appeals from a judgment of imprisonment entered upon his conviction of armed robbery.

Attorney General Thornburg, by Assistant Attorney General Catherine McLamb, for the State.

Charles V. Bell for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in denying his motion for a continuance, forcing him to represent himself, and denying his motion to suppress identification testimony. The single issue presented is whether the court (Judge Hairston) erred in forcing or allowing defendant to proceed without counsel at the hearing on his motion to suppress identification testimony. We find *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984), and its progeny, controlling. Pursuant thereto, we hold that absent a clear indication by defendant that he desired to proceed *pro se*, and absent the inquiries required by N.C. Gen. Stat. 15A-1242 (1983), the court erred in requiring defendant to proceed *pro se* at the suppression hearing.

The pertinent facts are as follows:

Defendant's court-appointed counsel made a motion to withdraw on the ground that an atmosphere of mistrust had devel-

oped between him and defendant. At a hearing on the motion defendant testified that he was faced with the possibility of a substantial sentence, that his appointed counsel had shown no interest in his case, and that he would rather have an attorney he could depend on. He testified: "I would just like to have a lawyer I can pay that I feel comfortable. . . . I just had a dream of having a lawyer, paying for a lawyer. . . . All I want is just [to be] properly represented. I don't think you [appointed counsel] have it for me . . . . That's all I'm asking."

The prosecuting attorney inquired whether defendant had the money to hire a private attorney. Defendant replied that he did not, but that he was "working on" it. The court stated that defendant could not delay the prosecution while getting "funds to hire the best counsel." It noted that it thought a reasonable time had expired and that there was no indication that defendant could hire an attorney that day. It then stated: "The MOTION IS DENIED, with leave to the defendant to represent himself, if he is so of a mind to." It instructed defendant to advise the court if at any time he wished to assume his own representation rather than having his appointed attorney represent him.

When the appointed attorney asked if defendant had any response, defendant stated: "I represent myself." The court asked: "You prefer to represent yourself?" Defendant responded: "Yes, I would."

The court then advised defendant that it would ask the appointed attorney to sit with him so defendant could "consult him concerning legal, technical matters." Defendant responded: "I don't want him sitting with me." The court thereupon allowed the appointed attorney's motion to withdraw.

After allowing the motion to withdraw the court proceeded immediately with a hearing on the motion to suppress the identification testimony. Defendant stated to the court: "I don't know about my case. I don't know one side of anything. Anything that's been presented to me was presented to me within the last couple [of] days. . . . All of these things that he [appointed counsel] put before me, whatever he brought up he did not talk to me about these things. So, I don't know. . . . He hasn't expressed to me about nothing, nothing about my case[,] about me." The court responded: "You have elected at the last minute to come in

and represent yourself. And, this is a very difficult thing for you to do. But that's the only election that was left open to you, if you wanted to discharge [appointed counsel]."

The fact that an accused waives his right to assigned counsel does not mean that he waives all right to counsel. *State v. McCrowre*, 312 N.C. 478, 481, 322 S.E. 2d 775, 777 (1984). *See also State v. White*, 78 N.C. App. 741, 338 S.E. 2d 614 (1986); *State v. Lyons*, 77 N.C. App. 565, 335 S.E. 2d 532 (1985); *State v. Graham*, 76 N.C. App. 470, 333 S.E. 2d 547 (1985); *State v. Michael*, 74 N.C. App. 118, 327 S.E. 2d 263 (1985). In *McCrowre*, as here, defendant discharged assigned counsel with the expectation of retaining private counsel. The trial court there denied defendant's request for "someone to assist" with his case. *McCrowre*, 312 N.C. at 480, 322 S.E. 2d at 776. In holding this error the Supreme Court reasoned that there was "no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *McCrowre*, 312 N.C. at 480, 322 S.E. 2d at 776-77. It added that "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Id.*, 322 S.E. 2d at 777 [quoting *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E. 2d 788, 800 (1981)]. It added further, citing N.C. Gen. Stat. 15A-1242 (1983), that

> [h]ad defendant clearly indicated that he wished to proceed pro se, the trial court was required to make inquiry to determine whether defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

McCrowre, 312 N.C. at 481, 322 S.E. 2d at 777; *see also Graham*, 76 N.C. App. at 474, 333 S.E. 2d at 549; *Michael*, 74 N.C. App. at 119, 327 S.E. 2d at 264-65.

The record here reveals no such inquiry. While there is some evidence that defendant understood that the charges were seri-

ous, there is no evidence that he was informed of the nature of the charges and the range of permissible punishments or that he understood and appreciated the consequences of proceeding without counsel. Absent such evidence, the court should not have permitted him to proceed *pro se*, N.C. Gen. Stat. 15A-1242; *McCrowre, supra.*

Further, here, as in *McCrowre*, "there is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *McCrowre*, 312 N.C. at 480, 322 S.E. 2d at 776-77. His statements that he "would just like to have a lawyer that [he could] pay," that he "had a dream of having a lawyer, paying for a lawyer," and that he "just [wanted to be] properly represented" indicate the contrary. The trial court here, like the trial court in *McCrowre*, apparently "mistakenly believed that defendant had waived his right to *all* counsel," *McCrowre*, 312 N.C. at 481, 322 S.E. 2d at 777, by waiving his right to appointed counsel.

"Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E. 2d 788, 800 (1981). Defendant here expressly indicated the contrary by the statements set forth above. We find no merit in the State's argument that defendant has failed to show prejudice because the eyewitness identification was positive and the evidence did not indicate that the identification methods used were impermissibly suggestive. The suppression hearing was the critical stage for developing any weaknesses in the State's evidence, and without the assistance of counsel defendant was ill-equipped to perform that task. Defendant clearly informed the court that he knew nothing about his case. He also demonstrated his lack of understanding of the suppression hearing proceedings by asking the prosecuting attorney during the hearing, "What's going on?," and by stating that he thought there was going to be a jury trial and he wanted testimony in front of a jury.

Following *McCrowre*, we hold that the court erred in requiring defendant to proceed *pro se* at the suppression hearing without a clear indication that he desired to do so and without making the inquiries required by N.C. Gen. Stat. 15A-1242. Accordingly,

there must be a new trial. This disposition makes it unnecessary to pass upon the remaining arguments presented.

New trial.

Judges BECTON and PARKER concur.

CYNTHIA AUSTIN MULLEN v. BRENT LEWIS MULLEN

No. 8526DC801

(Filed 4 March 1986)

1. **Divorce and Alimony § 24.8— child support—changed circumstances—findings not sufficient**

The trial court erred by concluding that plaintiff wife had made a sufficient showing of a change in circumstances to merit an increase in child support payments where the only finding on actual past expenditures was that plaintiff had child care expenses of approximately $25 per month when the original 1981 order was entered; the court did not make specific findings as to food, shelter, clothing or other major past expenditures; plaintiff testified that her child care expenses in 1981 were $25 per week rather than per month, so that the sole finding on actual past expenditures was not supported by the evidence; the court failed to make any specific findings as to food, shelter, or other major present expenditures besides day care; the court made no finding that the present expenses for child care were reasonable; and the court omitted any specific findings as to the parties' present reasonable expenses or estates. N.C.G.S. 50-13.7.

2. **Divorce and Alimony § 24.11— modification of child support—insufficient evidence—reversed**

An order finding changed circumstances and increasing child support was reversed rather than remanded where the court had insufficient evidence of the child's actual past expenditures to make the requisite specific findings of fact.

APPEAL by defendant from *Jones, William G., Judge*. Order entered 19 March 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 6 December 1985.

A consent judgment dated 16 September 1981 awarded custody of the parties' minor child to plaintiff-wife and ordered defendant-husband, *inter alia*, to pay $180 per month as child support and provide medical and hospital insurance covering the child.

Plaintiff-wife moved the court to vacate or modify this consent judgment by ordering an increase in child support. The court made the following pertinent findings of fact:

> 2. At the time said order was entered the plaintiff had monthly gross income of $890.00 and the defendant had monthly gross income of $1,350.00.
>
> 3. At the present time the plaintiff has monthly gross income of $1,466.00 and the defendant has monthly gross income of $2,332.00 . . . .
>
> 4. At the time the 1981 order was entered the plaintiff had child day care expenses of approximately $25.00 per month, virtually no evening or weekend babysitting expenses, no medical insurance expenses for the child, slight uninsured medical expenses for the child, and virtually no entertainment or recreational expenses for the child.
>
> 5. Since 1981 the plaintiff has incurred increased expenses for the child, due largely to his increased age (now five years). Specifically, her day care expense has increased to $160.00 monthly and she has evening and weekend babysitting expenses of $10.00 per month. The defendant either has not maintained medical and hospitalization insurance for the child or has not provided to the plaintiff information and forms necessary to make claims thereunder. As a result the plaintiff has secured such insurance at a monthly cost to her of $53.50. Moreover, the child now suffers from asthma and the plaintiff's uninsured medical expenses for the child have increased. The child now is old enough to require expenditures for his entertainment and recreation of approximately $15.00 monthly, and his clothing costs more because of his increased age and inflation.
>
> [6.] The plaintiff's reasonable needs for the care, support and maintenance of the child are approximately $700.00 monthly, and for her own support and maintenance approximately $600.00 monthly.
>
> 7. The defendant's reasonable needs for his own support are approximately $1,300.00 monthly.
>
> . . . .

9. The plaintiff has filed her motion in good faith and has insufficient means to defray the costs of prosecuting the same. The defendant has failed to pay support which is adequate at the time the plaintiff filed her motion.

10. The defendant has the ability to make the payments ordered herein, and the same are reasonable.

11. Counsel for plaintiff has rendered valuable services in prosecuting this matter, having expended approximately 15 hours prior to the hearing, 2 hours in attending the hearing, and additional time in preparing this order as directed by the Court. The reasonable value of his services is not less than $1,100.00, of which the plaintiff has paid $300.00. The defendant has the ability to pay partial counsel fees of $500.00 as provided herein.

The court concluded from these findings that plaintiff-wife had made a sufficient showing of a change in circumstances since the 16 September 1981 consent judgment to merit an increase in child support payments to $400 per month. It further concluded that plaintiff-wife was entitled to a partial award of attorney's fees of $500.

From the order entered in accordance with these findings, defendant-husband appeals.

Cynthia Austin Mullen, plaintiff appellee, pro se.

Bailey, Patterson, Caddell & Bailey, P.A., by James A. Warren, for defendant appellant.

WHICHARD, Judge.

[1] Defendant-husband contends the evidence and findings of fact do not support an order increasing child support. We agree.

N.C. Gen. Stat. Sec. 50-13.7 provides that a child support order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . ." This Court has stated:

> The modification of the order must be supported by findings of fact, based upon competent evidence, that there has been a substantial change of circumstances affecting the welfare of

> the child. . . . It is not necessary for the trial court to make detailed findings of fact upon all the evidence offered at trial. The order must contain the material findings of fact which resolved the issues raised. In each case the findings of fact must be sufficient to allow an appellate court to determine upon what facts the trial court predicated its judgment. [Citations omitted.]

Ebron v. Ebron, 40 N.C. App. 270, 271, 252 S.E. 2d 235, 236 (1979).

Specifically, the trial court must determine the "present reasonable needs of the subject minor child, before ordering a modification in child support." *Norton v. Norton*, 76 N.C. App. 213, 216, 332 S.E. 2d 724, 727 (1985). "To properly determine the child's present reasonable needs, the trial court must hear evidence and make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay." *Id.* "[E]vidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay." *Id.* at 218, 332 S.E. 2d at 728.

Applying the above requirements to the order and record here, we find them deficient in the following respects:

The court's only finding on actual past expenditures was that plaintiff-wife "had child care expenses of approximately $25.00 per month" when the 1981 order was entered. The court made no specific findings as to food, shelter, clothing or other major past expenditures. Further, plaintiff-wife testified that her child care expenses in 1981 were $25 per week, not $25 per month. Thus, the sole finding on actual past expenditures was not supported by the evidence.

The court found specific present expenses of the child for day care, babysitting, health insurance, and entertainment. It noted a general increase in his clothing expenses and uninsured medical expenses from 1981. Again, however, it failed to make any specific findings as to food, shelter, or other major present expenditures besides day care. The court also made no finding that the present expenses of the child were reasonable.

Regarding the parties' relative ability to pay, the court did state each party's gross income for 1981 and 1984. However, it

omitted any specific findings as to the parties' present reasonable expenses or estates, and it merely determined generally that plaintiff-wife's reasonable needs for the child were approximately $700 monthly and for herself were approximately $600 monthly, and that defendant-husband's reasonable needs for himself were approximately $1,300 monthly.

> Without definitive findings regarding the past and present needs of the [child], and the abilities of the plaintiff and the defendant to meet these needs, it is impossible to understand how the court concluded that the monthly financial needs of the [child would be approximately $700], or to comprehend by what formula the court divided the total amount between the parties.

Daniels v. Hatcher, 46 N.C. App. 481, 484-85, 265 S.E. 2d 429, *disc. rev. denied*, 301 N.C. 87 (1980).

[2] Further, as in *Norton, supra*, we "conclude that the trial court had insufficient evidence of [the child's] actual past expenditures to make the requisite specific finding of fact on actual past expenditures." 76 N.C. App. at 216, 332 S.E. 2d at 727. Here, as in *Norton*, "no evidence of actual past expenditures for the interim years 1982 and 1983 [and 1984] appears in the record." *Id.* at 217, 332 S.E. 2d at 727. Plaintiff-wife thus has failed to carry her burden of proving a substantial change in circumstances. *Id.*

Accordingly, following *Norton*, we reverse the 19 March 1985 modification and reinstate the $180 monthly child support payment due under the 16 September 1981 consent judgment retroactive to 15 March 1985, the modification date stated in the 19 March 1985 order. *Id.* This case, like *Norton*, is distinguishable from *Daniels*, where "the record was 'replete with evidence' comparing the [child's] needs and expenses at frequent intervals from the time of the consent order to the present." *Id.* We thus cannot simply vacate and remand for the requisite specific findings from the evidence, as was done in *Daniels*.

Defendant-husband also contends the court erred in ordering him to pay part of plaintiff-wife's attorney's fees. Because that part of the order increasing child support payments is reversed, the award of attorney's fees must also be reversed. *Walker v. Tucker*, 69 N.C. App. 607, 613-14, 317 S.E. 2d 923, 927-28 (1984).

We note that plaintiff-wife may again move for modification of the order at any time, and the court may allow the motion if it makes the required findings of fact based upon adequate evidence.

Reversed.

Judges JOHNSON and PHILLIPS concur.

FRANK CASHION AND RUFFIN KEYES v. TEXAS GULF, INC., AND DWAYNE PERGREM

No. 852SC711

(Filed 4 March 1986)

Malicious Prosecution § 11.2— probable cause for prosecution—convictions reversed on appeal

Plaintiff's convictions of embezzlement established the existence of probable cause which precluded a claim for malicious prosecution in the absence of evidence that the convictions were obtained through fraud or other unfair means even though the appellate court reversed the convictions because of a fatal variance between indictment and proof.

Judge PHILLIPS concurs in the result.

APPEAL by plaintiffs from *Brown, Frank R., Judge.* Judgment entered 23 April 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 4 December 1985.

This is a civil action instituted 27 July 1984 for malicious prosecution. On 17 July 1981, an employee of defendant Texas Gulf was rebuilding a pump and laid aside a bearing housing. On 20 July 1981, the employee returned to work and reported to his superiors that the bearing housing was missing. Defendant Dwayne Pergrem, security supervisor employed by defendant Texas Gulf, was contacted. Defendant Pergrem initiated an investigation and defendant Texas Gulf hired a private investigator. The private investigator discovered reported missing items at a local salvage yard and that the plaintiffs were reported to have previously sold various machinery parts to the salvage dealer. Plaintiff Cashion had sold various machinery parts to the salvage dealer as recently as 18 July 1981.

On 29 July 1981, warrants for the arrest of plaintiffs were issued and executed. On 31 August 1981, plaintiffs were indicted for embezzlement of brass and copper materials on 18 July 1981. A "corrected indictment" was returned amending the dates of the offense from 18 July 1981 to 31 July 1980 through 18 July 1981. Plaintiffs' cases, 832SC50 and 832SC342, were consolidated and heard at the 10 May 1982 criminal session of Beaufort County Superior Court. Plaintiffs were convicted of embezzlement.

Plaintiffs appealed to this Court which overturned their convictions because of a fatal variance between the allegations of the indictment and the proof the State presented at trial. *See generally State v. Keyes and Cashion*, 64 N.C. App. 529, 307 S.E. 2d 820 (1983) (defendants' motion to dismiss embezzlement charges should have been granted where the evidence showed defendants may have had access to machinery parts but there was no evidence to show that defendants received machinery parts by the terms of their employment). Thereafter, on 27 July 1984, plaintiffs filed their complaint against defendants for malicious prosecution. Defendants answered, denying plaintiffs' allegations. On 18 April 1985, defendants moved the court for summary judgment. The court granted defendants' motion for summary judgment. Plaintiffs appeal.

Sumrell, Sugg & Carmichael, by Rudolph A. Ashton, III, for plaintiff appellants.

McMullan & Knott, by Lee E. Knott, Jr., for defendant appellees.

JOHNSON, Judge.

The only issue we must decide is whether there was a genuine material issue of fact which would preclude the trial court's allowance of defendants' motion for summary judgment. After careful consideration of the record herein, we conclude that there is no genuine material issue of fact in the case *sub judice*.

It is well settled that a Rule 56 motion for summary judgment should be allowed only when there exists no triable genuine issue of material fact and the movant's forecast of the evidence demonstrates that it is entitled to a judgment as a matter of law. *Feibus & Co. v. Godley Construction Co.*, 301 N.C. 294, 271 S.E.

2d 385, *rehearing denied*, 301 N.C. 727, 274 S.E. 2d 228 (1980). 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 material fact and that any party is entitled to a judgment as a matter of law.

Rule 56(c), N.C. Rules Civ. P. The moving party has 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. Greensboro 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 now turn to the propriety of the court's granting defendants' motion for summary judgment. There are four elements essential to establishing a claim of malicious prosecution: "[1] [D]efendant initiated the earlier proceeding, [2] that he did so maliciously and [3] without probable cause, and [4] that the earlier proceeding terminated in plaintiff's favor." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E. 2d 611, 625 (1979). Plaintiffs' primary argument is that there are material facts in dispute as to whether defendants falsely and maliciously had warrants issued for plaintiffs' arrests. What the plaintiffs fail to realize is that "want of probable cause is an essential element of malicious prosecution." *Priddy v. Cooks United Dept. Store*, 17 N.C. App. 322, 324, 194 S.E. 2d 58, 59 (1973). Probable cause is a reasonable suspicion in the mind of a prudent person in light of known facts and circumstances. *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981). Unless plaintiffs can establish that their convictions were obtained through fraud or other unfair means, their convictions establish the existence of probable cause. *Priddy*, at 324, 194 S.E. 2d at 59. The fact that this Court reversed their convictions for a fatal variance between the indictment and the proof the State presented at trial does not serve to show that the criminal proceedings were initiated without probable cause; nor does it defeat defendants' motion for summary judgment. The State has the responsibility for charging plaintiffs with a crime based on the facts supplied. We are satisfied that in the absence of any showing that the convictions were obtained through fraud or other unfair

means defendants were entitled to summary judgment as a matter of law.

Affirmed.

Judge WHICHARD concurs.

Judge PHILLIPS concurs in the result.

STATE OF NORTH CAROLINA v. JESSIE LEE TAYLOR

No. 857SC844

(Filed 4 March 1986)

1. **Rape and Allied Offenses § 6.1— failure to instruct on attempted second degree rape—no evidence—no error**

There was no evidence in a rape prosecution of a failed attempt at nonconsensual intercourse and the trial court did not err by failing to give an instruction on the lesser included offense of attempted second degree rape where the State's evidence showed that defendant engaged in sexual intercourse with the victim by force and against her will and defendant's evidence was that they were engaged in consensual sexual foreplay when the prosecuting witness bit him on the cheek causing him to lose interest. N.C.G.S. 14-27.3(a)(1).

2. **Constitutional Law § 48— counsel silent at sentencing hearing—not ineffective assistance**

Defendant was not entitled to a new sentencing hearing for second degree rape where defense counsel simply said "No, sir" when asked if he had anything on sentencing, but said nothing negative about his client. However, silence at the sentencing hearing should rarely be the strategy or tactic of choice.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 6 September 1984 in Superior Court, WILSON County. Heard in the Court of Appeals 12 December 1985.

Defendant appeals from a judgment of imprisonment entered upon his conviction of second degree rape.

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

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in failing to instruct on the lesser included offense of attempted second degree rape. " 'The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.' " *State v. Peacock*, 313 N.C. 554, 558, 330 S.E. 2d 190, 193 (1985), *quoting State v. Wright*, 304 N.C. 349, 351, 283 S.E. 2d 502, 503 (1981). Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense. *Id.*

The State's evidence here showed that defendant engaged in sexual intercourse with the prosecuting witness by force and against her will. N.C. Gen. Stat. 14-27.3(a)(1). The defendant's evidence showed that he and the prosecuting witness were engaged in consensual sexual foreplay when the prosecuting witness bit him on the cheek, causing him to lose interest. There was no evidence of a failed attempt at nonconsensual intercourse. The court thus did not err in failing to charge on the lesser included offense of attempted second degree rape.

[2] Defendant contends he is entitled to a new sentencing hearing because he was denied effective assistance of counsel at his initial hearing, which consisted solely of the following:

> [DISTRICT ATTORNEY]: The State prays judgment. Regarding his prior convictions, they have been stated.
>
> COURT: All right. Do you have anything on sentencing?
>
> [DEFENSE ATTORNEY]: No sir.

This Court recently noted that "[c]learly sentencing is a critical stage of a criminal proceeding to which the right to effec-

tive assistance of counsel applies." *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E. 2d 518, 521, *disc. rev. denied*, 314 N.C. 670, 337 S.E. 2d 583 (1985). In *Davidson* counsel not only failed to engage in positive advocacy at the sentencing hearing, but also placed before the court commentary entirely negative to the defendant. *Id.* at 545, 335 S.E. 2d at 521-22. This Court held that the defendant had shown both deficient performance and prejudice to his defense, *see State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E. 2d 241, 248 (1985), *citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), and awarded a new sentencing hearing. It stated: "If resourceful preparation reveals nothing positive to be said for a criminal defendant, at the very least effective representation demands that counsel refrain from making negative declamations." *Davidson*, 77 N.C. App. at 546, 335 S.E. 2d at 522.

Defense counsel here said nothing negative about his client. He simply refrained from speaking or presenting evidence at the sentencing hearing. While we find the absence of positive advocacy at the sentencing hearing troublesome, we do not believe we can hold, on this record, that it constituted deficient performance prejudicial to the defendant. *Braswell, supra.*

Defendant has not cited, and our research has not disclosed, any case holding that a criminal defendant was denied effective assistance of counsel solely because counsel stood mute at the sentencing hearing. The Court of Appeals of New Mexico, confronted with this situation, stated:

> During the sentencing hearing, the trial court asked both counsel and defendant if they had any statement they wished to make before sentence was pronounced. Counsel had nothing to say. Defendant moved to withdraw his guilty pleas; this motion was denied. Sentence was then pronounced.
>
> . . . .
>
> This record does not show that counsel "did not act as an advocate during the sentencing proceedings. Counsel remained silent, but that could have been a choice of tactics; at least, there is nothing showing silence was not a tactical decision by counsel. The choice of tactics is within the control of counsel.

State v. French, 92 N.M. 94, 96, 582 P. 2d 1307, 1309 (1978). *See also Taylor v. Maggio*, 727 F. 2d 341, 349 (5th Cir. 1984) (habeas petitioner not allowed hearing based solely upon silence of his attorney at sentencing hearing; such silence alone does not overcome presumption that trial conduct is the product of reasoned strategy decisions); *Williams v. United States*, 304 F. Supp. 691, 692-93 (E.D. Mo. 1969) (retained counsel's silence at time of sentencing not ground for collateral attack on sentence). Cf. *Baty v. Balkcom*, 661 F. 2d 391, 395 (5th Cir. 1981), *cert. denied*, 406 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed. 2d 1308 (1982) (counsel's silence at sentencing, considered alone, might be ascribed to tactical judgment, but when considered cumulatively with other omissions defendant was denied effective assistance of counsel).

"Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics." *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E. 2d 692, 693-94 (1984). The record here provides no basis for holding that counsel's decision to remain silent at the sentencing hearing was not "strategy and trial tactics" properly left within the control of counsel. We thus find defendant's contention that he was denied effective assistance at the sentencing hearing without merit.

We nevertheless admonish defense counsel that silence at the sentencing hearing should rarely be the strategy or tactic of choice. " '[Z]ealous advocacy is as necessary at sentencing as at trial . . . . [T]he posture of the defense attorney at sentencing should fundamentally be that of an advocate . . . . [T]he defendant . . . deserve[s] . . . the most effective statement possible . . . in light of the available dispositional opportunities.' " *Davidson*, 77 N.C. App. at 546, 335 S.E. 2d at 522, *quoting* 3 American Bar Association Standards for Criminal Justice at 18-438, 439 (2d ed., 1982 Supp.). "In order to properly fulfill his responsibilities, counsel's energies and resources should be directed as fully to the dispositional phase of the proceedings as to pretrial preparation and courtroom advocacy." *United States v. Pinkney*, 551 F. 2d 1241, 1249 (D.C. Cir. 1976).

No error.

Judges BECTON and PARKER concur.

BURLIN B. MILLER, ET VIR, GEORGIA B. MILLER v. PARLOR FURNITURE OF HICKORY, INC.

No. 8525DC707

(Filed 4 March 1986)

1. **Bankruptcy § 4; Landlord and Tenant § 18— unexpired lease—bankruptcy petition—protection lost after petition dismissed**

Provision of 11 U.S.C. § 365(e)(1) prohibiting the termination of an unexpired lease because of the tenant's filing of a bankruptcy petition no longer protects the tenant once the bankruptcy proceeding has been dismissed.

2. **Bankruptcy § 4; Landlord and Tenant § 18— bankruptcy termination clause of lease—enforcement after bankruptcy petition dismissed**

Provisions in a lease authorizing the lessor to terminate the lease and take possession of the property in the event the tenant petitions to be declared bankrupt are valid under North Carolina law, and the bankruptcy termination clause could be enforced by the lessor after the tenant's petition in bankruptcy had been dismissed.

APPEAL by plaintiffs from *Vernon, Judge.* Judgment entered 6 May 1985 in District Court, CATAWBA County. Heard in the Court of Appeals 6 November 1985.

By the terms of a written lease agreement, plaintiffs leased to defendant two buildings located on Highway 70A in Catawba County. The lease agreement provided, *inter alia,* for the payment of monthly rental and contained the following provision:

ARTICLE XII

TENANT'S DEFAULT

[I]f the Tenant shall petition to be or be declared bankrupt or insolvent according to law, . . . or if proceedings for reorganization or for composition with creditors be instituted by or against such Tenant, then . . . the Landlord may immediately or at any time thereafter and without further notice or demand, enter into and upon said premises or any part thereof and take absolute possession of the same . . . .

On 28 February 1985, plaintiffs filed a Complaint in Summary Ejectment alleging that defendant had breached the lease by failing to pay rent. On 8 March 1985, judgment in favor of plaintiffs was entered by a magistrate. Defendant gave notice of appeal to

the District Court. On 28 March 1985, plaintiffs filed an Amended Complaint in District Court abandoning their claim for nonpayment of rent and alleging that defendant had defaulted, under Article XII of the lease agreement, by filing a Petition in Bankruptcy in the United States Bankruptcy Court for the Western District of North Carolina. The amended complaint alleged that defendant's Petition in Bankruptcy had been filed in March 1983 under Chapter 11 and that it had been dismissed on 19 February 1985. Defendant moved, pursuant to G.S. 1-1A, Rule 12(b)(6), to dismiss the complaint for failure to state a claim. The trial court concluded that the provisions of 11 U.S.C. § 365(e)(1) prohibited plaintiffs from enforcing the bankruptcy termination clause in the lease and dismissed the action. Plaintiffs appeal.

Sigmon, Clark and Mackie, by Warren A. Hutton, for plaintiff appellants.

Curt J. Vaught for defendant appellee.

MARTIN, Judge.

[1] 11 U.S.C. § 365(e)(1) provides, in pertinent part:

> Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—
>
> . . . .
>
> (B) the commencement of a case under this title;

The statute prohibits the termination of a lease due solely to the inclusion therein of an "*ipso facto*" or bankruptcy termination clause conditioned on the commencement of a bankruptcy case by or against the tenant. The issue presented on this appeal, however, is whether the prohibition of § 365(e)(1) remains applicable where there has been a dismissal of the bankruptcy proceedings which give rise to the claim of default. In our view, a dismissal of the bankruptcy case divests the tenant of the protection afforded by the statute. Therefore, we reverse the order of the trial court.

In rendering "*ipso facto*" or bankruptcy termination clauses unenforceable pursuant to 11 U.S.C. § 365(e)(1), "Congress meant to foster the process by which a trustee or a Chapter 11 debtor in possession could assume a lease so that it could 'be utilized to assist in the debtor's rehabilitation or liquidation.' " (Citation omitted.) *In re National Shoes, Inc.*, 9 Bankr. Ct. Dec. (CRR) 11, 20 Bankr. (West) 55 (Bankr. S.D.N.Y. 1982). This purpose is apparent from other provisions of the statute giving the trustee of the debtor the right, upon court approval, to assume or reject unexpired leases, 11 U.S.C. § 365(a); and to assign such a lease notwithstanding a provision therein restricting assignments, 11 U.S.C. § 365(f). However, where the bankruptcy case is dismissed for failure of the debtor to comply with orders of the bankruptcy court, there no longer exists any reason to benefit the debtor or preserve the assets of the bankrupt estate by prohibiting enforcement of an otherwise valid bankruptcy termination clause. Such clauses "are not invalidated in toto, but are merely made inapplicable *during the case* for the purposes of dealing with the . . . unexpired lease." 9A Am. Jur. 2d *Bankruptcy* § 523, at 61 (citing H. R. Rep. No. 595, 95th Cong., 1st Sess. 349 (1977)) (emphasis added).

Plaintiffs allege, and the record indicates, that defendant's Chapter 11 proceeding was dismissed by the bankruptcy court. The effect of a dismissal is to "undo the title 11 case insofar as is practicable, and to restore all property rights to the position they occupied at the beginning of the case." 2 Collier on Bankruptcy ¶ 349.01, at 349-2 (15th ed. 1985) (citing H. R. Rep. No. 595, 95th Cong., 1st Sess. 338 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 48 (1978)). Thus, the dismissal of defendant's bankruptcy proceeding without any adjudication returned the parties to the same status which they had before the commencement of the case and the protection from the bankruptcy termination clause, afforded defendant under 11 U.S.C. § 365(e)(1), was lost. Accordingly, we hold that the provisions of 11 U.S.C. § 365(e)(1) do not prevent plaintiffs from maintaining the present action.

[2] A complaint should not be dismissed pursuant to G.S. 1-1A, Rule 12(b)(6) unless, as a matter of law, plaintiff is not entitled to relief "under any state of facts which could be provided in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970). Under North Carolina law, provisions in a lease

authorizing the lessor to terminate the lease and take possession of the property in the event of the lessee's bankruptcy are valid and enforceable. *Carson v. Imperial '400' National, Inc.*, 267 N.C. 229, 147 S.E. 2d 898 (1966). Plaintiffs' complaint alleges the existence of such a clause in their lease of the subject property to defendant, and further alleges facts which, if true, would amount to a default thereunder by defendant. These allegations are sufficient to state a claim for relief. For the foregoing reasons, we reverse the order dismissing plaintiffs' complaint and remand this case to the District Court of Catawba County in order that the defendant may file answer and the case may proceed to a resolution on its merits.

Reversed and remanded.

Judges ARNOLD and COZORT concur.

R. DOUGLAS LEMMERMAN, GUARDIAN AD LITEM FOR JONATHAN SHANE TUCKER, A MINOR, AND SYLVIA A. TUCKER v. A. T. WILLIAMS OIL COMPANY

No. 8521SC247

(Filed 4 March 1986)

Master and Servant § 54— minor as casual employee—Industrial Commission exclusive jurisdiction—evidence sufficient

The trial court's findings and conclusion that Shane Tucker was defendant's casual employee and that the Industrial Commission had exclusive jurisdiction over his claim were supported by the evidence where Shane Tucker was eight years old; his mother worked at defendant's store and service station; Shane stayed at the store after school; he did his school lessons some afternoons and some afternoons performed tasks such as carrying out the garbage and stocking machines; he was paid a dollar or so on the afternoons he worked; and he slipped and fell one afternoon as he was going to find defendant's manager to see if there was anything else to do. N.C.G.S. 97-1, *et seq.*, N.C.G.S. 97-2(2).

Judge WEBB dissenting.

APPEAL by plaintiffs from *DeRamus, Judge*. Order entered 18 January 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 October 1985.

Plaintiffs sued for damages resulting from an injury sustained by Jonathan Shane Tucker on the premises of defendant's convenience store and service station. At the time involved he was eight years old and his mother, the plaintiff Sylvia A. Tucker, was working for defendant as a part time cashier. Defendant denied plaintiffs' allegations of negligence and asserted as an affirmative defense that the child was its employee under the Workers' Compensation Act and that the Industrial Commission therefore had exclusive jurisdiction over the claim. By agreement of the parties, the jurisdictional issue was heard by Judge DeRamus, who found and concluded that the boy was defendant's casual employee; that the accident happened in the course and scope of his employment; and that the North Carolina Industrial Commission had exclusive jurisdiction of the claim under the Workers' Compensation Act.

In pertinent part, the evidence on the question presented tended to show that: Ken Schneiderman was employed to manage defendant's store and service station; he received a commission on all sales made and, in effect, paid employees that he hired from his commission; he hired and fired employees as he saw fit. Sylvia Tucker, a cashier, was hired to work during the afternoons and she took the job on condition that Shane be permitted to stay there after he got out of school. Some afternoons the boy studied his school lessons and some afternoons, at Schneiderman's request and under his direction, he did tasks about the place such as carry out the garbage, pick up trash and restock the cigarette, candy, and soft drink machines. Each afternoon that the boy did such tasks Schneiderman paid him a dollar or so. On the afternoon involved he had done some work and was on his way to the stockroom looking for Mr. Schneiderman to find out if he wanted him to do anything else when he slipped and fell on a place that was always greasy and slick.

Pettyjohn, Molitoris & Connolly, by Theodore M. Molitoris, for plaintiff appellants.

Nichols, Caffrey, Hill, Evans & Murrelle, by R. Thompson Wright, for defendant appellee.

PHILLIPS, Judge.

The court's findings that defendant, as an employer, is subject to the North Carolina Workers' Compensation Act, G.S. 97-1, *et seq.*, and that plaintiff was accidentally injured on its premises are not contested. A requisite of the Industrial Commission's jurisdiction of a worker's compensation claim is that, of course, an employer-employee relationship existed, *Lucas v. Li'l General Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976), and the only question for decision is whether the court's finding and conclusion that the child was defendant's employee when the accident occurred was validly made. If so, the further findings and conclusions that the injury occurred during the course and scope of his employment, that the claim is governed by the Workers' Compensation Act and that the court has no jurisdiction to hear it, also contested by plaintiffs, inevitably follow since the evidence shows that he was injured while about the defendant's business. Since the parties waived a jury trial on this issue the court was the finder of fact and its findings, if supported by any competent evidence, are conclusive. *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E. 2d 761, 783, 57 A.L.R. 3d 1008, 1038 (1973).

The findings that the boy was a casual employee of defendant, who had hired him to perform odd jobs on the premises and paid him varying amounts therefor are abundantly supported by competent evidence. In his deposition, Shane Tucker testified as follows:

> Ken [Schneiderman] let me help him put cigarettes up on the shelves to sell and things like that. As to the kind of things I did, well, I'd take out the garbage, and I'd pick up paper in the store and throw it in the garbage. And then I'd stock cigarettes and drinks. I did that pretty much every day that I was there, but not all the time. Usually, he had already done it. Stock the cigarettes and everything. I came to the store almost every day after school while my mom was working there. Ken would give me some money for helping do these things. He gave me the same amount of money all the time. He gave me a dollar. Sometimes he would give me about two or three, depending on how much work I had done. No one other than Ken ever gave me money there. . . .

Sylvia Tucker's testimony was somewhat to the same effect. Plaintiffs' argument that the court's findings are against the greater weight of the evidence and that the evidence more strongly indicates that the boy was not an employee, casual or otherwise, and the payments made were gratuities for services voluntarily rendered, while appealing, is irrelevant. Under our law the test in circumstances like this is not what the greater weight of the evidence shows; the test is whether the facts found by the authorized finder are supported by competent evidence, *Davison v. Duke University, supra*, and it matters not that other facts could have been found just as easily.

Nor did the court misapply the law in concluding that the child was a casual employee under the Workers' Compensation Act. G.S. 97-2(2) defines the word "employee" in part as follows:

> [E]very person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, . . .

Though the statute does not define casual employment an eminent authority in this field has said "[e]mployment is 'casual' when it is irregular, unpredictable, sporadic and brief in nature." 1C A. Larson, Workmen's Compensation Law Sec. 51.00 (1982). Under the facts found, it seems plain that the child's employment was at least casual. It is also plain that his employment is not excluded by the statute, since the work that he did was required in the operation of defendant's business. And that the child was too young to be *lawfully* employed is irrelevant, as the statute plainly states.

Affirmed.

Judge JOHNSON concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not believe the evidence will support a finding that Jonathan Shane Tucker was an employee of the defendant.

IN THE MATTER OF THE ESTATE OF ROBERT DIEGO PROCTOR, DECEASED

No. 8510SC708

(Filed 4 March 1986)

Executors and Administrators § 37— litigation expenses of wrongful death action —not allowable as cost of estate

The superior court properly denied a petition by a personal representative for authorization of payment of litigation expenses incurred in connection with a wrongful death action concerning the deceased where the petition was filed prior to the 5 July 1985 amendment to N.C.G.S. 28A-18-2(a) which authorizes the payment of such expenses, excluding attorney fees, from the assets of deceased's estate.

APPEAL by petitioner from *Bailey, Judge.* Order entered 17 April 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 3 December 1985.

Crisp, Davis, Schwentker, Page & Currin by Robert B. Schwentker; and Farris & Farris by Thomas J. Farris for petitioner appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog by Ronald C. Dilthey and David H. Batten for respondent appellee.

COZORT, Judge.

Petitioner appeals the superior court's denial of her petition for the authorization of payment of litigation expenses out of the deceased's estate for expenses incurred in connection with a wrongful death action concerning the deceased. We affirm.

Petitioner appellant, Janet M. Proctor, is the mother of the deceased, Robert Diego Proctor, and is the executrix of his estate. He died by electrocution in a boating accident on 5 June 1982. The beneficiaries of the estate are the two minor children of the deceased who inherit under a testamentary trust wherein peti-

tioner appellant is named as the trustee. As the personal representative of the estate, petitioner appellant has retained legal counsel and has pursued wrongful death actions against certain defendants in state and federal court.

Respondent appellee, Rebecca K. Proctor, is the mother and natural guardian of Derek Ross Proctor and Erwin Noel Proctor, the minor children of the deceased.

Petitioner filed a petition for the authorization of payment of litigation expenses incurred in connection with a wrongful death action concerning the deceased. The petition was filed on 30 November 1984, in the nature of a special proceeding before the Clerk of Superior Court of Wake County. After due notice and service, a hearing was held on 6 December 1984 before the Honorable J. Russell Nipper, then Clerk of Superior Court of Wake County. The clerk heard the matter upon stipulated facts and heard testimony of John McNeill Smith, one of the attorneys who represents the petitioner in the wrongful death action. By order filed 1 February 1985, the clerk denied the petition. In the order denying the petition the clerk found and concluded that, while the litigation expenses now due are reasonable, such expenses are not debts or obligations of the deceased's estate. Thus, the clerk concluded that "the petition of Janet Mead Proctor, Executrix of the estate of Robert Diego Proctor for approval of payment of expenses for litigation should be denied."

Petitioner appealed the clerk's ruling to the superior court. The matter was heard before Judge Bailey who, by order filed 17 April 1985, affirmed the clerk's order. Appellant and appellee agree that this appeal presents one issue for our consideration: Whether the personal representative [executrix] of an estate may pay the reasonable and necessary costs of litigation from the estate in pursuing a wrongful death claim? The answer to this question, as we shall show, has been addressed by our Legislature.

An action for wrongful death may be brought only by the personal representative or collector of the decedent. G.S. 28A-18-2(a); *see Burcl v. North Carolina Baptist Hospital*, 306 N.C. 214, 293 S.E. 2d 85 (1982). In pursuing a wrongful death action, however, the personal representative of a decedent's estate is not acting for the estate but as trustee for those entitled to recover

under the law. *See In re Estate of Below*, 12 N.C. App. 657, 660, 184 S.E. 2d 378, 381 (1971). A recovery resulting from a wrongful death action is not an asset of the deceased's estate. *Id.*, 12 N.C. App. at 659, 184 S.E. 2d at 380. This is so because "[a] cause of action for wrongful death, being conferred by statute, at death, could never have belonged to the deceased." *Id.* The proceeds of any recovery from a wrongful death action are to "be distributed to the same persons, and in the same proportionate shares, as the personal property of the decedent, remaining after the payment of all debts and other claims and expenses of administration, would be distributed if the decedent died intestate." *Williford v. Williford*, 288 N.C. 506, 509, 219 S.E. 2d 220, 222-23 (1975); G.S. 28A-18-2(a). Therefore, if the deceased dies testate, those persons entitled to share in his estate may not be the same as those entitled under the Intestate Succession Act to share in the proceeds of a wrongful death action recovery.

In any event, on 5 July 1985, after the petitioner's request for payment of litigation expenses had been denied in the court below, the Legislature amended G.S. 28A-18-2(a) by adding, after the first sentence, the following:

> 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 attorneys' fees, incurred in pursuing the 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.

1985 N.C. Sess. Laws Ch. 625, Sec. 1. The amendment was effective on 5 July 1985. *Id.* at Sec. 2.

With the amendment of G.S. 28A-18-2(a) the Legislature has chosen to allow reasonable and necessary expenses, excluding attorneys' fees, incurred in pursuing a wrongful death action to be paid from the assets of the deceased's estate. If there is any recovery from the wrongful death action, the recovery must first be applied to reimburse the estate for the expenses paid from its assets in pursuing the action.

Prior to the 5 July 1985 amendment to G.S. 28A-18-2(a) there was no statutory authority for paying out of a decedent's estate the reasonable and necessary expenses incurred in pursuing a wrongful death action. Thus, on 1 February 1985 the clerk properly denied appellant's petition for the authorization of the payment of litigation expenses out of decedent's estate, and the superior court was correct in affirming the clerk's order. Since, at the time the petition was denied, there was no statutory authority for paying the wrongful death litigation expenses out of decedent's estate, we affirm the denial of the petition.

Appellant urges this Court to find the 5 July 1985 amendment to G.S. 28A-18-2(a) retroactive and applicable to the instant case. This we decline to do. A statute is to be given prospective effect only and is not to be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from its terms. *Housing Authority of Durham v. Thorpe*, 271 N.C. 468, 157 S.E. 2d 147 (1967), *rev'd on other grounds*, 393 U.S. 268, 21 L.Ed. 2d 474, 89 S.Ct. 518 (1969). If the Legislature had wanted to make the 5 July 1985 amendment to G.S. 28A-18-2(a) retroactive, it could have stated so in the amendment. In declining to make the amendment retroactive, we note, however, that there is now nothing to prevent appellant from filing a *new* petition seeking to have those same expenses paid from the deceased's estate.

Affirmed.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. JOHN TERRY ABNEY

No. 8526SC881

(Filed 4 March 1986)

Criminal Law § 134.2— judgment signed out of term—no implied consent—null and void

An order dismissing the charges against defendant with prejudice was null and void because it was signed twelve days after adjournment of the term in which the motion was heard even though neither party objected nor asked

the judge to render his decision during the term when the judge stated that he would take the matter into consideration.

Judge PHILLIPS dissenting.

APPEAL by the State from *Snepp, Judge*. Order entered 12 March 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 January 1986.

This is an appeal by the State from an order dismissing charges against defendant with prejudice. The following facts are not in controversy. On 9 February 1981, defendant was indicted on two counts of felonious breaking and entering and two counts of felonious larceny. Defendant failed to appear for trial on 6 May 1981, whereupon an order for his arrest was issued. On 8 June 1981, the State entered a dismissal with leave to the charges because of defendant's failure to appear and the belief that defendant could not readily be found.

Defendant was arrested in Texas 25 June 1981, and charged with an offense in the state of Texas of which he was subsequently convicted and sentenced to the Texas Department of Corrections. The Assistant District Attorney of Mecklenburg County in charge of defendant's case became aware of defendant's whereabouts around the middle of July 1981, at the earliest, or the middle of August 1981, at the latest. At the request of the Mecklenburg County Sheriff's Department, the Harris County Texas authorities placed a "hold" on defendant and so notified Mecklenburg County.

In November 1981, defendant, then in the custody of the Texas Department of Corrections, prepared a request for trial under the Interstate Agreement on Detainers, forwarded it to the prison authorities, with a request that, after the proper documents had been attached, it be forwarded to the Mecklenburg District Attorney. The Texas prison authorities notified defendant that as of 11 November 1981, no detainer had been filed, but that his request would be forwarded to Mecklenburg County authorities as soon as a detainer was filed. No detainer was ever filed by the district attorney.

Defendant was paroled by the State of Texas on 7 June 1982. In January 1983, defendant returned to the State of North Caro-

lina. On 25 December 1984, defendant was arrested pursuant to the order of arrest issued 6 May 1981.

On 28 February 1985, defendant filed a motion to prohibit the State from prosecuting him on the ground that his constitutional right to a speedy trial has been denied under the sixth and fourteenth amendments to the United States Constitution and under article I, sec. 23 of the Constitution of North Carolina.

The district attorney reinstituted the charges at the time defendant's motion was called for hearing on 28 February 1985. After the hearing on 28 February, Judge Snepp announced, "Let me take this [matter] into consideration." Neither party objected nor requested the judge to render his decision during the term. On 12 March 1985, Judge Snepp entered his order dismissing the charges with prejudice. The State appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General William N. Farrell, Jr., for the State appellant.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant appellee.

JOHNSON, Judge.

By its first Assignment of Error the State contends that the order signed by Judge Snepp on 12 March 1985 is null and void because it was entered out of session without agreement of the parties.

We take judicial notice that Judge Snepp was assigned to hold the 25 February 1985 Schedule D Mixed term of Superior Court, Mecklenburg County. This term of court was scheduled for one week and was not extended. Court was adjourned on 28 February after this case was heard. The order in question was entered 12 March 1985, twelve days after adjournment of the term in which the motion was heard.

In *State v. Boone*, 310 N.C. 284, 311 S.E. 2d 552 (1984), the Court stated that:

> [J]udgments and orders 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 our decisions on the subject

> are to the effect that, *except by agreement of the parties* or by reason of some express provision of law, *they cannot be entered otherwise*, and assuredly not in another district and without notice to the parties interested.

Boone, at 287, 311 S.E. 2d at 555 (quoting *State v. Humphrey*, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923)) (emphasis ours).

Defendant argues that since neither party objected to Judge Snepp's failure to render a decision during the term, "the trial court reasonably interpreted the silence as consent by both parties to a delay in the decision," even to the extent of rendering the decision out of term.

But for this Court's recent holding in *State v. Reid*, 76 N.C. App. 668, 334 S.E. 2d 235 (1985), we believe that the parties' silence and passive conduct, to wit: failing to request the judge to render a decision during the term or failing to object to the judge's failure to render a decision before adjourning court could reasonably be interpreted as implied consent and agreement for Judge Snepp to take such time as he found appropriate in considering the matter and rendering his decision, even out of term. This is particularly so in light of (a) the judge's statement and (b) knowledge of the parties of their right to have the judge render his decision during the term unless otherwise agreed to by the parties.

In that we are bound to follow the holding in *Reid, supra*, we are compelled to vacate the order in question and remand the case. In *Reid* the trial judge, after conducting a hearing, stated, "I'm going to take this matter under advisement. We're going to be in recess—we're going to be adjourned." *Id.* at 669, 334 S.E. 2d at 235. Neither party objected to the judge's failure to render a decision before adjourning court. This Court held that the parties' failure to object did not constitute implied consent to the order being entered out of term. *Reid, supra.*

The order entered 12 March 1985, twelve days after the term of Superior Court when the matter was scheduled and heard, is null and void. The order is vacated and the cause is remanded to Superior Court, Mecklenburg County, for a new hearing on defendant's petition filed 28 February 1985.

In holding that the order is null and void, we do not reach the State's remaining Assignment of Error.

Vacated and remanded.

Chief Judge HEDRICK concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I do not believe that this case is controlled by *State v. Reid, supra.* The circumstances here are different and in my opinion tend to show the implied consent of the parties for the judge to sign the order after the term ended.

RUBEN L. YORK v. MICHAEL TAYLOR AND WIFE, GLORIA TAYLOR

No. 8521DC828

(Filed 4 March 1986)

1. **Appeal and Error § 16; Rules of Civil Procedure § 52— motion to amend findings of fact—jurisdiction after notice of appeal**

The trial court is not divested of jurisdiction to hear and rule on an N.C.G.S. 1A-1, Rule 52(b) motion for amended and additional findings of fact even though notice of appeal has been given.

2. **Appeal and Error § 16; Rules of Civil Procedure § 60— relief from judgment—motion filed with notice of appeal—jurisdiction of trial court**

The trial court had jurisdiction to rule on a motion for relief from judgment pursuant to N.C.G.S. 1A-1, Rule 60(b) filed contemporaneously with a notice of appeal.

3. **Rules of Civil Procedure § 60.4— motion for relief from judgment—failure to find essential facts**

The trial court erred in denying plaintiff's motion for relief from judgment against him on defendant's counterclaim where the trial court made no findings of fact resolving the critical issues as to whether plaintiff was entitled to relief from judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect" and whether plaintiff had a meritorious defense to defendants' counterclaim.

APPEAL by plaintiff from *Harrill, Judge*. Judgment entered 10 October 1984 in District Court, FORSYTH County. Heard in the Court of Appeals 3 February 1986.

This is a civil action wherein plaintiff seeks to recover from defendants $3,500.00 allegedly due on the selling price of a motor home allegedly sold by plaintiff to defendants. Plaintiff's complaint was filed on 30 December 1983. On 30 March 1984, defendants filed an amended answer admitting that they agreed to purchase the motor home from plaintiff if it was in good condition but denying that they owed further payment to plaintiff because the vehicle had been damaged extensively by fire. Defendants also alleged a counterclaim seeking damages for unfair and deceptive trade practices. The amended answer and counterclaim was served on plaintiff on 30 March 1984. On 20 August 1984, the clerk entered default against plaintiff, on the grounds that plaintiff had failed to file a reply to the counterclaim. On 29 August 1984, plaintiff made a motion to amend his pleadings to file a reply to defendants' counterclaim. On 10 September 1984, plaintiff made a motion to set aside the entry of default. On 10 October 1984, the trial judge denied both motions and entered default judgment in favor of defendants against plaintiff in the amount of $17,137.02, which was treble the defendants' provable damages, and punitive damages of $10,000.00. On 19 October 1984, plaintiff gave notice of appeal and filed a motion pursuant to G.S. 1A-1, Rule 52(b) for amended and additional findings of fact. Plaintiff also filed a motion pursuant to G.S. 1A-1, Rule 60(b) for relief from judgment. On 23 April 1985, the trial judge denied plaintiff's motions for amended and additional findings of fact and for relief from judgment. From this order, plaintiff appealed.

Harrell Powell, Jr., and Garry Whitaker for plaintiff, appellant.

James H. Early, Jr., for defendants, appellees.

HEDRICK, Chief Judge.

[1, 2] The notice of appeal from the default judgment for defendants with respect to plaintiff's claim and defendants' counterclaim against plaintiff was filed at the same time as plaintiff's Rule 52(b) motion for amended and additional findings of fact and Rule 60(b) motion for relief from judgment. The trial court is not divested of

jurisdiction to hear and rule on a Rule 52(b) motion even though notice of appeal has been given. *Parrish v. Cole*, 38 N.C. App. 691, 248 S.E. 2d 878 (1978). The trial court does not have jurisdiction, however, to rule on motions pursuant to Rule 60(b) where such motion is made after the notice of appeal has been given. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971), *reh. denied*, 281 N.C. 317 (1972). From our research, we have discovered no cases with respect to whether the trial court has jurisdiction to rule on Rule 60(b) motions that are filed contemporaneously with the notice of appeal. We do have, however, precedent holding that the appellate court is the proper place to file Rule 60(b) motions while the case is pending appeal. *Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (1980). Moreover, in *Swygert* this Court remanded a Rule 60(b) motion filed in this Court pending appeal to the trial court for a hearing and determination on the questions and issues raised by the motion. It would be incongruous for us to say that the trial court had jurisdiction to rule on a Rule 52(b) motion but was divested of jurisdiction to hear a Rule 60(b) motion filed at the same time. This is especially true since we have the authority to remand the Rule 60(b) motion to the trial court for a hearing and determination pending appeal. *Id.* Therefore, under the circumstances of this case, we hold that the trial court had jurisdiction to rule on plaintiff's Rule 60(b) motion.

[3] We therefore address the question of the correctness of the trial court's ruling denying plaintiff's Rule 60(b) motion. It is the duty of the trial court in ruling on a Rule 60(b) motion to make findings of fact and to determine from such facts whether the movant is entitled to relief from such judgment or order. *Hoglen v. James*, 38 N.C. App. 728, 248 S.E. 2d 901 (1978). Although the record indicates that a hearing was conducted, at which plaintiff's counsel was not present, the trial court made no findings of fact resolving the critical issues as to whether plaintiff was entitled to relief from judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect" and whether plaintiff had a meritorious defense to defendants' counterclaim.

We therefore vacate the order denying plaintiff's motion and remand the case to the district court for a new hearing and ruling on all issues raised by the 60(b) motion.

There are, pending in this Court, rulings on defendants' motion to dismiss plaintiff's appeal, plaintiff's petition for writ of certiorari and other questions relating to plaintiff's appeal which are not yet resolved, and if these questions are not rendered moot by the trial court's ruling on plaintiff's 60(b) motion, *see, Beard v. Pembaur*, 68 N.C. App. 52, 313 S.E. 2d 853, *cert. denied*, 311 N.C. 750, 321 S.E. 2d 126 (1984), we will, on motion of plaintiff, reinstate these unresolved questions in our calendar for disposition. The order denying plaintiff's Rule 60(b) motion is vacated and the case is remanded for further proceedings.

Order vacated and remanded.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. LEE MARVIN HAISLIP

No. 852SC1059

(Filed 4 March 1986)

Automobiles and Other Vehicles § 130.1 — DWI — second offense — aggravating factor — properly considered

The trial court did not err when sentencing defendant for driving while impaired by considering a prior DUI conviction as a grossly aggravating factor under N.C.G.S. 20-179(c) where defendant did not meet his statutory burden of proving that he was indigent or that he did not waive counsel at the time of the prior conviction in that a statement by defendant's counsel was not evidence of indigency and the lack of a written waiver in the court file of the prior conviction was not alone sufficient to prove that defendant did not waive counsel. N.C.G.S. 15A-1334(b).

APPEAL by defendant from *Watts, Judge*. Judgment entered 1 May 1985 in Superior Court, MARTIN County. Heard in the Court of Appeals 11 February 1986.

Attorney General Lacy H. Thornburg by Assistant Attorney General David Roy Blackwell for the State.

Thomas B. Brandon III for defendant appellant.

COZORT, Judge.

Defendant appeals the trial court's imposition of Level Two punishment, upon his conviction of driving while impaired, pursuant to G.S. 20-179(c) and (h). We affirm.

On 1 May 1985 defendant was convicted of driving while impaired in violation of G.S. 20-138.1. Pursuant to G.S. 20-179(o), the State presented evidence showing the defendant pled guilty to driving under the influence (hereinafter "D.U.I.") on 23 November 1981, in the district court in Martin County. At trial defendant's attorney elicited from the defendant that when he pled guilty to D.U.I., he was not represented by counsel. On appeal the parties have stipulated that the court file of the defendant's 23 November 1981 D.U.I. conviction record does not contain a written waiver of counsel form executed by the defendant. At the sentencing hearing defendant's attorney stated to the court that at the time of defendant's 1981 D.U.I. conviction defendant was indigent. Judge Watt found as a grossly aggravating factor under G.S. 20-179(c) the defendant's prior D.U.I. conviction and imposed Level Two punishment pursuant to G.S. 20-179(h).

On appeal defendant argues that "the trial court committed reversible error in finding a grossly aggravating factor present based upon the defendant's prior conviction for D.U.I. when the record indicates that the defendant pled guilty to his first and only prior D.U.I. when he had been indigent, not represented by counsel, and had not waived his right to court appointed counsel."

G.S. 20-179(o) governs the use of prior convictions to aggravate punishment under the Safe Roads Act of 1983. The statute provides:

> Evidentiary Standards; Proof of Prior Convictions.—In the sentencing hearing, the State must prove any grossly aggravating or aggravating factor by the greater weight of the evidence, and the defendant must prove any mitigating factor by the greater weight of the evidence. Evidence adduced by either party at trial may be utilized in the sentencing hearing. Except as modified by this section, the procedure in G.S. 15A-1334(b) governs. The judge may accept any evidence as to the presence or absence of previous convictions that he finds reliable but he must give prima facie effect to convic-

> tions recorded by the Division or any other agency of the State of North Carolina. A copy of such conviction records transmitted by the police information network in general accordance with the procedure authorized by G.S. 20-26(b) is admissible in evidence without further authentication. If the judge decides to impose an active sentence of imprisonment that would not have been imposed but for a prior conviction of an offense, the judge must afford the defendant an opportunity to introduce evidence that the prior conviction had been obtained in a case in which *he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves by the preponderance of the evidence all three above facts concerning the prior case, that conviction may not be used as the basis for imposing an active sentence of imprisonment.* [Emphasis added.]

Under this statute once the State has proven by the greater weight of the evidence a prior D.U.I. conviction, defendant has the burden of proving by the preponderance of the evidence that in the case of the prior conviction (1) he was indigent; (2) he had no counsel; and (3) he had not waived counsel. If defendant meets his burden on *all* three facts, then the prior conviction may not be used as a basis for imposing an active sentence. Evidence adduced by either party at trial may be used at the sentencing hearing, G.S. 20-179(o), and the formal rules of evidence do not apply. G.S. 15A-1334(b).

Defendant argues that the trial court erred in using his prior D.U.I. conviction as a basis for imposing Level Two punishment because there was evidence that defendant was indigent, had no counsel, and had not waived his right to counsel. Upon reviewing the record, we find no evidence that defendant was indigent or that he did not waive counsel. While the formal rules of evidence do not apply at a sentencing hearing, the statement by defendant's counsel that defendant was indigent at the time of his 1981 D.U.I. conviction is not evidence. *State v. Albert*, 312 N.C. 567, 579, 324 S.E. 2d 233, 240-41 (1985). Defendant did not meet his statutory burden of proving that he was indigent.

Nor did defendant meet his statutory burden of proving that he did not waive counsel. While the State stipulated that the file of the prior conviction contains no written waiver of counsel, the

State did not stipulate that defendant did not waive counsel. It does not appear from the record that this stipulation was presented to the trial judge though it appears from the record that the trial judge reviewed the file. Defendant offered no other evidence that he did not waive counsel. In any event, we hold the fact that the court file of a prior conviction contains no written waiver of counsel, standing alone, is not sufficient to satisfy defendant's burden of proving he did not waive counsel. Here defendant could have filed a motion to suppress evidence of the prior conviction pursuant to G.S. 15A-980 and testified on voir dire as to his indigency and that he did not waive counsel. This he did not do.

The judgment of the trial court is

Affirmed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. GEORGE ANTHONY MORRIS

No. 8526SC632

(Filed 4 March 1986)

1. Larceny § 6.1— value of property stolen—replacement value not proper method

Replacement value is not the proper method for determining value under the larceny statute, N.C.G.S. 14-72. Rather, the proper measure of value is the price the stolen goods would bring in the open market in the condition they were in at the time they were stolen.

2. Larceny § 8— felonious larceny case—incompetent evidence of value—failure to instruct on misdemeanor larceny

The trial court in a felonious larceny case did not err in refusing to instruct the jury on the lesser included offense of misdemeanor larceny, notwithstanding the only evidence to show that the stolen property exceeded $400 in value was incompetent evidence of replacement value, where defendant failed to object to such evidence, and there was no evidence that the value of the stolen goods was less than $400.

Judge BECTON dissenting.

State v. Morris

APPEAL by defendant from *Friday, Judge.* Judgment entered 19 February 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 October 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General David E. Broome, Jr., for the State.

Public Defender Isabel Scott Day by Assistant Public Defender Gail M. Phillips for defendant appellant.

COZORT, Judge.

The defendant was convicted, upon an indictment proper in form, of felonious larceny and was sentenced to four years in prison. Defendant was acquitted of felonious breaking and entering. The defendant appealed his conviction assigning error to the trial court's refusal to instruct the jury on the lesser included offense of misdemeanor larceny. We hold that the judge's failure to instruct on the lesser included offense was not error. The evidence follows.

On 6 July 1984 at approximately 2:15 a.m., the defendant was observed by Officer R. S. Miller of the Charlotte Police Department pushing a lawn mower and edger down Cove Creek Road in Charlotte near The Plaza. Officer R. L. Matthews also observed the defendant with a lawn mower and edger in the Cove Creek area. Officer Matthews stopped the defendant and questioned him. The defendant told Officer Matthews that he borrowed the items from a friend in the area. After further investigation it was discovered that a lawn mower and edger were missing from the Gouch residence at 5827 The Plaza. Mr. Charles Gouch identified the stolen items as a "Lawn Boy" mower and a "Sears" edger. Gouch testified that the replacement value for the two items was $500.00. No other evidence as to value was presented at trial.

The sole issue presented on appeal is whether the trial court erred by refusing to instruct the jury on the lesser included offense of misdemeanor larceny where the only evidence as to the value of the stolen items was an estimated replacement value.

[1, 2] G.S. 14-72 provides that one is guilty of felonious larceny if he commits larceny after a breaking or entering or if the property taken exceeds $400.00 in value. Defendant argues that replacement value is not the proper method for determining value under

G.S. 14-72. We agree. The proper measure of value is the price the stolen goods would bring in the open market in the condition they were in at the time they were stolen, not their replacement value. *State v. Stafford*, 45 N.C. App. 297, 299, 262 S.E. 2d 695, 696 (1980); *State v. Dees*, 14 N.C. App. 110, 187 S.E. 2d 433 (1972). However, in this case Gouch's statement as to value was admitted into evidence without an objection or a motion to strike by the defendant. Incompetent evidence, if not objected to, can be sufficient to take the case to the jury. *State v. Haney*, 28 N.C. App. 222, 220 S.E. 2d 371 (1975). There was no evidence that the value of the stolen goods was less than $400.00; therefore it was not prejudicial error to fail to instruct the jury on misdemeanor larceny. *Id.; cf. State v. Rick*, 54 N.C. App. 104, 106, 282 S.E. 2d 497, 499 (1981). (Evidence of value was properly objected to and the trial court should have instructed on misdemeanor larceny.)

No error.

Judge WEBB concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Mr. Gouch testified that he had owned the lawn mower and edgers for two years but had no recollection of the price he paid for the items originally. Considering this testimony and the absence of evidence relating to the condition of the two-year-old stolen property, the jury could have rejected the unobjected-to replacement value testimony as easily as it could have accepted it. In its instructions to the jury, the trial court stated: "[defendant] denies the property is worth this amount [$400.00] of money." Because the jury could have found from the evidence and the reasonable inferences therefrom that the value of the stolen items did not exceed $400.00, I believe the trial court erred in refusing to give the tendered instruction on misdemeanor larceny. *See State v. Rick*, 54 N.C. App. 104, 106, 282 S.E. 2d 497, 499 (1981). I, therefore, vote for a new trial.

VON ALLEN AND WIFE, SAVANNAH F. ALLEN AND JUNE D. ALLEN v. THE HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 8519SC810

(Filed 4 March 1986)

1. Insurance § 140— windstorm insurance—evidence excluded—no error

In an action under an insurance policy for wind damage to the roof of a building, there was no prejudice in the exclusion of evidence that an unidentified person who represented himself to be some kind of insurance agent looked at the building but made no comment about it because its admission would not have affected the verdict; excluded evidence that another insurance company paid for storm damage done to property not involved in this case had no tendency to show that plaintiffs' property was similarly damaged and that defendant was similarly obligated; and excluded evidence that cars situated in the building during the storm were damaged and that plaintiffs lost rental income as a consequence of the storm was irrelevant to plaintiffs' suit because neither the cars nor the rentals were covered by the insurance policy.

2. Negligence § 30.1— insurance claim for wind damage—negligent failure to repair test holes cut in roof—evidence insufficient

The trial court did not err by directing a verdict against plaintiffs on a negligence claim arising from defendant insurance company's allegedly negligent failure to properly repair test holes cut in plaintiffs' roof where no evidence was presented that plaintiffs were damaged as a consequence.

APPEAL by plaintiffs from *Helms, Judge.* Judgment entered 27 February 1985 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 6 December 1985.

Plaintiffs assert two claims against defendant—one under an insurance policy for wind damage sustained by their building, the other for negligently damaging the insured building while investigating the claim. At trial both claims were dismissed, the negligence claim by a directed verdict and the insurance claim by judgment after the jury found that plaintiffs' building was not damaged by wind. Plaintiffs' evidence tended to show that their building was in good condition before a violent windstorm rippled and folded back the roof, and that both roof and building were further damaged by a heavy rain which accompanied the wind; that two or three small test holes were cut in the roof at defendant's direction, the holes were not refilled or patched properly, and later rains seeped into the roofing materials, causing the roof to collapse. Defendant's evidence tended to show that for more than a year before the storm the roof was waterlogged, sagging

and in a rotting condition, and that the storm was not nearly as severe as plaintiffs' witnesses claimed.

Hollers & Atkinson, by Russell J. Hollers, for plaintiff appellants.

Tuggle, Duggins, Meschan & Elrod, by Arthur A. Vreeland, for defendant appellee.

PHILLIPS, Judge.

[1] By four of their five assignments of error plaintiffs contend that in trying the insurance claim the court erred in excluding or refusing to receive evidence that was material to their case. None of these contentions have merit and we overrule them. One bit of evidence not received was that before the policy was issued an unidentified person who represented himself to be some kind of insurance agent looked at the building, but made no comment about it. Even if this evidence tends to show, as plaintiffs contend, that the roof was in good condition, since defendant thereafter insured the building, it does so so slightly and indirectly and with such weak probative force that its admission could not have affected the verdict in our opinion. Another bit of evidence, that another insurance company paid for storm damage done to property not involved in this case, had no tendency to show that plaintiffs' property was similarly damaged and that defendant was similarly obligated. The other evidence excluded—that some cars situated in the building during the storm were damaged and that plaintiffs lost rental income as a consequence of the storm—was irrelevant to plaintiffs' suit as neither the cars nor the rentals were covered by the insurance policy.

[2] Plaintiffs' fifth assignment of error, likewise without merit, is for the court directing a verdict against them on the negligence claim. Assuming *arguendo* that their evidence does tend to show that defendant negligently failed to properly repair the test holes cut in the roof, no evidence was presented that plaintiffs were damaged as a consequence. Though plaintiffs did present testimony that before the storm their building had a fair market value of between $70,000 and $75,000 and that immediately after the storm its value was only $20,000, no evidence was presented as to the value of the building after the roof collapsed. The only other evidence as to costs or values was that after the roof fell it would

have cost $40,000 to remove and replace it; but this evidence was also left dangling and unsupported since plaintiffs failed to show that before the test holes were cut the roof could have been repaired or replaced for less than that. For that matter no evidence was presented that the roof was repairable at any cost before the test holes were cut. Thus, while it can be surmised that plaintiffs suffered some pecuniary damage because the test holes were not properly refilled, no evidence recorded tends to show that that is the case.

No error.

Judges WHICHARD and JOHNSON concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY OTTER POND INVESTMENT GROUP, LIMITED, DATED AUGUST 31, 1983, RECORDED IN BOOK 358, PAGE 422, MOORE COUNTY REGISTRY, BY J. ALLEN HARRINGTON, TRUSTEE

No. 8520SC822

(Filed 4 March 1986)

Mortgages and Deeds of Trust § 32— mortgagor as defaulting bidder—not entitled to prove worth of foreclosed property

A mortgagor who was a defaulting bidder at the original foreclosure sale was not entitled to prove that the foreclosed property acquired by the creditors at a second sale was worth the sum that it owed them after the difference between the mortgagor's defaulted bid and the final sale price was deducted from the mortgagor's bid deposit pursuant to N.C.G.S. 45-21.30(d). N.C.G.S. 45-21.36.

APPEAL by respondent Otter Pond Investment Group, Limited from *Collier, Judge.* Order entered 30 April 1985 in Superior Court, MOORE County. Heard in the Court of Appeals 6 December 1985.

Harrington & Gilleland, by J. Allen Harrington, for petitioner appellees.

Thigpen & Evans, by John B. Evans, for respondent appellant Otter Pond Investment Group, Limited.

PHILLIPS, Judge.

This foreclosure proceeding to sell real property is based on the failure of Otter Pond Investment Group, Limited to pay its $2,500,000 secured note when due. The proceeding progressed in due course and when the secured realty was first offered for sale the debtor-mortgagor ended up as the highest bidder at a price of $2,336,300, in support of which it deposited $111,300 with the Clerk of Superior Court. But Otter Pond thereafter refused to complete the purchase and the property was duly re-advertised and resold for $2,230,000—$106,300 less than the defaulted bid. This sale, to one of the creditor-noteholders, was duly completed and confirmed. Thereafter, the Clerk of Superior Court, pursuant to the petition of the foreclosing trustee, ordered that $106,300 of the $111,300 deposit be turned over to the trustee for distribution as the law provides, and that the remaining $5,000 of the deposit, less the trustee's costs in reselling the property, be returned to Otter Pond. Upon appeal to the Superior Court the order was affirmed.

The deductions made from the defaulting bidder's deposit were expressly authorized by G.S. 45-21.30(d), which provides that a "defaulting bidder at any sale or resale . . . shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales," and the appellant does not contend otherwise. Its sole contention is that the court erred in depriving it of the right, authorized by G.S. 45-21.36, to prove that the foreclosed property acquired by the creditors was worth the sum that it owed them. This contention has no merit for two reasons. First, G.S. 45-21.36 permits such proof only in a suit against a mortgagor, trustor, or other maker for a deficiency judgment, and this is not a suit of any kind, but a foreclosure proceeding. Second, by its very terms, G.S. 45-21.36 has no application "to foreclosure sales made pursuant to an order or decree of court," and the foreclosure sale made in this proceeding was pursuant to an order of court. Furthermore, even if the appellant had had the right to present evidence as to the value of the property sold, nothing in the record shows either that the appellant offered to present such evidence or that the court refused to receive it.

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. MELVIN CECIL MOORE AND BILLY DEAN TRANSEAU

No. 8523SC871

(Filed 18 March 1986)

1. **Searches and Seizures § 23— search warrant—probable cause—marijuana field—people exiting house near field**

An affidavit of a detective in the sheriff's department was sufficient to support a finding of probable cause to support issuance of a search warrant where the affidavit showed that the officer had been to an area of Wilkes County and observed a field of growing marijuana and people coming out of a house near the field, and the magistrate had a substantial basis for concluding there was a fair probability that marijuana was in the house and that the house near the marijuana field was related to the field.

2. **Searches and Seizures § 44— motion to suppress evidence—failure to make findings of fact**

The trial court did not err in failing to make findings of fact before denying defendants' motions to suppress evidence seized from a house in rural Wilkes County pursuant to a search warrant since there was no conflict of evidence between the affiant's statements in his affidavit and testimony at trial.

3. **Criminal Law § 75.7— officers' questions to defendants—no warning of constitutional rights—answers admissible**

There was no merit to defendants' contentions that statements made by them to law officers should have been suppressed since they had not been warned of their constitutional rights and they had been unlawfully arrested where the officers had a map which showed a marijuana field close by and the map was in all other respects accurate; the house from which the officers had reason to believe the defendants had just left was as shown on the map; the officers had the right to detain defendants while one officer checked to see if the marijuana field was where the map indicated it would be; and officers could ask defendants questions concerning their identity and their business in the area.

4. **Criminal Law § 119— fingerprint evidence—request for instructions substantially complied with**

The trial court's instructions substantially complied with defendants' requested instructions that, as to each defendant, his silence was not to be con-

strued as evidence that his fingerprints could only have been impressed at the time the crime was committed and that neither of them had to explain the presence of his fingerprints.

5. Criminal Law § 113.7— acting in concert—instructions proper

In a prosecution of defendants for manufacturing and trafficking in marijuana by possessing more than 100 but less than 2,000 pounds, defendants were not prejudiced by the trial court's instruction that if the jury found that either of the defendants was in close proximity to the marijuana that would be a circumstance together with other circumstances from which the jury could infer that defendants were aware of the presence of marijuana and had the power and intent to control its disposition or use, since there was no objection to this portion of the charge; the other circumstances to be considered by the jury were amply stated in other parts of the charge; and in the instructions on acting in concert the court properly explained how the jury should consider evidence that one of the defendants was in proximity to the marijuana.

6. Narcotics § 4.3— constructive possession of marijuana—sufficiency of evidence

In a prosecution of defendants for manufacturing and trafficking in marijuana, evidence was sufficient to show that defendants had constructive possession of marijuana where it tended to show that both defendants were found at a house in which a substantial amount of marijuana was found; their fingerprints were found on items within the house; one defendant had in his possession a key which fit a gate across the road to the house and the door to the house; one defendant's truck was present on the premises and the truck contained twine identical to the twine used to tie marijuana plants to stakes in a field near the house and to twine found within the house; and the other defendant admitted that he looked after the place.

7. Criminal Law § 113.7— acting in concert—instruction proper

There was no merit to the contention of one defendant that the evidence at most showed that he was present at a house where a substantial amount of marijuana was found but that there was no evidence that he was present when the other defendant did some act which constituted the crime and that the trial court therefore erred in instructing on acting in concert, since there was evidence that both defendants were in the house in which there was a large quantity of marijuana and the jury could conclude from this that the two defendants acted together to possess the marijuana.

Judge PARKER concurring in the result.

APPEAL by defendants from *Wood, Judge*. Judgment entered 11 February 1985 in Superior Court, WILKES County. Heard in the Court of Appeals 10 February 1986.

The defendants were charged with trafficking in marijuana by possessing more than 100 pounds but less than 2,000 pounds and by manufacturing more than 100 pounds but less than 2,000 pounds. Each of the defendants moved to suppress evidence on

the ground that it was seized pursuant to an invalid search warrant. These motions were denied on the ground that the affidavit upon which the warrant was issued was proper on its face. The defendants then made motions to suppress the evidence on the ground that the supporting affidavit upon which the search warrant was based contained statements which were false.

A hearing on this motion was held prior to the trial. The evidence at this hearing showed that an unnamed informant gave a map to Reggie Blackburn, the Wilkes County Jailer, with instructions to give the map to Detective David Call or the Sheriff of Wilkes County. The map passed through several hands at the Sheriff's Department and was delivered to David Call. Mr. Call talked to the jailer who described the man who had delivered the map to him. From this description Mr. Call concluded the person was an informant who had previously furnished him with reliable information as to the location of a marijuana field. The map was a drawing of Brushy Mountain in Wilkes County which showed the location of a marijuana field.

On 8 November 1983 Mr. Call, accompanied by another deputy with the Wilkes County Sheriff's Department, went to the location described by the map. There was a logging road as shown on the map. They drove down the logging road approximately 50 feet to a locked steel cable which was shown on the map. They left their vehicle, crossed the cable, and continued down the logging road for approximately 500 feet. They observed tire tracks periodically as they continued. They encountered a locked aluminum gate across the road as the map indicated. After going around the gate and continuing some 300 to 400 feet, they located a four wheel drive truck, later identified to be owned by defendant Moore. Detective Call looked into the vehicle through its window and observed nothing unusual.

The officers decided to wait to see if anyone would return to the vehicle. From the officers' position they could observe both the vehicle and a two story white frame house, indicated on the map, which was 500 yards from their position. The map did not indicate that marijuana could be located in the house. The officers remained in that position some 20 to 30 minutes and heard noises coming from inside the house. They relocated within 250 to 300 yards of the house. The noises within the house sounded to Detec-

tive Call as if someone were throwing heavy objects onto a floor. After remaining in that position for some 20 to 30 minutes, the officers heard a loud slamming bang as if a screen door had shut. They immediately observed the two defendants on the back porch of the house. The officers lost sight of the defendants when they walked toward a barn near the house. The officers returned to a location near the truck. After some 20 to 30 minutes, the defendants reappeared walking toward the truck.

At that time the officers identified themselves and asked for identification from both defendants. Defendant Moore gave his driver's license and defendant Transeau gave either his driver's license or social security card to Detective Call. Detective Call then asked both defendants what they were doing there. Defendant Moore indicated that they were cutting wood. Moore then repeated that they were cutting wood or looking at timber. Call then asked what the defendants were doing in the house. Defendants denied being in the house except that Transeau indicated he had been in the house when he was a boy. Call then asked about the keys to the gates. Neither defendant answered the question. Call then asked who owned the property. Transeau indicated, among other things, that it was the old Busic place and "he sometimes looked after it."

The officers patted down the defendants either at the vehicle or after they all four walked down to the house and the officers obtained a pocketknife from Moore. Moore then asked what he was being held for and whether they were under arrest. Call informed the defendants that they had received information that a large marijuana field was located on the property and that they were investigating the possibility that defendants had broken into the house. At that time Call advised them of their *Miranda* rights. Call admits that the defendants had not previously been informed of their rights and that the defendants were never free to leave after they encountered them at the vehicle.

Detective Call left the defendants with Officer Summers so that he could see if marijuana was located where the map indicated. He took the winding logging road, which left the grassy area around the house, some 1,400 feet, approximately 1,000 feet from the house by a straight line, where he encountered a well-cultivated garden of marijuana plants in the road. The field was

not visible from the house or vice versa. He then returned to where he had left Summers and the defendants. He was unable to gain entrance into the front door of the house because it was locked and was unable to see into the house because the windows were covered over from within. The four went to the back of the house where the officers had observed the defendants previously. Call observed a screen door on the porch and a locked wooden door. Call asked for and obtained a key from Moore which unlocked the padlock. The key also unlocked the two padlocks on the cable and aluminum gate. After observing that the key unlocked the padlock Call locked it back.

The officers then called for assistance. Before help arrived, the four walked to the truck. Call searched the vehicle after gaining consent to do so by Moore. He observed, among other things, twine which was identical to that used to stake up the marijuana plants outside and later found inside the house. The officers transported the defendants to the Wilkes County Sheriff's Department after another officer arrived and stood sentry at the house.

Detective Call and Detective Nick Nixon prepared an affidavit for a search warrant for the house that same evening. Detective Call signed it prior to going to the magistrate. Call did not remember specific questions asked by the magistrate. The magistrate granted the warrant. The application contains the following sworn statement:

> Affiant has recieved [sic] information within the past 24 hrs from a confidental [sic] source that has given information in the past that has proven to be true and reliable that said confidental [sic] source has seen a quanity [sic] of marijuana growing in a wooded area at the above described location within the past 72 hars [sic] and that said confidental [sic] source has drawn a map describing the above described location and Affiant has been to the above described location and found it to be as described in the map. Affiant has recieved [sic] other information from other sources describing the above described location and that marijuana was growing there. Affiant has observed subjects in the and comming [sic] out of the above described residence near the marijuana

field. Affiant has also seen the above described marijuana. [sic] on 11-8-83.

Detective Call returned with other officers to the house and searched the premises. They located a large quantity of marijuana, a chain saw, and various other items. Defendant Moore's fingerprints were found in the house on a cracker box and on a plastic bag containing marijuana. Defendant Transeau's fingerprints were found in the house on a bottle and on a plastic bag containing marijuana.

The court overruled the motions to suppress the evidence obtained in the search. The jury found each defendant not guilty of trafficking by manufacturing and guilty of trafficking by possession of marijuana. Defendant Moore was sentenced to twelve years in prison and defendant Transeau to seven years in prison. Each defendant was fined $25,000.00. The defendants appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David S. Crump, for the State.

Dennis R. Joyce for defendant appellant Melvin Cecil Moore.

Brewer & Freeman, by Paul W. Freeman, Jr. for defendant appellant Billy Dean Transeau.

WEBB, Judge.

[1] Each of the defendants assigns error to the denial of his motions to suppress evidence seized pursuant to a search of the house. Each of the defendants made two motions to suppress. At a hearing on their first motions the court considered only the application for the search warrant in determining whether there was probable cause to issue the warrant. The appellants contend the affidavit of Mr. Call was not sufficient to support a finding of probable cause. The United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983) held that in issuing a search warrant:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying

> hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 238, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548.

In this case the affidavit shows that the officer had been to an area of Wilkes County and observed a field of growing marijuana. He stated he had observed persons coming out of a house near the field. We believe that the magistrate had a substantial basis for concluding there was a fair probability that marijuana was in the house.

The appellants argue that the affidavit does not contain any information from which anyone could reasonably relate the dwelling to be searched to the field of marijuana. We believe that the magistrate could conclude there is a fair probability that a house near a marijuana field in rural Wilkes County is related to the field. We hold that the court did not err in finding the application was sufficient for the magistrate to find there was a fair probability that marijuana was in the house.

[2] The appellants also contend in their first assignment of error that the court erred in not allowing their second motions to suppress. Evidence was received in the form of testimony from Mr. Call at the hearing on the defendants' second motions to suppress. The court did not make findings of fact but denied each defendant's motion. The defendants argue it was error for the court not to make findings of fact. Our Supreme Court has held it is not reversible error to fail to make findings of fact before admitting evidence after a hearing on a motion to suppress if there is not a material conflict in the evidence on voir dire. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). The appellants argue that there was a conflict in the evidence in this case because Mr. Call's testimony differed from the statements in his affidavit. For this reason they say it was error for the court not to find facts. We do not believe there was a conflict between the affidavit and Mr. Call's testimony. Mr. Call supplied in more detail in his testimony the facts which he set forth in the affidavit. He testified that the marijuana was 1,410 feet from the house. We do not believe this is inconsistent with his characterization of the house

as "near" the field in the affidavit. He testified he did not see the people come in or out of the house. He heard a door slam and then saw the defendants on the back porch. We do not believe this is inconsistent with his statement in the affidavit as to people coming from the house. In sum we do not believe the affidavit was so impeached by the showing at the second voir dire hearing that we should hold the magistrate could not have relied upon it. The appellants' first assignment of error is overruled.

[3] Each of the defendants contends that the statements made by them before they were warned of their rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) should have been suppressed because they had not been warned of their rights and because they had been unlawfully arrested. An officer may briefly detain a person if he can point to specific and articulable facts which justify a conclusion that a crime has probably been committed. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). He may then "ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. ---, ---, 104 S.Ct. 3138, 3150, 82 L.Ed. 2d 317, 334 (1984). We believe that in this case the officers could point to specific and articulable facts which justified their belief that a crime had been committed. They had a map which showed a marijuana field close by and the map in all other respects was accurate. The house from which the officers had reason to believe the defendants had just left was as shown on the map. The officers had the right to detain the defendants while Mr. Call checked to see if the marijuana field was where the map indicated it would be and the officers could ask the questions which were asked. This assignment of error is overruled.

The defendants assign error to the admission of evidence that their fingerprints were found on objects in the house. They base this argument on the premise that the search of the house was illegal. We have held it was a proper search. This assignment of error is overruled.

[4] The defendants next assign error to the failure of the court to give their requested jury instructions that as to each defendant his silence was not to be construed as evidence that his fingerprints could only have been impressed at the time the crime

was committed and that neither of them had to explain the presence of his fingerprints. The court instructed the jury that the defendants' silence was not to be considered against them in any way. It also instructed the jury that they could not consider the fingerprint evidence unless they were satisfied beyond a reasonable doubt as to each defendant that the fingerprints were his and could have been impressed only while the marijuana was in the house. We hold that this instruction substantially complied with the defendants' request and was not prejudicial to either of them.

The defendants next assign error to the admission of testimony by Mr. Call and by Nick Nixon, a deputy sheriff, regarding their opinions as to the weight of the marijuana. The defendants contend neither of the witnesses was qualified as an expert in "weight" and their testimony was hearsay because they gave the result of what was shown on a scale. We are bound by *State v. Singleton*, 33 N.C. App. 390, 235 S.E. 2d 77 (1977), to overrule this assignment of error.

[5] The defendants next assign error to the court's charge that if the jury found that either of the defendants was in close proximity to the marijuana that would be a circumstance together with other circumstances from which the jury could infer the defendants were aware of the presence of marijuana and had the power and intent to control its disposition or use. The defendants contend this was error because the jury was not told what other kinds of circumstances could be considered and that it allowed the jury to convict both defendants if they found one of them was in close proximity to the marijuana. There was no objection to this portion of the charge and it is not properly before us for review. North Carolina Rules of Appellate Procedure, Rule 10(b)(2). We do not believe it was error. We believe the other circumstances to be considered by the jury were amply stated in other parts of the charge. In the instructions on acting in concert we believe the court properly explained how the jury should consider evidence that one of the defendants was in proximity to the marijuana. This assignment of error is overruled.

The defendants next assign error to the court's overruling their motions to quash the bills of indictment. They argue that *State v. Sanderson*, 60 N.C. App. 604, 300 S.E. 2d 9, *disc. rev.*

den., 308 N.C. 679, 304 S.E. 2d 759 (1983) is a better-reasoned case than *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *disc. rev. den.*, 306 N.C. 559, 294 S.E. 2d 372 (1982) and ask us to overrule *Anderson*. This we decline to do. The defendant Moore also argues that he was first indicted for only one offense and possibly because of his vigorous defense he was one year later indicted for two offenses. He does not attack the form of the indictment. We cannot speculate as to why the State chose to indict Moore for two offenses rather than one. This assignment of error is overruled.

[6] The defendants next assign error to the court's overruling their motions to dismiss. The case was tried on the theory that the defendants had constructive possession of the marijuana. If a person has the intent and capability to maintain control and dominion over personal property he has constructive possession of it. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). The evidence shows in this case that both defendants were found at the house and their fingerprints were found on items within the house. Moore had in his possession a key that fit the gate and the door to the house. Moore's truck was present on the premises and the truck contained twine identical to the twine used to tie the marijuana plants to the stakes and to twine found within the house. Transeau admitted he looked after the place. We hold that from this evidence the jury could find each of the defendants had constructive possession of the marijuana. We do not believe *State v. Minor*, 290 N.C. 68, 224 S.E. 2d 180 (1976), relied on by the defendants, is applicable. In that case there was no evidence linking the defendant to the marijuana other than the fact that he had been a visitor to an abandoned house located 100 feet from a marijuana field.

Both defendants assign error to the court's overruling their motions to dismiss on the ground that G.S. 90-95(h) is unconstitutional. Both of them concede that this Court in *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420, *modified and affirmed*, 309 N.C. 451, 306 S.E. 2d 779 (1983) and *State v. Porter*, 65 N.C. App. 13, 308 S.E. 2d 767 (1983), *cert. den.*, 310 N.C. 155, 311 S.E. 2d 195 (1984) has upheld the constitutionality of this statute. They ask us to reconsider this question. This we decline to do.

The defendants contend that the court erred in its charge because it did not sufficiently state the defendants' evidence or contentions. At the conclusion of the court's charge the defendants asked for instructions that they had no burden to explain the presence of their fingerprints and that evidence that they were in close proximity to each other does not of itself indicate that they were acting for a common purpose. We believe that the court's charge which put the burden of proof on the State to prove the impression of the fingerprints adequately stated this contention of the defendants. We also believe that the court's charge as to acting in concert adequately stated the defendants' contentions.

[7] The defendant Transeau assigns error to the court's charging on acting in concert. He argues that at most the evidence shows that he was present at the house but that there was no evidence that he was present when Moore did some act which constituted the crime. There was evidence that both defendants were in the house in which there was a large quantity of marijuana. We believe the jury could conclude from this that the two defendants acted together to possess the marijuana. This supports a charge on acting in concert. *See State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). This assignment of error is overruled.

The defendant Transeau also assigns error to the admission of evidence as to the marijuana growing in the field. We hold that when the State offered evidence that there was a large quantity of marijuana in the house and there was a field of marijuana 1,400 feet down a path from the house the jury could conclude that the defendants controlled the field and were bringing marijuana from the field to the house. *State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265, *cert. denied*, 293 N.C. 592, 241 S.E. 2d 513 (1977), is not applicable. In that case no marijuana was found in the house. This assignment of error is overruled.

The defendant Moore assigns error to the denial of his motion to suppress evidence as to the keys seized from his person and the twine taken from the truck. He bases his argument under this assignment of error on the premise that his arrest was unlawful and he was not properly advised pursuant to *Miranda*. We have held that his arrest was lawful and his *Miranda* rights were not violated. This assignment of error is overruled.

No error.

Chief Judge HEDRICK concurs.

Judge PARKER concurs in the result.

Judge PARKER concurring in the result.

Before a magistrate may issue a valid warrant to search a particular residence, there must be "probable cause" to believe that evidence of a crime will be discovered in that particular dwelling. *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967). In my opinion, the deputy sheriff's affidavit supporting his application for the warrant was insufficient to show probable cause to believe marijuana was in the house; therefore, I do not agree with the majority's analysis of the validity of the search.

In his affidavit, Deputy Call described the information he had received from his confidential source and stated that he had seen the marijuana field. However, the only statement concerning the house was that Deputy Call had "observed subjects in the and coming out of the . . . residence near the marijuana field." He did not identify the "subjects" or in any way connect them with the marijuana field. The affidavit is void of any information about marijuana in the house. The officers saw no marijuana or drug paraphernalia in the house and the suspects had no traces of marijuana on them. The mere fact that the house is "near" the field does not sufficiently connect the house to the field to establish probable cause to believe that there will be marijuana in the house. *See Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958).

However, in light of the recent decision in *United States v. Leon*, --- U.S. ---, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984), the marijuana found in the house was still admissible even though the search warrant was invalid. In *Leon*, the Supreme Court held that

> . . . the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neu-

tral magistrate but ultimately found to be unsupported by probable cause.

Id. at ---, 104 S.Ct. at 3407, 82 L.Ed. 2d at 684.

For the foregoing reasons, I concur in the result.

CONCRETE SERVICE CORP. v. INVESTORS GROUP, INC., C. PAUL ROBERTS, TIMOTHY E. OATES, AND BARBARA SUMMEY

No. 8514DC935

(Filed 18 March 1986)

1. **Rules of Civil Procedure § 12.1— denial of motion to dismiss for failure to state claim—no review on appeal**

Where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss.

2. **Evidence § 31— list of bank accounts and signatories—document not authenticated—best evidence not offered**

In an action by plaintiff supplier to recover an amount due for building materials where defendant claimed that checks were written on his account without his consent, the trial court did not err in excluding a list of bank accounts and the authorized signatories since defendant argued that the document was properly authenticated by his testimony and he offered no other authentication; and the original signature cards were the best evidence but no reason was given for their non-production. N.C.G.S. 8C-1, Rules 901(b)(1), 1002.

3. **Rules of Civil Procedure § 15.1— amendment of pleadings to add defendant—no abuse of discretion**

The trial court did not err in granting plaintiff's motion to amend its pleadings to add one particular defendant on its claims for unfair trade practices, since defendant did not specifically object to evidence outside the scope of the original pleadings; the complaint gave defendant ample notice of the transactions at issue; and the amendments merely added another legal theory of liability on the very same facts.

4. **Unfair Competition § 1— actions intended to deceive creditors—unfair and deceptive trade practice—sufficiency of evidence**

The trial court's conclusion that defendant engaged in actions intended to deceive creditors into extending credit and that these practices were forbidden by N.C.G.S. 75-1.1 was amply supported by the findings of fact which were supported by evidence that defendant knew his codefendant had no credit and that the codefendant did business through various corporate and other entities

and not in his own name so as to induce people to do business with and extend credit to him; defendant, with this knowledge, supplied his codefendant with letters which enabled the codefendant to obtain credit from plaintiff and other suppliers; defendant maintained a checking account designated "Timothy E. Oates, Attorney-Special Account" and allowed his codefendant to use the account; and defendant failed to notify the bank to stop use of his name on the account.

5. Attorneys at Law § 7.5— unfair trade practices—award of attorney fees proper

Where the trial court determined that defendant engaged in unfair trade practices by deceiving creditors and making an unwarranted refusal to pay for materials supplied by plaintiff, it was within the discretion of the trial court to award plaintiff attorney fees.

APPEAL by defendant Timothy E. Oates from *LaBarre, Judge*. Judgment entered 18 April 1985 in District Court, DURHAM County. Heard in the Court of Appeals 4 February 1986.

Plaintiff supplier sued to obtain amount due for building materials, plus treble damages and attorney fees. Defendants Roberts and Oates, through the corporation they controlled, defendant Investors Group, had obtained the materials from plaintiff. Oates, an attorney, was Roberts' son-in-law. Since Roberts had only recently been released from prison and could not obtain credit, Oates gave him letters on Oates' legal stationery and signed by Oates. The letters read in part: "I am in the process of building a law office . . . I am requesting information by [sic] your company on how to set up a line of credit so that I may purchase the materials. . . . I desire to buy materials from your company and be billed on a monthly basis." The letters included a direction, "Please bill to: Investors Group, Inc." Oates attached his personal financial statement to the letters. The letters were not addressed. Roberts delivered these letters to several suppliers, including plaintiff. Plaintiff subsequently supplied the materials, payment for which is at issue here.

In addition to using Oates' request for credit and financial statement, Roberts used a checking account designated "Timothy E. Oates, Attorney-Special Account." Defendant Summey, Roberts' secretary, signed checks drawn on the account. Oates claimed that he discovered that Roberts was using the account for his construction business, and demanded that he stop. Nevertheless, a check on the account, signed by Summey, was thereaf-

ter sent to plaintiff in payment of Investors Group's outstanding balance, some $5,600. The check, like many others written on the account, was returned for insufficient funds. Investors Group then gave plaintiff a promissory note representing the balance, but no payments were ever made on it.

Plaintiff demanded payment from Oates, Roberts and Summey, but no payment was made. Plaintiff then instituted this action, which resulted in a judgment that plaintiff had been injured in the amount of the outstanding balance, that defendants' business practices were intended to and did deceive creditors, and that plaintiff was entitled to treble damages and attorney fees. From the judgment only defendant Oates (all references hereafter to "defendant" are to Oates) appeals.

Powe, Porter and Alphin, by Edward L. Embree, III, for plaintiff-appellee.

B. J. Sanders for defendant-appellant Timothy E. Oates.

EAGLES, Judge.

I

[1] Defendant first assigns error to the denial of his motion to dismiss the action for failure to state a claim against him, made at the beginning of trial. Defendant urges that we view the motion to dismiss as a "freeze-frame," considering it in light of the pleadings as they stood at the time the motion was made.

The Supreme Court recently held that the denial of a motion for summary judgment is not reviewable on appeal from final judgment:

> The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. [Citation.] After there has been a trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.
>
> The denial of a motion for summary judgment is an interlocutory order and is not appealable. An aggrieved party

> may, however, petition for review by way of certiorari. [Citation.] To grant a review of the denial of the summary judgment motion after a final judgment on the merits, however, would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E. 2d 254, 256 (1985); *see also MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E. 2d 271 (1983) (identical result). This same logic should apply to denials of motions to dismiss based on an alleged failure to give notice of facts stating a claim.

A motion to dismiss under G.S. 1A-1, R. Civ. P. 12(b)(6) generally tests the legal sufficiency of the complaint: Has the pleader given notice of such facts as will, if true, support a claim for relief under some legal theory? *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). An incorrect choice of legal theory should not result in dismissal where the pleader has given sufficient notice of facts concerning the wrong complained of. *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E. 2d 562 (1981). The motion does not present the merits, but only whether the merits may be reached. *See Wilkes v. N.C. State Bd. of Alcoholic Control*, 44 N.C. App. 495, 261 S.E. 2d 205 (1980). As the United States Supreme Court has stated with respect to the similar provisions of Fed. R. Civ. P. 12(b), "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L.Ed. 2d 90, 96, 94 S.Ct. 1683, 1686 (1974). When following denial of the motion the court has proceeded to the merits and the fact-finder has found they support the claim, whether the initial ruling was technically correct becomes insignificant. The policy behind the Rules of Civil Procedure is to resolve controversies on the merits, not on technicalities of pleading. *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E. 2d 420 (1972). This is especially true in light of the liberal pleading now allowed, the relatively free availability of amendments, and the affirmative duty of the opponent to object to evidence as outside

the pleadings. G.S. 1A-1, R. Civ. P. 15; *Sutton v. Duke, supra; Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972).

Other jurisdictions support our view. "It is an almost universal rule that a verdict will cure defects in the pleadings unless the substantial rights of the adverse party have been prejudiced." 5 Am. Jur. 2d Appeal & Error Section 795 (1962). This rule was applied in *Morgan v. Roper*, 250 S.C. 280, 157 S.E. 2d 572 (1967), the court holding that defendants could not complain that the trial court overruled their demurrer following judgment on the merits against them. *See also McDonald v. Morley*, 15 Cal. 2d 409, 101 P. 2d 690 (1940) ("immaterial" whether complaint stated cause of action where evidence supported judgment); *Baughman v. Cooper-Jarrett, Inc.*, 530 F. 2d 529 (3d Cir.) (no basis or logic for reviewing interlocutory denial of motion; in fact, review might violate Seventh Amendment where case had gone to jury), *cert. denied sub nom., Wilson Freight Forwarding Co. v. Baughman*, 429 U.S. 825, 50 L.Ed. 2d 87, 97 S.Ct. 78 (1976).

A majority of this court followed analogous reasoning in *Sharpe v. Park Newspapers of Lumberton, Inc.*, -- N.C. App. ---, 337 S.E. 2d 174 (1985). There we considered whether a controversy arose from the pleadings *and* the evidence, holding that to limit our consideration to the pleadings alone, and to ignore subsequent discovery, could lead to wasteful results.

We therefore hold that the denial of defendant's motion to dismiss is not properly presented by this appeal. We are careful in so doing to distinguish cases in which the trial court denies motions based on jurisdictional or similar grounds, and there is no right of immediate appeal. In those cases the adverse party must, absent a successful petition for certiorari, submit to trial on the merits. Only then will that party have a chance to appeal denial of the original motion. *See Duke Univ. v. Bryant-Durham Electric Co., Inc.*, 66 N.C. App. 726, 311 S.E. 2d 638 (1984) (denial of motion to dismiss for lack of subject matter jurisdiction; appeal dismissed); *Henredon Furniture Industries, Inc. v. Southern Ry. Co.*, 27 N.C. App. 331, 219 S.E. 2d 238 (1975) (refusal to join parties; appeal dismissed), *disc. rev. denied*, 289 N.C. 298, 222 S.E. 2d 697 (1976). Our holding is limited: we hold only that where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon pro-

ceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss. We therefore overrule defendant's first assignment of error.

II

[2] Defendant assigns error to the exclusion of certain documentary evidence. Defendant claimed that the list in question (typewritten and unsigned, with no indicia of origin) stated all bank accounts of Investors Group and allied entities and the authorized signatories. He argues that the document was properly authenticated by his testimony, and therefore should have been admitted. *See* G.S. 8C-1, R. Ev. 901(b)(1). Authentication under Rule 901 is only one prerequisite to admissibility, however. The document still must satisfy other pertinent evidentiary standards. *See* 11 J. Moore, Moore's Federal Practice Section 901.04 (2d ed. 1985) (discussing identical federal rule). One of these is that to prove the content of a writing, the original is usually required. G.S. 8C-1, R. Ev. 1002. Defendant sought not only to introduce the document, but to prove that its contents were what he claimed they were, *i.e.* a list of bank accounts with the names of the persons authorized to sign on them. For this purpose the original signature cards clearly were the best evidence. No reason was given for their non-production and the court did not err in excluding the document. *Id.; see United States v. Alexander*, 326 F. 2d 736 (4th Cir. 1964).

III

[3] Plaintiff originally raised unfair trade practices claims only against Investors Group and Roberts. By motion at the close of the evidence, plaintiff moved to amend its pleadings to add Oates as a defendant on those claims. He now argues that the court erred in allowing the motion. Under G.S. 1A-1, R. Civ. P. 15(b), a party attempting to limit the trial of issues by implied consent must object specifically to evidence outside the scope of the original pleadings; otherwise, allowing an amendment to conform the pleadings to the evidence will not be error, and, in fact, is not even technically necessary. *Mangum v. Surles, supra; Roberts v. William N. & Kate B. Reynolds Mem. Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). Defendant made no such objection. Moreover, the complaint gave defendant ample notice of the transactions at

issue. The amendment merely added another legal theory of liability on the very same facts. Defendant has failed to show any prejudice. *Estrada v. Jacques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984). On the authority of *Estrada*, and also on the ground that the record does not reflect that the statute of limitations was raised below, we also reject defendant's contention that the amendment does not relate back. We also reject defendant's argument that an earlier amendment somehow negated the original complaint: that amendment made allegations "in addition to" those originally made. There is no requirement that all claims be legally consistent. G.S. 1A-1, R. Civ. P. 8(e)(2). These assignments are overruled.

IV

Defendant next argues that the evidence against him was insufficient, and that the court should have allowed his motion, made at the conclusion of the evidence, to dismiss under G.S. 1A-1, R. Civ. P. 41(b).

A

Where as here the court sits as finder of fact, if it allows a Rule 41(b) motion it must find facts just as it would in entering judgment without allowing the motion. *Id.*; R. Civ. P. 52(a); *W & H Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 268 S.E. 2d 567 (1980). There is therefore little point in making such a motion at the close of all the evidence. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

B

On appeal from a judgment containing findings of fact and conclusions of law, the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, then state which assignments support which questions in the brief. App. R. 10, App. R. 28. Failure to do so will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E. 2d 159 (1982).

Here defendant did properly except to a large number of the court's findings of fact and the resulting conclusions of law. He

then correctly assigned error individually to each excepted finding and conclusion. Rather than direct this Court to the particular findings he challenges, however, defendant instead argues the general denial of his Rule 41(b) motion. He thus completely frustrates the purpose of his individual exceptions and assignments of error. We conclude that defendant thereby has reduced his appeal relative to the sufficiency of the evidence to a single broadside attack. Broadside appeals have always been deemed ineffective to challenge particular findings of fact. *Id.; Mayhew Electric Co. v. Carras*, 29 N.C. App. 105, 223 S.E. 2d 536 (1976); *see under former rules Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E. 2d 445 (1957). Therefore the only question presented is whether the findings of fact support the conclusions of law and the conclusions support the judgment. App. R. 10(a); *Anderson Chevrolet/Olds*. We review the judgment in that light.

C

The basis of the judgment was that the defendants' acts were unfair or deceptive. Unfair or deceptive acts or practices in or affecting commerce are unlawful. G.S. 75-1.1. A precise definition of unfair or deceptive acts is not possible, but whether a particular act is unfair or deceptive depends on the facts surrounding the transaction and the impact on the marketplace. *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). An action for unfair or deceptive acts or practices is *sui generis. Id.* The legislation creating these actions expanded existing common law remedies. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). Therefore, traditional common law defenses such as contributory negligence or good faith are not relevant; what is relevant is the effect of the actor's conduct on the consuming public. *Id.; Winston Realty Co., Inc. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E. 2d 677 (1985) (contributory negligence not a defense). The statutes do not protect only individual consumers, but serve to protect business persons as well. *See Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980) (developers could sue mortgage lender); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980) (one insurance agent sued another); W. Aycock, N.C. Law on Antitrust and Consumer Protection, 60 N.C. L. Rev. 205, 215 (1982). The Supreme Court has recently expressly disapproved language of this court suggesting that a sophisticated corporate

plaintiff must exercise greater care in relying on allegedly deceptive misrepresentations. *Winston Realty, supra, disavowing Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E. 2d 565, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). The fact that plaintiff is a corporation is therefore immaterial. Practices are deceptive which have the capacity or tendency to deceive; proof of actual deception is not required. *Marshall v. Miller, supra.* The narrow legal limits of the law of fraud do not describe the limits of what may constitute unfair or deceptive practices. *Johnson v. Phoenix, supra; Marshall v. Miller, supra; see F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 31 L.Ed. 2d 170, 92 S.Ct. 898 (1972); *see also Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 333 S.E. 2d 299 (1985) (allowing consideration of whether lease to competitor constituted unfair or deceptive act). Once it is found that the alleged acts were committed, whether they constitute unfair or deceptive acts is a question of law for the court. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975).

D

[4] The facts found by the court clearly support its conclusion that defendant Oates engaged in unfair or deceptive acts. The court found that Oates knew that defendant Roberts had no credit and that Roberts typically did business "through various corporate and other entities and not in his own name so as to induce persons to do business and extend credit to him." The court found that Oates, with this knowledge, supplied Roberts with the letters enabling Roberts to obtain credit from plaintiff and other suppliers. (While the evidence did not expressly show whether plaintiff and other suppliers would have extended their credit to Roberts without the letters, the court found, based on the evidence, that Roberts was not himself creditworthy, necessarily implying on these facts that plaintiff extended credit in reliance on the letter.) In addition, the court found that Oates knew that Roberts was using the checking account under his (Oates') name and designated "Special Account," giving checks drawn on that account by Roberts a false appearance of the security generally accorded attorney trust accounts. More importantly, the court resolved a key question of credibility against Oates, finding that he failed to notify the bank to stop use of his name on the account. The court found that these practices were intended to deceive creditors and unfairly obtain credit. The court found that

Oates, along with the other defendants, refused to pay the amount due on the credit account thus obtained and that this refusal was unwarranted.

These findings support the court's conclusion that Oates engaged in unfair and deceptive acts. If he did not intend to honor obligations incurred on material accounts opened as a result of his letter, his letter was simply a fraud. To the extent that Oates' letter reflected a genuine commitment, his consistent avoidance of payment on the account was totally unjustified. Oates' acquiescence in the operation of the bogus special account served only to further lull creditors into a false sense of security when Oates had no intention of honoring obligations on that account. The trial court's conclusion that Oates engaged in actions intended to deceive creditors into extending credit and that these practices are forbidden by G.S. 75-1.1 is amply supported by the findings of fact and the evidence before us.

Our decision in *Pedwell v. First Union Nat'l Bank*, 51 N.C. App. 236, 275 S.E. 2d 565 (1981), supports this result. There we held that plaintiffs stated a claim under G.S. 75-1.1 by alleging that defendants conspired to defeat plaintiffs' real estate contract with one of the co-conspirators by having the other co-conspirator deny financing shortly before closing, when plaintiffs could not timely obtain alternative financing. Nothing in *Pedwell* suggested that plaintiffs would have been unable to obtain financing or purchase housing elsewhere. Nevertheless, we held that these facts stated a claim for unfair or deceptive practices. It is clear that acts designed to unfairly obtain credit are equally as unlawful as acts unfairly denying credit. Indeed, once credit has actually been extended, acts unfairly and deceptively obtaining credit have a far greater potential for actual damage. Accordingly, we conclude that the findings support the conclusions of law. These assignments are overruled.

V

[5] Finally, defendant argues that the court erred in awarding plaintiff attorney fees. By statute, such fees may be awarded upon findings that defendant willfully engaged in unlawful acts or practices, proscribed by Chapter 75, and that there was an unwarranted refusal to fully resolve the matters. G.S. 75-16.1. In addition, we have held that the complainant must show some actual

injury resulting from the violation. *Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 262 S.E. 2d 860, *disc. rev. denied*, 300 N.C. 198, 269 S.E. 2d 624 (1980). Award or denial of fees, even where supporting facts exist, is within the discretion of the trial judge. *Borders v. Newton*, 68 N.C. App. 768, 315 S.E. 2d 731 (1984).

The trial court made findings that defendant specifically intended to deceive creditors, satisfying the willfulness element, and that his refusal to pay was unwarranted. As a result of defendants' actions, plaintiff supplied materials and received no payment in return. This constituted the actual injury required by *Mayton. See Brown v. Boger*, 263 N.C. 248, 139 S.E. 2d 577 (1965) (division of land "without injury" discussed). The award of attorney fees thereafter lay in the discretion of the court. *Borders v. Newton, supra.* We perceive no abuse thereof.

Defendant Oates has failed to show any prejudicial error. Accordingly, the order appealed from is

Affirmed.

Judges ARNOLD and PHILLIPS concur.

TINA D. LITTLE, A MINOR, BY ANN HINES DAVIS, HER GUARDIAN AD LITEM, PLAINTIFF v. NATIONAL SERVICE INDUSTRIES, INC., D/B/A GHOST TOWN IN THE SKY, DEFENDANT v. GOFORTH INDUSTRIES, INC., A NORTH CAROLINA CORPORATION, AND HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, THIRD-PARTY DEFENDANTS

No. 8530SC848

(Filed 18 March 1986)

Fixtures § 1— chairlift—negligent repair—improvement to realty—intent of owner—summary judgment for repair company

In an action to recover for the allegedly negligent redesign and repair of a chairlift, summary judgment was properly entered for defendant on the ground that the repairs were improvements to real property and the action was therefore barred by N.C.G.S. 1-50(5), since the test for resolving the question of whether a chattel attached to real property becomes real property or remains personalty is the intention with which the annexation of the article to the realty is made; where the owner of the land and the owner of the chattel are the same person, as in this case, annexation of the chattel to the realty

gives rise to a presumption that the owner intended that the chattel become part of the realty; although the presumption may be rebutted by evidence of a contrary intention, the relationship of the parties to this controversy, plaintiff as owner of the land and defendant as the one who annexed the chattel, required that the owner's contrary intention be ascertainable from facts and circumstances reasonably apparent to defendant; the characteristics of the chairlift, its relationship to plaintiff's land and its business, and the manner in which the chairlift was attached to the land all constituted strong evidence that it was an improvement to realty; and plaintiff's evidence of the manner in which it treated the chairlift for tax purposes and as to the common practice of dismantling and selling chairlifts in the recreational park industry, though some evidence of intent to treat the chairlift as personalty, was insufficient to rebut the presumption that it was an improvement to realty, absent some showing that defendant had actual or constructive notice of these factors.

APPEAL by defendant from *Grist, Judge.* Judgment entered 8 March 1985 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 11 December 1985.

National Service Industries, Inc. (National), defendant and third party plaintiff, is the owner and operator of Ghost Town in the Sky, a recreational park in Maggie Valley, North Carolina. In February 1975, National hired third party defendants Goforth Industries, Inc. (Goforth), to repair and redesign the chairlift which was used to transport visitors from the parking lot to the top of the mountain where the park was located. The work was completed by the end of 1976 and consisted of redesigning and repairing the brake system, carriage tracks and wheels, and the concrete column footings.

On 31 July 1983, while riding the chairlift, Tina Little was injured due to an alleged malfunction of the brake system. Ms. Little, through her Guardian ad litem, filed suit against National which in turn filed suit against Goforth, alleging negligence in the redesign and repair of the chairlift.

In its responsive pleading, Goforth moved to dismiss the third party complaint, pursuant to G.S. 1A-1, Rule 12(b)(6), on the ground that National's claim was barred by the six year statute of limitation contained in G.S. 1-50(5). Goforth also denied negligence, alleged that any injuries sustained by plaintiff were proximately caused by National's negligence, and asserted the provisions of G.S. 1-50(5) as an affirmative defense. Both National and Goforth filed affidavits. The trial court entered judgment

dismissing National's third party complaint against Goforth on the grounds that the repairs made to the chairlift were improvements to real property, thereby barring the action pursuant to G.S. 1-50(5). National appeals.

Richard W. Riddle for defendant appellant.

Roberts, Cogburn, McClure & Williams, by Landon Roberts, Isaac N. Northup, Jr., and Glenn S. Gentry, for third party defendant appellee.

MARTIN, Judge.

The sole issue raised by this appeal relates to the status of National's chairlift as an "improvement to real property." If the chairlift is considered a part of the real property, G.S. 1-50(5) bars National's third party claim; otherwise the statute has no application. For the reasons stated herein, we affirm the judgment of the trial court.

Goforth's motion to dismiss for failure to state a claim was converted to a Rule 56 motion for summary judgment by the trial court's consideration of the affidavits filed in support of, and in opposition to, the motion. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Summary judgment is granted in favor of the moving party where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 279 S.E. 2d 102 (1981). A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). "Once the movant demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial." *Orient Point Assoc. v. Plemmons*, 68 N.C. App. 472, 473, 315 S.E. 2d 366, 367 (1984).

The pertinent portions of G.S. 1-50(5) provide:

G.S. 1-50. Six years.

. . . .

(5) a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to the real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

. . . .

3. Actions to recover damages for personal injury, death or damage to property;

. . . .

6. Actions for contribution or indemnification for damages sustained on account of an action described in this subdivision;

. . . .

G.S. 1-50(5) is a statute of repose which bars actions for personal injuries or property damages allegedly caused by defects in design, construction or repairs to real property unless the action is brought within six years from the completion of the work. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983). Both National and Goforth agree that Goforth's work was completed more than six years before the initiation of this action; for that matter, the record indicates that it was completed more than six years before the occurrence of the accident in which the minor plaintiff was injured. Therefore, the resolution of this case depends upon whether there is any genuine issue of material fact as to the status of National's chairlift apparatus as an "improvement to real property."

The materials submitted to the trial court at the hearing of Goforth's motion consisted of the pleadings and affidavits submitted by National and Goforth. From those materials appear the following undisputed facts: National is the owner and operator of the recreational park and is the owner of the chairlift. Goforth was employed by National in 1975 to perform certain work on the chairlift. The work consisted of redesigning and repairing the bull

wheel, carriage tracks and wheels, and brake system which are component parts of the chairlift. The chairlift is affixed to the ground by means of poured concrete footings to which the steel tower supports are bolted and braced. The bull wheel is attached by bolts to a concrete form encased in steel. The brake system is housed above the bull wheel and is bolted to steel beams.

Additionally, National asserted by affidavit that the entire chairlift system was carried on its books as machinery and equipment so as to be "written off tax wise as personal property." National also asserted that it is a common practice in the recreation park industry to remove chairlifts and to sell them to other recreational parks.

To determine the status of the chairlift as real or personal property, we turn to the law of fixtures. "A fixture has been defined as that which, though originally a movable chattel, is, by reason of its annexation to land, or association in the use of land, regarded as a part of the land, partaking of its character. . . ." 1 Thompson on Real Property, 1980 Replacement, § 55, at 179 (1980). Generally controversies involving the question of fixtures arise out of disputes as to rights of possession of, or interests in, the chattel. In that context, several tests for resolving the question of whether a chattel attached to real property becomes real property or remains personalty have been referred to in the cases. They include (1) the manner in which the article is attached to the realty, *Clark v. Hill*, 117 N.C. 11, 23 S.E. 91 (1895); (2) the nature of the article and the purpose for which it is attached to the realty, *Jenkins v. Floyd*, 199 N.C. 470, 154 S.E. 733 (1930); and (3) the intention with which the annexation of the article to the realty is made. *Foote v. Gooch*, 96 N.C. 265, 1 S.E. 525 (1887). Under the modern view, the controlling test is the intention with which the annexation is made. *Ingold v. Phoenix Assur. Co.*, 230 N.C. 142, 52 S.E. 2d 366 (1949).

The intent with which a party annexes a chattel to real property is determined, in large measure, by the relationship of the parties to the land and to each other. For example, when additions are made to land by its owner, it is generally viewed that the purpose of the addition is to enhance the value of the land, and the chattel becomes a part of the land. *Belvin v. Paper Co.*, 123 N.C. 138, 31 S.E. 655 (1898); *Moore v. Valentine*, 77 N.C. 188

(1877). On the other hand, where the improvement is made by one who does not own the fee, such as a tenant, the law is indulgent and, in order to encourage industry, the tenant is permitted "the greatest latitude" in removing equipment which he has installed upon the land. *Overman v. Sasser*, 107 N.C. 432, 12 S.E. 64 (1890). Where the controversy is between parties connected to the transaction in some manner, as in a controversy between the owner of the land and the one who annexed the chattel, the subjective intent of the parties as evidenced by their words, conduct, or agreements, express or implied, is the relevant intent. Thompson, *supra*, § 56. *See Lee-Moore Oil Co. v. Cleary*, 295 N.C. 417, 245 S.E. 2d 720 (1978). However, where the rights of a third party, who is unconnected to the land or the original transaction by which the chattel was annexed, are concerned, the question is not so much the actual subjective intention of the party making the annexation, but his intention reasonably apparent to such third person as manifested by physical facts and outward appearances. Thompson, *supra*, § 59. In such a case, the annexor's intent is ascertained from such external indicia as the relationship of the annexor to the land (owner or tenant), the nature of the chattel attached and its relationship or necessity to the activity conducted on the land, and the manner in which the chattel is attached. *Id.* Because Goforth is a stranger to both the land of National and its annexation of the chairlift to its land, we must apply the latter tests to determine National's intent as it was reasonably apparent to Goforth.

National is the owner of the chairlift and of the premises upon which it is situated. Where the owner of the land and the owner of the chattel are the same person, annexation of the chattel to the realty gives rise to a presumption that the owner intended that the chattel become a part of the realty. *Lee-Moore Oil Co. v. Cleary, supra.* Although the presumption may be rebutted by evidence of a contrary intention, *id.*, the relationship of the parties to this controversy requires that the contrary intention be ascertainable from facts and circumstances reasonably apparent to Goforth. The burden of showing the contrary intention is upon the party claiming that the annexed chattel is personal property. *Ingold v. Phoenix Assur. Co., supra.*

The characteristics of the chairlift and its relationship to National's land and its business are undisputed. The chairlift con-

sists of towers, cables, tracks, wheels and other component parts, operated by electricity, and it is used to transport customers from National's parking lot at the highway to its recreational park at the top of the mountain. The nature of the annexed chattel and its use in connection with the business conducted on the realty is strong evidence of the intention with which it was attached to the realty.

> If personal property is attached to the real estate and is adapted to the purposes for which the real estate is being used, it will be presumed that the party attaching it intended that it should be part of the real estate, unless a contrary intention appears from the conduct of the parties in relation to it.

Thompson, *supra*, at 206. The chairlift is appropriate to National's use of its land and it is apparently consistent with National's interest that the chairlift be treated as a part of the realty. Thus, to persons having no notice to the contrary, the nature of the chairlift and its use give the reasonable outward appearance that National intended that it be a part of the real property. *See Jenkins v. Floyd, supra.*

The manner in which the chattel is attached to the land also provides objective evidence of the intention of the party attaching it. In this case, the structure, or principal part of the chairlift system, is attached to National's property by means of steel tower legs bolted to poured concrete foundations. There is no question that the concrete footings were annexed to the real property; attachment of the tower legs to the concrete footings by bolts is also a sufficient actual annexation to the soil to show an intention that the chairlift system be a part of the real property. *See Clark v. Hill, supra.* Where the principal part of the machinery is physically annexed to the realty, component parts thereof which are not physically annexed, but which, if removed, would not be useful other than as component parts of the machinery and the removal would leave the principal part useless, are considered to be annexed. Thompson, *supra*, § 61.

> It is a well recognized rule that when articles of personal property which are especially adapted and designed to be used in connection with the realty, and essential to the convenient and profitable enjoyment of the estate, are affixed to

> it, with an intention to make them a permanent accession to the land, they become a part of the realty, though not so fastened as to be incapable of removal without serious injury to themselves or the freehold.

Thompson, *supra*, § 62, at 221-22.

All of the external indicia of intent shown by the uncontested facts are consistent with an intention by National that the chairlift be made a part of the real property. National argues, however, that a genuine issue of fact as to its intention is created by its assertions as to the manner in which it treats the chairlift for tax purposes and as to the common practice with respect to chairlifts in the recreational park industry. We disagree. National's internal accounting treatment of the chairlift would evidence its subjective intention that the chairlift remain personalty. However, in the absence of some showing that Goforth had actual or constructive notice, this accounting practice would not ordinarily be ascertainable to third parties and would therefore not be relevant to the issue of National's intent as reasonably apparent to Goforth. For similar reasons, evidence of a common practice in the recreational park industry to remove and sell chairlifts, standing alone, is insufficient to create a genuine issue of fact as to National's intent. There was no showing that Goforth was engaged in the recreational park industry or familiar with practices among those who are.

Summary judgment is generally not appropriate where intent or other subjective feelings are at issue. *Feibus & Co., Inc. v. Godley Const. Co.*, 301 N.C. 294, 271 S.E. 2d 385 (1980). The rule that intent should generally be a question of fact for the jury does not mean, however, that it should always be so. In this case, it is not National's actual subjective intent which is at issue, rather, the issue is National's apparent intent, ascertainable to others from physical facts and outward appearances. Though there may be an issue of fact as to National's actual intent with respect to the chairlift, the issue of actual intent is immaterial. Questions of fact which are immaterial are insufficient to defeat summary judgment. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Goforth has demonstrated, through the cumulative weight of inferences from objective facts, National's apparent intent that the chairlift become a part of its real property. Na-

tional has failed to produce any relevant affirmative evidence of objective facts from which a contrary intent, apparent to others, may be inferred. Thus no genuine issue of facts exists. As between National and Goforth, therefore, the chairlift is treated as an "improvement to real property" and National's third-party action is barred by G.S. 1-50(5). The judgment of the trial court must be affirmed.

Affirmed.

Judges EAGLES and COZORT concur.

JOHN CAIN, EMPLOYEE-PLAINTIFF v. R. W. GUYTON, D/B/A G. S. AUTO PARTS & GUYTON BATTERY SERVICE, EMPLOYER-DEFENDANT, NON-INSURED

No. 8510IC555

(Filed 18 March 1986)

1. **Master and Servant § 48— workers' compensation—employment of five workers—jurisdiction of Industrial Commission**

In an action to recover benefits under the Workers' Compensation Act, plaintiff's testimony which was corroborated by defendant's tax records was competent evidence that defendant regularly employed five or more employees during the period of plaintiff's employment with defendant and that the Industrial Commission thus had jurisdiction.

2. **Master and Servant § 56— workers' compensation—obstructive lung disease—work as "battery buster"—causal relation between employment and disease**

In a workers' compensation proceeding a doctor's testimony that sulfuric acid fumes are a respiratory irritant, along with testimony that plaintiff often inhaled those fumes while working as a "battery buster" in defendant's employ, was sufficient to establish a causal relationship between plaintiff's work for defendant and his obstructive lung disease.

3. **Master and Servant § 93.3— workers' compensation—expert witness—hypothetical question proper**

Plaintiff in a workers' compensation proceeding could properly ask his medical expert witness a hypothetical question which asked the doctor to assume facts pertaining to plaintiff's medical history in conjunction with his employment history, and there was no merit to defendant's contention that facts relating to cotton dust were not supported by the evidence.

Chief Judge HEDRICK dissenting.

Cain v. Guyton

APPEAL by plaintiff from order of the North Carolina Industrial Commission filed 19 December 1984. Heard in the Court of Appeals 20 November 1985.

This is a claim for benefits under the Workers' Compensation Act. G.S. Chap. 97-1. On 9 October 1981, plaintiff, John Cain, instituted this action pursuant to filing a G.S. 97-22, Notice of Accident to Employer, with three of his former employers: defendant, Guyton Battery Service; Thomasville Furniture Industries, Inc.; and Bladenboro Cotton Mills. The notice alleged that plaintiff had contracted an occupational disease, to wit: a cardio-respiratory disease. Plaintiff settled his case against Bladenboro Cotton Mills and was allowed a voluntary dismissal of his claim against Thomasville Furniture Industries, Inc.

On 30 August 1982, plaintiff's claim against defendant R. W. Guyton, d/b/a G.S. Auto Parts & Guyton Battery Service came to be heard before Deputy Commissioner Bryant. In an opinion filed 24 September 1983, an opinion and award favorable to plaintiff was entered by Deputy Commissioner Bryant. Defendant appealed to the Full Commission. From an opinion and award of the Full Commission favorable to plaintiff, with one commissioner dissenting, defendant appeals.

Charles R. Hassell, Jr., for plaintiff appellee.

Williamson & Walton, by Benton H. Walton, III, for defendant appellant.

JOHNSON, Judge.

[1] Defendant contends that the record herein does not support a finding of the Industrial Commission's jurisdictional prerequisite that defendant regularly employed five or more employees. After careful consideration of the record herein, we disagree. During the time frame in question the Workers' Compensation Act by statute was inapplicable to any employer "that has regularly in service less than five employees. . . ." G.S. 97-13(b) (amended 1979). The term "employment" was then defined as including "employments in which five or more employees are regularly employed in the same business or establishment. . . ." G.S. 97-2(1) (amended 1979). This Court has construed this requirement as jurisdictional. *See Wiggins v. Rufus Tart Trucking Co.*, 63 N.C.

App. 542, 305 S.E. 2d 749 (1983). The plaintiff has the burden of proving that the employer regularly employed five or more employees. *See Aylor v. Barnes*, 242 N.C. 223, 87 S.E. 2d 269 (1955). The Commission's findings of jurisdictional facts are not conclusive on appeal even if they are supported by competent evidence. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). Where a party contests the jurisdiction of the Industrial Commission a reviewing court must consider all the evidence in the record and make an independent determination of the jurisdictional facts. *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 309 S.E. 2d 273 (1983), *disc. rev. denied*, 311 N.C. 407, 319 S.E. 2d 281 (1984). With respect to the jurisdictional question raised by defendant the evidence in the case *sub judice* tended to show the following: Plaintiff went to work for defendant during the 1960's. Defendant employed plaintiff for the purposes of "busting batteries" with an ax in order to beat the lead out of the batteries, loading battery hulls onto a truck, and driving the trucks loaded with battery hulls. Defendant, Mr. Guyton, supervised plaintiff and paid plaintiff primarily in cash. On those occasions when plaintiff was paid by check, they were drawn on Guyton Battery Service checks. During the period wherein plaintiff worked for defendant, there were more than five people working on the premises "busting batteries," and loading or unloading trucks. During periods of heightened activity the number of workers would increase to as many as ten (10). In 1966 income was reported to the Internal Revenue Service for twenty (20) employees of defendant. In 1968, income for twenty-three (23) employees of defendant was reported to the Internal Revenue Service. We conclude that plaintiff's testimony which was corroborated by defendant's records is competent evidence that defendant regularly employed five or more employees during the period of plaintiff's employment with defendant and that the Commission thus had jurisdiction.

[2] Defendant's next Assignment of Error is that the Industrial Commission erred in finding that there was a causal relationship between plaintiff's work for defendant and the disability plaintiff suffers from. We disagree.

G.S. 97-53(13) establishes when diseases and conditions will be deemed as occupational diseases within the meaning of the

Workers' Compensation Act. The applicable provision to the case *sub judice* is G.S. 97-53(13), which is as follows:

> (13) Any disease other than hearing loss covered in another subdivision of this section, 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.

G.S. 97-53(13). In *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E. 2d 359 (1983), our Supreme Court articulated the applicable requirements for proving a causal relationship in occupational disease claims filed pursuant to G.S. 97-53(13). The Court adopted the "significant contribution" principle so as to strike a fair balance between the employee and the employer in the application of the Workers' Compensation Act in difficult lung disease cases. *Rutledge*, at 105, 301 S.E. 2d at 372. The Court deemed the following matters worthy of consideration:

> In determining whether a claimant's exposure to cotton dust has significantly contributed to, or been a significant causative factor in, chronic obstructive lung disease, the Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony. It may consider other factual circumstances in the case among which are (1) the extent of the worker's exposure to cotton dust during employment, (2) the extent of other non-work-related, but contributing, exposures and components; and (3) the manner in which the disease developed with reference to the claimant's work history.

Id. (citations omitted). We now turn to that evidence which supports a determination that there was an increased risk by plaintiff of contracting chronic pulmonary disease because of his employment with defendant as a "battery buster."

The evidence tended to establish that plaintiff would work for defendant in periods of eight months during the years from 1964 to 1969. Plaintiff suffered a pre-existing chronic obstructive pulmonary disease attributable to his smoking cigarettes, earlier industrial exposure to cotton dust, and dust along with fumes in a furniture factory where he was employed prior to his employment

as a "battery buster." The only source of heat available to the "battery busters" was the burning of battery hulls which produced a black smoke which was inhaled by plaintiff. When the employees were bursting batteries, the liquid acid and fumes contained therein would be released. After bursting the battery the casing was cut away so that the lead could be extracted from the battery. The acid, which was released, would burn human flesh and corrode clothes and shoes.

When plaintiff would drive the trucks loaded with lead intended for smelting he would sleep in the trucks at night. The acid fumes were so strong that "[y]ou had to turn where the fumes wouldn't come, your back reversed to the trailer or truck to keep the fumes from coming your way. I was unable to take a deep breath when I was in it."

Dr. Saltzman testified that "I have an opinion to a reasonable degree of medical probability that sulfuric acid vapors or fumes are a respiratory irritant." Plaintiff's medical history reveals that "[h]e had classic findings of chronic obstructive lung disease." Based on plaintiff's history Dr. Saltzman testified as follows:

> Based on the history, the physical examination and the lab tests of his visits on January 6 and later on February 2, I diagnosed a very severe chronic obstructive pulmonary lung disease with a clinical picture of chronic asthmatic bronchitis, history of hyper-reactivity compatible with no good documentation of allergic difficulty, and as I stated, I interpreted the exposure to be minimal and insignificant as to cigarette smoking, and as I stated, there clearly has been some aggravation of symptoms in association with his industrial exposure. Then I went on in the medical occupational assessment at the end of that note and I stated that, 'Clearly this patient has had industrial exposures that have been associated with respiratory distress and relevant symptomalogy. These industrial exposure (sic) can cause respiratory problems not occurring in individuals not so exposed. Clearly this patient is severely impaired. I interpret him to have Class IV AMA Impairment—70% whole body. At least 60% of the whole body impairment is interpreted to reflect his chronic obstructive pulmonary disease.'

In *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E. 2d 359 (1983), the Court held that the chronic obstructive lung disease entitled the claimant to recover the entire disability so long as the occupation related cause was a significant causal factor in the disease's development. *Id.* at 101, 301 S.E. 2d at 369-70. The doctor's testimony that the acid fumes are a respiratory irritant, along with testimony that plaintiff often inhaled those fumes, is sufficient to establish a causal relationship with plaintiff's obstructive lung disease. Indeed the Commission found as fact the following:

> 21. Normally, exposure to sulfuric acid fumes would cause acute bronchitis without permanent damage; however, because plaintiff's lungs were hyperreactive and already affected by cotton dust exposure, wood dust exposure, and furniture glue fumes exposure, it is more likely that the sulfuric acid fumes from the battery busting aggravated and accelerated his lung disease and caused permanent damage that has progressed and totally disabled the plaintiff.

The Full Commission's finding supports its conclusion of law that the chronic obstructive pulmonary disease contracted by plaintiff was significantly contributed to by the fumes in his employment. The Full Commission also concluded as a matter of law that "plaintiff was last injuriously exposed to the hazards of this occupational disease while employed by defendant-employer." In compensable cases of occupational diseases, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease "shall be liable." G.S. 97-57. This statute does not require an independent showing of a significant contribution to the occupational disease. *Rutledge, supra.* The Court in *Rutledge, supra,* citing *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 169, 22 S.E. 2d 275, 277, 278 (1942), construed "last injuriously exposed" to mean "an exposure which proximately augmented the disease to any extent, however slight." *Rutledge*, at 89, 301 S.E. 2d at 362-63. Plaintiff's last employment was with defendant. We conclude that the Full Commission correctly applied the appropriate legal standard and therefore defendant's Assignment of Error alleging insufficient proof of causation is overruled.

[3] Defendant's final Assignment of Error is that the Full Commission erred in overruling defendant's objections to a hypothetical question posed by plaintiff to his expert witness. We disagree.

The hypothetical question propounded to Dr. Saltzman merely asked the doctor to assume facts pertaining to plaintiff's medical history in conjunction with his employment history. "[T]here is substantial authority to the effect that the interrogator may form his hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove." *Dean v. Carolina Coach Co.*, 287 N.C. 515, 518, 215 S.E. 2d 89, 92 (1975), citing with approval, 31 Am. Jur. 2d *Expert and Opinion Evidence*, sec. 56 at 562; *Pigford v. Norfolk Southern R.R.*, 160 N.C. 93, 75 S.E. 860 (1912).

Defendant contends that facts relating to cotton dust are not supported by the evidence. However, in earlier testimony Dr. Saltzman testified as follows:

> I also obtained a history, detailed questioning of Mr. Cain in regard to his past exposures in industrial environments. Mr. Cain told me about his prior work history, that he had worked initially at a lumber company and then he worked in the Bladenboro Cotton Mill in the card room between 1949 and 1953, and described that environment as so dusty that you would have difficulty in seeing, and it was in that interval that he first recalls having tightness or congestion in his chest and shortness of breath which he described to be progressive during the course of the work week and better when away from work and considerably better during the weekends, and he was told at that time that he had asthma.

This testimony by Dr. Saltzman was sufficient to form the basis for the hypothetical posed to him, which utilized the fact of plaintiff's exposure to cotton dust. Defendant had ample opportunity to cross-examine Dr. Saltzman and present alternative historical data. *See Rutledge, supra.* Defendant's final Assignment of Error is overruled.

Affirmed.

Judge WHICHARD concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I do not believe that there is competent evidence in the record to support the Industrial Commission's findings and conclusions that plaintiff's lung condition was significantly contributed to and aggravated by his exposure to battery acid fumes and that he was last injuriously exposed to the hazards of occupational lung disease while employed by defendant. The only evidence in the present case concerning the relationship between plaintiff's exposure to battery acid fumes and his lung disease is the testimony of Dr. Saltzman. He testified that:

> [M]ost acid fume exposures produce reversible, short-term injury and the effects subside when the exposure terminates. Presumably there must be some point at which exposure to acid fumes is intense enough and long enough that permanent changes can occur. Whether or not that is the case in this individual is not defined.

Dr. Saltzman further testified that the exposure to the fumes "could . . . or might" have aggravated plaintiff's lung disease. The record is devoid of evidence that plaintiff's exposure to fumes in fact contributed to this disease to any extent. Therefore, I dissent from the opinion of the majority and vote to reverse.

TERRI CARAWAN, PLAINTIFF/EMPLOYEE v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT/EMPLOYER

No. 8510IC807

(Filed 18 March 1986)

Master and Servant § 68— workers' compensation—allergy to pesticide—occupational disease

Evidence was sufficient to support the Industrial Commission's findings of fact which led to its conclusion of law that plaintiff's disability was compensable as an occupational disease within the meaning of N.C.G.S. 97-53(13) where the evidence tended to show that plaintiff had a contact allergy to

Dursban contracted because of the use of the compound as an insecticide in the plant where she worked; plaintiff was exposed to a greater concentration of Dursban than the general public because of the frequency, amount of exposure, and constant close physical proximity to the sprayed area; and concentrated extra spraying on one occasion contributed to the development of plaintiff's allergy.

APPEAL by defendant from order of the North Carolina Industrial Commission filed 26 April 1985. Heard in the Court of Appeals 6 December 1985.

This is a claim for compensation pursuant to the Workers' Compensation Act. G.S. Chap. 97-1. On 18 April 1984, this matter was heard before Deputy Commissioner Lawrence Shuping, Jr. In an opinion and award filed 19 October 1984, Deputy Commissioner Shuping, *inter alia*, found as fact the following:

> 6. Plaintiff's aforedescribed allergic contact dermatitis was not a result of an interruption of her normal work routine, but rather was due to her own peculiar susceptibility to the insecticide Dursban with which defendant-employer regularly sprayed its business premises as part of its program of routine building maintenance and was thus, for the reasons stated in finding of fact #5 hereinabove, an ordinary disease of life to which the public was equally exposed outside of that employment.

From Deputy Commissioner Shuping's denial of an award of compensation plaintiff appealed to the Full Commission.

On 8 February 1985, this matter was argued before the Full Commission. The Full Commission adopted the opinion and award only to the extent of its stipulations. The remainder of the opinion and award was vacated and set aside. The Full Commission made new findings of fact as follows:

Findings of Fact

> 1. Plaintiff, 24, is married and has a high school education. From 2 April 1979 until 10 January 1983, she worked as a telephone operator for the defendant. Prior to her employment by defendant, plaintiff did not have any known allergies. The building in which plaintiff worked was old and both the building and the switchboard with which plaintiff worked

were infested with 'cord lice,' a parasite living on the fabric of insulation covering the wires manipulated by plaintiff and other operators. The lice often bit the telephone operators on the hands and arms.

2. As part of its routine building maintenance, defendant contracted with a professional pest control service to control the lice and other insects in the building where plaintiff worked. Each month the pest control company applied the insecticide Dursban to cracks, crevices, baseboards, window sills, the storage room, the lounge and other areas in the building.

3. As a result of her exposure to the insecticide Dursban in her workplace, plaintiff began to experience outbreaks of allergic contact dermatitis when she returned to work on 10 January 1983 after several days off. Plaintiff's face, upper chest and other areas of the body not covered by clothing were affected. Symptoms included inflammation of the skin, swelling, scaling, edema of the eyelids which partially closed plaintiff's eyes, burning and itching of the eyes, a nosebleed on occasion, and sleeplessness and fatigue. These symptoms afflicted the plaintiff each time she entered her workplace from her initial outbreak on 10 January 1983 until she was terminated by defendant on 10 May 1983.

4. Plaintiff's allergic contact dermatitis was caused by conditions characteristic of and peculiar to her employment. Plaintiff's employment placed her at a greater risk of contracting the disease than the public at large. Plaintiff therefore contracted an occupational disease which temporarily totally disabled her from 10 January 1983 until 23 May 1983 when she reached maximum medical improvement. Plaintiff did not sustain any permanent disability as a result of her occupational disease.

In a majority opinion and award favorable to plaintiff, then Chairman Stephenson dissenting, the Full Commission concluded as a matter of law pursuant to G.S. 97-53(13) that from 10 January 1983 until 23 May 1983, plaintiff was temporarily totally disabled as a result of her occupational disease. Defendant appealed.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Donnell Van Noppen III, for plaintiff appellee.

Robert Carl Voight, for defendant appellant.

JOHNSON, Judge.

The pivotal question we must address is whether there was competent evidence to support the Full Commission's Findings of Fact which led to its conclusion of law that plaintiff's disability is compensable as an occupational disease within the meaning of G.S. 97-53(13). Findings of fact made by the Full Commission are binding on this Court if there is competent evidence tending to support the findings. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E. 2d 456 (1982). If there is competent evidence supporting the Full Commission's findings the appellate court only has jurisdiction to review for errors of law. *Byers v. North Carolina State Hwy. Comm.*, 3 N.C. App. 139, 164 S.E. 2d 535 (1968), *aff'd*, 275 N.C. 229, 166 S.E. 2d 649 (1969). Guided by these standards of review we now examine the Full Commission's decision to award plaintiff compensation for an occupational disease.

The causes for plaintiff's disability that the Full Commission necessarily must have determined that plaintiff proved are stated in G.S. 97-53(13) as follows:

> Any disease, other than hearing loss covered in another subdivision of this section, 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.

G.S. 97-53(13). Defendant asserts that the evidence shows that the causes and conditions which led to plaintiff's disability (allergic response from exposure to Dursban) are not peculiar to a particular trade, occupation or employment. We disagree.

In *Caulder v. Waverly Mills*, 314 N.C. 70, 331 S.E. 2d 646 (1985), the Court explained the "Hazards," G.S. 97-57, of occupational diseases and in so doing stated that "A condition peculiar to the workplace which accelerates the progress of an occupational disease to such an extent that the disease finally causes the worker's incapacity to work constitutes a source of danger and difficulty to that worker and increases the possibility of that worker's ultimate loss." *Caulder*, at 75, 331 S.E. 2d at 649 (employee's exposure to dust arising from synthetic fibers was exposure to a substance peculiar to the workplace and therefore, be-

cause it worsened an already contracted lung disease it was the last injurious exposure to that occupational disease within the meaning of the statute). In clarifying the meaning of "hazard" the Court emphasized "that the substance is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself *or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed.*" *Id.* at 75, 331 S.E. 2d at 649 (emphasis ours). In the case *sub judice* plaintiff incurred three instances of allergic reactions while at her workplace; the first instance was on 10 January 1983; the second instance was on 13 April 1983; and the last instance was on 9 May 1983. Plaintiff consulted a physician who referred her to a specialist. The specialist diagnosed that she had an allergic contact dermatitis, airborne. The specialist, Dr. Jones, essentially testified to the effect that plaintiff had a contact allergy to Dursban contracted because of the use of the compound as an insecticide in the plant where she worked. Dursban is the trade name for a chemical manufactured by Dow Chemical Company. The chemical name for Dursban is chlorpyrifos. Dr. Jones, without objection, was asked to assume the following:

> Q. In answering the remaining questions that I have for you, please assume that the North Carolina Industrial Commission will find by the greater weight of the evidence the following facts to be true based on all the evidence in the case: (a) the findings—assume the findings of the physical examination and tests that you have made and already testified about; (b) that Terri Carawan worked at Carolina Telephone and Telegraph as a telephone operator from April 2, 1979, to May 10, 1983, and that during her period of employment her duties as an operator required her to sit at a switchboard inserting wires and plugs into holes in the switchboard; (c) that the room in which she worked was sprayed with Dursban insecticide on a regular monthly basis by an exterminating company with the spraying occurring while operators were working and the chemical being applied to cracks and crevices about the perimeter of the room including the base of the boards of the switchboard at which the operators sit, and that the Dursban was sprayed at a concentration of 0.5% which is the most concentrated recommended concentration; (d) that in ad-

dition to the regular monthly spraying, there was in mid-November 1982, some six weeks before her first onset, an extra complete spraying of Dursban in the same operator's room which was requested by Carolina Telephone and Telegraph due to a reported incident of body lice on one employee. And in addition, at the same time operators' chairs were sprayed by both Carolina Telephone and Telegraph and by the independent exterminating company with a different chemical. Also, in addition to the regular monthly spraying of Dursban, employees of Carolina Telephone and Telegraph occasionally sprayed aerosol insecticides on and about the switchboard to get insect problems including the presence of a parasite referred to by operators as cord lice, a parasite living on the old frayed cloth insulation of the telephone cords.

A. Okay.

Q. The names and the contents of those sprays have not been identified. That Dursban chlorpyrifos is an active ingredient present in a wide range of common household and commercial insecticides, both aerosols and liquid spray varieties. That the telephone operator sits closer to the area of the repeated pesticide spraying than do people in most other occupations including the industrial, retail, and office occupations. That Terri Carawan has never experienced her allergic reaction to Dursban except in Carolina Telephone and Telegraph building where she worked. That she uses those pesticides in her home and also that she regularly shops in a supermarket which is regularly sprayed with Dursban and that when she enters that supermarket she does not experience the same reaction that she has experienced at Carolina Telephone and Telegraph.

The synopsis of the evidence introduced as stated in a prelude to a series of questions asked of Dr. Jones reveals that plaintiff was exposed to a greater concentration of Dursban than the general public because of the frequency, amount of exposure, and the constant close physical proximity to the sprayed area. Dr. Jones went on to testify that the concentrated extra spraying in November 1982 contributed to the development of plaintiff's allergy. Pursuant to G.S. 97-53 an occupational disease would be

compensable if caused by the use of certain listed chemicals as follows:

> Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals.

G.S. 97-53. We hold that although the chlorpyrifos (Dursban) plaintiff is allergic to is not listed in G.S. 97-53, the evidence permitted the Commission to find and conclude that the form and quantity of her exposure to chlorpyrifos caused her to contract a compensable occupational disease within the meaning of G.S. 97-53. In support of this holding we note that prior to a 1 July 1971 amendment of G.S. 97-53(13), plaintiff's condition was specifically deemed an occupational disease within the meaning of the Act. G.S. 97-53(13), as it then existed was as follows:

> (13) Infection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavities or any other internal or external organ or organs of the body due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.

G.S. 97-53(13) (1965) (amended 1971). The amendment which eliminated this statutory language stated, hereinabove, broadened the coverage of G.S. 97-53(13) to include a wider range of conditions susceptible to interpretation of being an occupational disease within the meaning of the Act. *See generally Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979).

For the aforementioned reasons the judgment is

Affirmed.

Judges WHICHARD and PHILLIPS concur.

NORTH CAROLINA HUMAN RELATIONS COUNCIL, ON BEHALF OF PATTY P. LEACH v. WEAVER REALTY COMPANY/D.B.A. WAKEFIELD APARTMENTS, ALVIN R. BUTLER, PRESIDENT, LEE ANNE WATSON, AGENT/PROPERTY MANAGER AND APEX HOUSING PARTNERSHIP

No. 8510SC951

(Filed 18 March 1986)

1. **Constitutional Law § 20.4— N. C. State Fair Housing Act—intent required for violation—disparate impact—circumstantial evidence only**

To prevail on a claim of violation of the N. C. State Fair Housing Act, a plaintiff must show that defendant refused to engage in a real estate transaction with plaintiff due to plaintiff's race, color, religion, sex or national origin, and statistics describing the disparate impact of practices or policies may be circumstantial evidence of prohibited biased conduct; however, if the finder of fact reasonably finds that a particular housing practice or policy is not motivated by considerations of race, color, religion, sex or national origin, then the particular practice or policy is not a violation of the State Fair Housing Act, no matter how disparate the impact of the practice or policy.

2. **Constitutional Law § 20.4— N. C. State Fair Housing Act—violation—proximate cause standard applicable**

The traditional proximate cause standard applies in actions involving violations of the N. C. State Fair Housing Act, and race, color, religion, sex or national origin must therefore be more than a mere factor in a defendant's decision not to engage in a real estate transaction.

3. **Constitutional Law § 20.4— refusal to lease apartment to black person—violation of N. C. State Fair Housing Act—summary judgment for landlord improper**

Evidence presented by plaintiff was sufficient to raise a genuine issue of material fact as to whether defendants discriminated against plaintiff in the leasing of an apartment because she was black, and the trial court erred in granting summary judgment for defendants. N.C.G.S. 41A-4(a)(1).

APPEAL by plaintiff from *Bailey, Judge.* Order of summary judgment entered 12 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 3 March 1986.

This is a proceeding instituted by the North Carolina Human Relations Council on behalf of Patty P. Leach pursuant to the North Carolina Fair Housing Act, North Carolina General Statutes Chapter 41A.

Plaintiff's prayer for relief includes the following:

A. Assume jurisdiction of the within action;

B. Grant compensatory damages to Plaintiff in the amount of FIFTY THOUSAND DOLLARS ($50,000.00) and punitive and exemplary damages in the amount of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), along with all costs and all other relief as expressly provided under the State Fair Housing Statute;

C. Declare that the acts and conduct of the Defendants are in violation of the State Fair Housing Act, Chapter 41A of the General Statutes of North Carolina;

D. Permanently enjoin the Defendants, their agents, employees and all persons acting in concert with them from engaging in any act or conduct which has the purpose or effect of denying equal housing opportunities on the basis of race or color, including, but not limited to, the denial to rent, refusal to sell, refusal to negotiate, or to otherwise make unavailable equal housing opportunities on the basis of race or color;

E. Require the Defendants, their employees and agents to undertake an affirmative program to correct the effect of their race-based unlawful actions by establishing a program requiring, *inter alia*:

1. Posting in a conspicuous place in all property rental offices the fact that Weaver Realty Company is an "Equal Housing Opportunity" Company and otherwise display the Fair Housing poster prepared by the Council;

2. The establishment of a five (5) year audit program through which defendant would be required to maintain information in its records indicating the race of all inquirers and applicants for housing with the Defendants. Such audit process shall be monitored by the Council;

3. The implementation of an affirmative educational program and instruction on State fair housing law for all officers, agents and employees of Defendant, Weaver Realty Company;

4. The utilization of an internal audit system through checkers and the other internal audit devices for purposes of monitoring compliance;

5. The creation of an affirmative marketing program to encourage eligible minority homeseekers to secure housing in Wakefield Apartments and other of its rental properties in the State of North Carolina in order to achieve a racial composition consistent with the demography of the community;

6. Adoption and implementation by Defendant, Weaver Realty Company, of objective and uniform standards, criteria, and procedures for determining when vacancies exist and establishing priorities therefor, and for accepting, processing and selecting applications for tenancy in Defendant apartment complexes;

7. The inclusion in all Defendant, Weaver Realty Company, advertisements in all newspapers and other mass media for a period of five (5) years that its properties and apartments are open to all applicants without regard to race.

F. Grant any additional relief that the court deems just and equitable.

Defendants filed a motion for summary judgment supported by documents and affidavits indicating among other things:

1) Wakefield Apartments were financed by the Farmers Home Administration (FHA) and were subject to FHA regulations including a rule that families with fewer than four members cannot rent a three-bedroom apartment without permission from the FHA.

2) Weaver Realty had a policy of its own which provided that single parents who had children of opposite sexes, at least one of whom was over six, could not qualify for a two-bedroom apartment.

3) No exception to the family composition rules has ever been given to any Wakefield Apartment applicant regardless of race.

4) The family of the plaintiff, Patty Leach, did not meet the family composition requirements.

5) Lee Anne Watson, the defendant property manager had no authority to waive the family composition rules.

The evidence offered in opposition to summary judgment disclosed the following:

1) Ari Crenshaw reported statements by Lee Anne Watson, the resident manager of Wakefield Apartments, indicating that Ms. Watson rejected several black applicants pursuant to instructions from her employer to limit the number of black residents.

2) Terena Hancock stated Ms. Watson told her that Wakefield Apartments had a quota for black residents, but Ms. Watson would not accept any more blacks than required by the quota.

3) Michael Beatty stated Ms. Watson told him that she checked black applicants' backgrounds and did everything she could to keep blacks out of Wakefield Apartments.

4) Jacqueline P. Cottle, a white woman, posed as a Wakefield Apartment lease applicant with familial and financial attributes similar to the plaintiff. Lee Anne Watson told Mrs. Cottle that she did not meet the requirements for renting a three-bedroom apartment but stated that because Mrs. Cottle "appeared to be a nice person," Ms. Watson would "write Weaver Realty requesting special permission for the rule to be waived." Ms. Watson also told Mrs. Cottle that the family composition rules were her "weapon" for keeping out undesirable blacks.

5) Six percent of black Wakefield Apartment applicants and sixty-four percent of white Wakefield Apartment applicants were accepted by 30 March 1984. Over the same period of time, fifteen percent of black applicants and ten percent of white applicants were denied leases explicitly because of the family composition rules.

From an order of summary judgment for defendants, plaintiff appealed.

North Carolina Human Relations Council, by Daniel D. Addison, and Attorney General Lacy H. Thornburg, by Assistant Attorney General Douglas A. Johnston, for plaintiff, appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by M. Daniel McGinn and Mack Sperling, and Young, Moore, Henderson & Alvis, P.A., by William M. Trott, for defendants, appellees.

HEDRICK, Chief Judge.

This is the first case brought under the North Carolina State Fair Housing Act to reach the Appellate Division of the North Carolina General Court of Justice. Our Legislature modeled the key provisions of the State Fair Housing Act after provisions of the federal Fair Housing Act. Compare G.S. 41A-4 with 42 U.S.C. Sec. 3604. In light of the similarity between the two acts, the body of federal cases interpreting the federal Fair Housing Act is useful, although not controlling, in interpreting the North Carolina State Fair Housing Act.

Federal Courts have held that violations of the federal Fair Housing Act may be shown under two different theories. First, housing policies and practices motivated by racial discrimination violate the act. See, e.g. *United States v. West Peachtree Tenth Corp.*, 437 F. 2d 221 (5th Cir. 1971). To prove discriminatory intent under the federal standard, a plaintiff need not show that race is the sole or dominant motive behind the challenged policies or practices. Under the federal standard, it is sufficient for the plaintiff to show that race was a factor or a significant factor. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977); *Woods-Drake v. Lundy*, 667 F. 2d 1198 (5th Cir. 1982).

The second way of establishing violations of the federal Fair Housing Act is showing that policies and practices have a racially discriminatory effect, even absent evidence of a racially discriminatory motive. See, e.g. *Robinson v. 12 Lofts Realty, Inc.*, 610 F. 2d 1032 (2d Cir. 1979).

Plaintiff urges us to adopt the entire body of federal law interpreting the federal Fair Housing Act when interpreting our State Fair Housing Act. We refuse to do so.

[1] The "adverse" or "disparate impact" theory through which a plaintiff may show a violation of the federal Fair Housing Act using statistics, without showing racially biased motivation, is contrary to the ordinary meaning of the terms in the North Carolina State Fair Housing Act. The North Carolina Act prohibits any person from refusing to engage in a real estate transaction "*because of* race, color, religion, sex or national origin." We hold that to prevail, plaintiff must show defendant refused to engage

in a real estate transaction with plaintiff due to plaintiff's race, color, religion, sex or national origin. Statistics describing the disparate impact of practices or policies may be circumstantial evidence of prohibited biased conduct. However, if the finder of fact reasonably finds that a particular housing practice or policy is not motivated by considerations of race, color, religion, sex or national origin, then the particular housing practice or policy is not a violation of the State Fair Housing Act no matter how "disparate" the impact of the practice or policy.

[2] We also refuse to adopt the peculiar standard of causation adopted by federal courts in federal Fair Housing Act cases. We see no reason not to adopt the traditional proximate cause standard which the courts of our State have ample experience in applying. Thus race, color, religion, sex or national origin must be more than a mere factor in a defendant's decision not to engage in a real estate transaction.

[3] The only question for review in the present case is whether the evidentiary matter offered in support and opposition to the motion for summary judgment raises a genuine issue of material fact in relation to plaintiff's claim for relief under G.S. 41A-4(a)(1), which in pertinent part provides:

> (a) It is an unlawful discriminatory housing practice for any person in a real estate transaction, because of race, color, religion, sex, or national origin, to:
>
> (1) Refuse to engage in a real estate transaction.

G.S. 41A-3(7) provides that " '[r]eal estate transaction' means the sale, exchange, rental or lease of real property." Plaintiff contends on appeal that the evidentiary matter considered by Judge Bailey raises a genuine issue of material fact as to whether defendants refused to rent a two- or three-bedroom apartment to Patty Leach because she is black.

The evidence in the record discloses that the defendant, Weaver Realty Company, has two special rules regarding the rental of its two- and three-bedroom apartments. One rule, required by the Farmers Home Administration as a condition of financing construction of the apartments, provides that families with fewer than four members may not rent three-bedroom apartments without Farmers Home Administration approval. The other

rule provides that single parents who have children of opposite sexes, at least one of whom was over six, could not qualify for a two-bedroom apartment.

The record discloses that Patty Leach is a divorced black single parent with two minor children of opposite gender, both of whom are over six. In an affidavit, Mrs. Cottle describes a conversation with Lee Anne Watson, Weaver Realty's resident manager at Wakefield Apartments. Mrs. Cottle states Ms. Watson told her that the family composition rules were weapons to keep out undesirable blacks. Plaintiff may meet her burden of proof by showing that the facially neutral family composition rules used to deny her application were promulgated to discriminate against blacks. Mrs. Cottle also reports statements by Ms. Watson indicating that Ms. Watson would try to get the family composition rules waived for Mrs. Cottle, a white woman. Plaintiff may also meet her burden of proof by showing that she could have leased the apartment if she were of another race.

The evidence presented by plaintiff is sufficient to raise a genuine issue of material fact as to whether defendants discriminated against plaintiff in the leasing of an apartment because plaintiff is black. For the reasons stated, summary judgment must be reversed and the case remanded.

Reversed and remanded.

Judges WEBB and PARKER concur.

TRACY H. GRAHAM v. MID-STATE OIL COMPANY AND SUN OIL COMPANY

No. 855SC814

(Filed 18 March 1986)

Unfair Competition § 1; Judgments § 4— unfair and deceptive trade practice—claim determined by partial summary judgment—avoidance of inconsistent judgments

Plaintiff could not prevail on his claim for an unfair and deceptive trade practice where he abandoned his exception to the trial court's entry of partial summary judgment for defendant on plaintiff's claim of conversion and for defendant on its counterclaim for an amount due on an open account; this par-

tial summary judgment necessarily determined facts which would defeat plaintiff's unfair and deceptive trade practices claim; and to allow plaintiff to prevail on this claim would result in inconsistent judgments.

APPEAL by plaintiff from *Stevens, Henry L., III, Judge.* Order entered 3 May 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 6 December 1985.

This appeal involves only the parties Tracy H. Graham and Mid-State Oil Company. On 21 April 1983, plaintiff instituted this action seeking recovery for conversion of funds in the first cause of action of his complaint and treble damages for an unfair and deceptive trade practice in his second cause of action. Defendant Mid-State Oil Company answered and counterclaimed, alleging plaintiff owed defendant $19,006.64 plus interest based upon the theory of an open account, or in the alternative, an account stated.

On 18 May 1984, defendant Mid-State Oil Company moved for summary judgment, supported by affidavits, deposition, transcript, and accompanying exhibits. Plaintiff filed two affidavits in opposition to defendant's motion. On 6 June 1984, Judge James D. Llewellyn denied summary judgment as to plaintiff's unfair trade practice claim with exception as to plaintiff's claim regarding the funds in the collateral deposit account, but granted summary judgment in favor of defendant as to both plaintiff's conversion claim and defendant's counterclaim. The court also removed defendant Sun Oil Company as a party and dismissed all claims against Sun Oil Company with prejudice. On 15 April 1985, the matter was called for a pre-trial conference regarding the unresolved claim before Judge Henry L. Stevens, III. In the pre-trial conference it was first posited that Judge Llewellyn's order implicitly disposed of the unfair and deceptive trade practice claim. On 3 May 1985, Judge Stevens entered judgment wherein he concluded "As A Matter of Law that the prior Order entered by Judge Llewellyn on June 6, 1984 legally precludes plaintiff from litigating its Second Claim for Relief alleging unfair and deceptive acts or practices . . . under the principles of estoppel by judgment, *res judicata* and the principle that one Superior Court Judge cannot overrule another Superior Court Judge." Judge Stevens dismissed plaintiff's unfair and deceptive trade practice claim with prejudice. Plaintiff appeals.

The facts pertinent to this appeal are as follows: Plaintiff operated a Travelers service station in Wilmington, North Carolina, from 1973 through 16 June 1982. Mid-State Oil Company and its predecessors in interest [defendant] owned the Travelers station during the time at issue and continue to be the owners. Plaintiff purchased petroleum products from defendant for use in its operation of the business on an open account basis. Plaintiff and defendant entered into a collateral deposit agreement whereby plaintiff deposited an amount equal to a certain percent of the petroleum products he purchased as security for the open account. The collateral deposit account was governed by written instrument. It is not the subject of this appeal. Rather, the question on appeal focuses on certain voluntary payments made by plaintiff to defendant from time to time in addition to payments toward the amount owed for purchases. It is undisputed that these payments, denominated "savings" on plaintiff's remittances to defendant, were for the purpose of having available funds for payment of future expenses associated with the operation of the business, such as plaintiff's income tax, employee withholding and personal property taxes. No written instrument documented this "savings" account. It was the practice between the parties that when plaintiff signed a written request to defendant to issue a check to him, defendant would do so. The additional payments and withdrawals therefrom were credited and debited to plaintiff's general ledger for the open account. Each month plaintiff was sent a copy of the ledger account entries regarding the general open account. These ledger card statements reflected both payments on the open account and the additional payments, indicated by the letter "S" next to the entry, as well as each withdrawal made by plaintiff. Each month plaintiff was separately provided with a copy of his collateral deposit account ledger card.

At a final pre-trial conference, plaintiff stipulated to the correctness of a reconciliation of the general open account presented by defendant, which showed that during the period from 1 January 1976 through 31 December 1982, plaintiff paid $38,027.94 to his general open account as additional payments on account, that he withdrew $17,460.00 during the same period, leaving a balance of additional payments, as of 31 December 1982, of $20,567.94. Plaintiff also stipulated that the balance of his collateral deposit account as of 24 September 1982 was $6,143.40.

Plaintiff does not dispute that as of 31 December 1982, after plaintiff had ceased to operate the Travelers service station, plaintiff owed defendant $39,574.58 on the general open account for purchases of petroleum products. By applying the funds made as additional payments, $20,567.94, and the funds in the separate collateral deposit account, $6,143.40, defendant arrived at the balance still owing of $19,006.64, the amount defendant prayed for in its counterclaim. Plaintiff disputes defendant's right to "withhold or otherwise appropriate" the funds he paid as "savings" toward the total balance due.

Yow, Yow, Culbreth & Fox, by Stephen E. Culbreth and Ralph S. Pennington, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by F. Joseph Treachy, Jr., and Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for defendant appellee.

JOHNSON, Judge.

Plaintiff first contends that it was error for Judge Stevens to dismiss plaintiff's second cause of action based on Judge Stevens' conclusion that Judge Llewellyn's order implicitly precluded plaintiff from litigating the cause of action regarding an allegedly unfair trade practice. We affirm Judge Stevens' order to dismiss, but we arrive at this result on appeal for reasons other than those stated in Judge Stevens' order.

A review of the record discloses that although plaintiff assigned error to the entry of partial summary judgment by Judge Llewellyn, plaintiff failed to present and discuss this assignment of error in his brief. Hence, this exception is deemed abandoned and Judge Llewellyn's ruling that summary judgment for defendant on plaintiff's first cause of action, conversion, and summary judgment for defendant on its counterclaim are conclusive on appeal. Rule 28(a), N.C. Rules App. P. Regarding plaintiff's conversion claim, plaintiff alleged in the complaint that "defendant did wrongfully assume and exercise the right of ownership over these two accounts which were the property of the plaintiff and has refused to return said property to the plaintiff and has wrongfully deprived the plaintiff owner of his right to the property." In defendant's counterclaim defendant alleged that $19,006.64 "was due and owing to defendant after defendant had applied *all*

credits lawfully due and owing to plaintiff and all payments made by plaintiff." (Emphasis added.) In granting partial summary judgment Judge Llewellyn made a judicial determination that no material issue of fact existed as to either of these two claims. Rule 56, N.C. Rules Civ. P. Accepting as given that (1) summary judgment for defendant on plaintiff's first cause of action and summary judgment for defendant on defendant's counterclaim are conclusive and (2) there is no factual dispute regarding the above allegations, we hold that it necessarily follows that plaintiff cannot prevail as a matter of law on his second cause of action. The following facts, which are conclusive on this appeal, necessarily arise from the entry of summary judgment on plaintiff's first cause of action and defendant's counterclaim: (1) defendant did not wrongfully assume and exercise the right of ownership of plaintiff's "savings"; (2) defendant did not wrongfully deprive plaintiff of his right to the "savings"; and (3) defendant applied all credits lawfully due and owing plaintiff and all payments made by plaintiff. Therefore, defendant's withholding and appropriation of the "savings" cannot be a wrongful act upon which to base an unfair trade practice claim as alleged by plaintiff. To hold otherwise would result in an inconsistent judgment. Inconsistent judgments are erroneous. 8 Strong's N.C. Index 3d *Judgment* sec. 4 (1977). Plaintiff's second cause of action should have been dismissed.

Because the issue raised by plaintiff in his first Assignment of Error is dispositive of the case, we need not address plaintiff's second and only other Assignment of Error.

Dismissal by Judge Stevens of the second cause of action of plaintiff's complaint is

Affirmed.

Judges WHICHARD and PHILLIPS concur.

DONALD W. JOHNSON v. BUILDER'S TRANSPORT, INC.

No. 8512SC727

(Filed 18 March 1986)

Master and Servant § 10.2— discharge of employee for filing of workers' compensation claim—action for retaliatory discharge—employee's disability—summary judgment for employer

The trial court properly entered summary judgment for defendant employer in plaintiff's action for retaliatory discharge where plaintiff had received compensation for his permanent partial disability, and affidavits submitted by defendant showed that plaintiff's disability interfered with his ability adequately to perform work available; N.C.G.S. § 97-6.1(e) provided a blanket exception for employers who dismissed employees having a permanent disability which interfered with their ability adequately to perform work available; and the reasons for defendant's failure to continue plaintiff's employment thus did not constitute a material issue which would affect the outcome of the litigation.

APPEAL by plaintiff from *Johnson, E. Lynn, Judge.* Judgment entered 17 January 1985 in Superior Court, HOKE County. Heard in the Court of Appeals 4 December 1985.

This is a civil action for retaliatory discharge instituted by plaintiff, Donald W. Johnson, against defendant Builder's Transport, Inc. G.S. 97-6.1. On 29 July 1980, defendant employed plaintiff as a truck driver. On 18 November 1982, plaintiff sustained injuries from an automobile accident which occurred during the course and scope of his employment with defendant. On 19 November 1983, plaintiff instituted a proceeding for the recovery of benefits pursuant to the Workers' Compensation Act. This claim included allegations of a five percent (5%) permanent disability, along with a pre-existing ten percent (10%) permanent disability. Defendant paid out a total of $2,257.75 toward medical expenses incurred by plaintiff resulting from his automobile accident. Additionally, defendant paid to plaintiff a total of $4,788.00 representing a twenty-one (21) week period of lost wages. On 4 October 1983, plaintiff returned to work. On 30 November 1983, the parties entered into a settlement agreement and release to resolve plaintiff's claim; whereby defendant, without acknowledging an added five percent (5%) disability, agreed to pay to plaintiff a lump sum payment of $3,240.00. Plaintiff and defendant agreed that this award would be a complete and final determination of

the controversy. On 28 December 1983, defendant filed a final report of compensation. Defendant terminated plaintiff's employment on 6 January 1984.

On 27 March 1984, plaintiff instituted this civil action alleging retaliatory discharge and further alleging that he had suffered mental anguish therefrom. G.S. 97-6.1(a). Defendant answered denying all pertinent allegations. On 27 August 1984, defendant filed a motion for summary judgment. On 17 January 1985, the court ordered summary judgment for defendant. Plaintiff appeals.

McLeod & Senter, P.A., by John Michael Winesette, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Guy F. Driver, Jr. and William McBlief, for defendant appellee.

JOHNSON, Judge.

The sole issue raised by this appeal is whether the trial court erred when it allowed defendant's motion for summary judgment. We hold that the trial court did not err when it ordered summary judgment for defendant.

G.S. 1A-1, Rule 56(c) provides in pertinent part as follows:

> 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 material fact and that any party is entitled to a judgment as a matter of law.

Rule 56(c), N.C. Rules Civ. P. The judge's role is to determine if there is a material issue of fact that is triable. *Wachovia Mortgage Co. v. Autry-Barker-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 moving party, through his forecast of the evidence, has the burden of establishing a lack of triable issues of fact, but the nonmoving party may not rest upon the mere allegations of his pleadings. *Taylor v. Greensboro 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). Having stated the applicable legal principles controlling the disposition of this case, we now turn to the propriety of the court's granting defendant's motion for summary judgment.

The statutory scheme within the Workers' Compensation Act that we are called upon to construe involves the interrelationship between two subsections of G.S. 97-6.1. The subsection whereby plaintiff instituted this lawsuit states:

> (a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

G.S. 97-6.1(a). Defendant relies upon G.S. 97-6.1(e) as it existed prior to amendment and as it existed at the time of the filing of this action. G.S. 97-6.1(e), as it existed prior to the 1985 amendment, reads as follows:

> (e) The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for permanent disability, total or partial, shall in no manner be deemed a violation of this section.

G.S. 97-6.1(e) (1979) (amended 1985). Defendant contends "the issue of defendant's motives in discharging plaintiff and the issue of plaintiff's ability to work have no bearing on the result: the plaintiff's permanent partial disability removes him from the retaliatory discharge exception in the Workers' Compensation Act." Defendant's interpretation of subsection (e) may be consistent with the wording of subsection (e), but it is entirely inconsistent with the wording of subsection (a). Moreover, we hold that such an interpretation runs contrary to the General Assembly's intent expressed in subsection (a). Subsection (a) explicitly prohibits an employer from discharging "*any* employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act." G.S. 97-6.1(a) (emphasis ours). Thus, when subsections (a) and (e) are read in *pari materia* it becomes clear that pursuant to subsection (e) an employer may discharge an employee for a bona fide reason such as the employee is so disabled that he or she is no longer able to effectively carry out the duties for which he or she is employed.

At the time G.S. 97-6.1(e) was being amended legislators expressed their concern for employers with employees no longer able to perform their tasks and therefore agreed to the exception stated in subsection (e). Note, *Workers' Compensation—Retaliatory Discharge—The Legislative Response to Dockery v. Lampart Table Co.*, 58 NCL Rev. 629, 643, n. 98 (1980). G.S. 97-6.1 (e) (1979) (amended 1985) should not be misinterpreted to sanction an employer's contravention of G.S. 97-6.1(a), to wit: dismissing an employee merely because that employee in good faith has initiated a proceeding against the employer. The General Assembly has aptly guarded against such a misinterpretation of subsection (e) in the current version of G.S. 97-6.1(e), which is as follows:

> (e) The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for permanent total disability, *or a permanent partial disability interfering with his ability to adequately perform work available,* shall in no manner be deemed a violation of this section.

G.S. 97-6.1(e) (as amended) (emphasis ours). It is clear that the General Assembly intended subsection (e) to be a narrow exception to the general rule in subsection (a) that an employer may not dismiss an employee who has in good faith instituted a proceeding against the employer. We now turn to the record herein to determine if there was a material issue of fact with respect to whether defendant properly relied upon G.S. 97-6.1(e) as a basis for terminating plaintiff's employment.

Plaintiff argues that he should be allowed to present before a jury his evidence pertaining to defendant's termination of his employment. It is contended by plaintiff that there exists a material issue of fact with respect to why defendant fired him. We disagree.

The facts that plaintiff has received compensation for his permanent partial disability and affidavits submitted by defendant showing that this disability interferes with his ability to adequately perform work available render his inquiry into the reasoning for his dismissal as pointless. We recognize that plaintiff asserts through his pleadings and supporting materials various credible theories which might raise an issue of fact. However,

these allegations do not raise a triable, material issue of fact in light of the General Assembly's blanket exception in G.S. 97-6.1(e) for employers that dismiss employees who have a permanent disability interfering with their ability to adequately perform work available. G.S. 97-6.1(e). Thus, the reasons for defendant's failure to continue the employment of plaintiff do not constitute a material issue such that would affect the outcome of the litigation. *See Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). Moreover, defendant's forecast of the evidence that would have been presented at trial reveals the uncontradicted fact of plaintiff's fifteen percent (15%) permanent partial disability, which would interfere with plaintiff's ability to drive a truck. Defendant submitted two physicians' reports, two letters from physicians to defendant and an affidavit by defendant's Workers' Compensation Manager which all support defendant's assertion that plaintiff's permanent partial disability interferes with his ability to adequately perform his work such that his dismissal was justified. Plaintiff did not submit any affidavits or materials in opposition to defendant's motion for summary judgment. Based on the foregoing we conclude that the trial court correctly granted defendant's motion for summary judgment.

Affirmed.

Judges WHICHARD and PHILLIPS concur.

IN THE MATTER OF: THE APPEAL OF K-MART CORPORATION FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY MECKLENBURG COUNTY FOR 1978, 1979, 1980, 1981, 1982, AND 1983

No. 8510PTC713

(Filed 18 March 1986)

1. Taxation § 25.10— denial of exemption by county or municipal board—appeal to Property Tax Commission proper

There was no merit to appellee's contention that the Property Tax Commission had no jurisdiction to entertain appellant's appeal, since the plain intent of N.C.G.S. § 105-282.1(b), N.C.G.S. § 105-322, and N.C.G.S. § 105-324 is to permit a property owner, as a matter of right, to appeal to the Property Tax

Commission upon a county's or municipal board's denial of its application for an exemption.

2. **Taxation § 19.1— property in warehouse for shipment to stores—no exemption from taxation**

The Property Tax Commission properly concluded that household appliances passing through appellant's warehouse were not exempted from taxation by N.C.G.S. § 105-275, since the appliances were not placed in a public warehouse for the purpose of transshipment to appellant's customers but were instead held for transshipment to appellant's stores.

APPEAL by K-Mart Corporation and Mecklenburg County from the decision of the North Carolina Property Tax Commission entered 7 February 1985. Heard in the Court of Appeals 4 December 1985.

Since 1978 larger household appliances sold by many K-Mart stores in the southeastern states have passed through a company warehouse in Mecklenburg County. Before 18 October 1983, none of those items were listed for taxes in Mecklenburg County and no exemption had been applied for or obtained. On that day the Tax Office of Mecklenburg County notified K-Mart that it intended to discover the value of the articles that were warehoused during 1983 and the preceding five years and to tax them. K-Mart then listed the articles warehoused during those years as being worth approximately $24 million, and applied for an exemption for the six years involved. Several special classes of property are exempted from taxation by G.S. 105-275, which provides that such property "shall not be listed, appraised, assessed, or taxed," and the class that K-Mart's warehoused merchandise belongs to, so it contends, was established by paragraph (10) of G.S. 105-275, as follows:

> (10) Personal property shipped into this State and placed in a public warehouse as intermediate consignee for the purpose of transshipment in its original form or package to the owner's customers either inside or outside the State. No portion of a premises owned or leased by a consignor or consignee, or a subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this subdivision despite any licensing as such. The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center.

The application for an exemption was denied by the Mecklenburg County Board of Equalization and Review, and upon appeal the Property Tax Commission, after finding facts to the following effect, reached the same result:

The warehoused items, referred to by K-Mart as Department 19 merchandise, are larger household appliances such as stoves, refrigerators, washers and dryers, microwave ovens, stereos and televisions. Most stores, because they do not have the space, neither inventory nor display these articles, though some larger stores do display them. Before 1980 the warehouse shipped such items directly to customer buyers; but after 1980 most of the items sold or ordered through the stores were shipped from the warehouse to the stores, which either delivered them to the customers or held them for the customers to pick up. The stores usually display and maintain small stocks of smaller, portable appliances and the warehouse replenishes these stocks as requested; and some stores keep small stocks of all Department 19 merchandise for sale to walk-in customers. When a customer orders a single item that comes to the warehouse in a carton containing more than one unit, the warehouse sends the whole package to the store, which keeps the surplus items for future sale. Orders sent to the warehouse usually identify only the store that is to receive the goods and usually do not identify the customer, if there is one. An item sent to an individual store is the property of that store until it is received by the customer.

From these and other facts so found the Commission concluded that K-Mart had failed to establish that the items were kept in the warehouse for transshipment to its customers, as the statute creating the exempted class provides.

Lane & Helms, by H. Parks Helms, for appellant, cross-appellee K-Mart Corporation.

Hamlin L. Wade for appellee, cross-appellant Mecklenburg County.

PHILLIPS, Judge.

[1] In the hearing before the Property Tax Commission, Mecklenburg County contended that the Commission had no jurisdiction to entertain K-Mart's appeal to it and cross-assigns as error

the Commission's ruling to the contrary. The basis for this contention is that G.S. 105-282.1(c) provides that when an owner "demonstrates that the property meets the conditions for exemption, the exemption *may* be approved by the board at that time." (Emphasis supplied.) This language, so the County argues, gave the Mecklenburg County Board of Equalization and Review the discretion, as it saw fit, to either grant or deny the application and K-Mart thus had no right to appeal therefrom. This contention is rejected. The plain intent and thrust of G.S. 105-282.1(b), G.S. 105-322, and G.S. 105-324, it seems to us, is to permit a property owner, as a matter of right, to appeal to the Property Tax Commission upon a county or municipal board denying its application for an exemption.

[2] By its sole assignment of error K-Mart contends that the Property Tax Commission's decision against it is based on findings of fact not supported by evidence and that in any event the law was not properly applied to them. This contention has no merit, in our view, and we overrule it. That the goods were warehoused for transshipment of some kind, as the evidence certainly established, is not dispositive of the case, as appellant apparently contends. For the issue is whether the evidence shows that the warehoused goods were held for transshipment to K-Mart's *customers*, as G.S. 105-275(10) provides. If so, they were within the exempted class; but if they were held for transshipment to K-Mart's *stores* they were outside the exempted class and therefore subject to taxation. The five findings of fact that K-Mart attacks are those to the effect that the warehoused goods were shipped to the stores either for sale or customer pickup. These findings clearly have evidentiary support and appellant does not really contend that they do not; rather, it is contended that based on the whole record different findings should have been made. We disagree. While the Commission properly found that some goods held in the warehouse were transshipped to K-Mart's customers, the record would not support a finding that all or even most of the goods were so transshipped to its customers or that the warehouse received the goods for that purpose, as the statute obviously requires. While K-Mart offered no evidence at all as to the amount or percentage of its goods that were transshipped to customers, witnesses on both sides testified that some merchandise was shipped to individual stores for special sales and other

purposes; that though the stores usually kept only smaller items, some kept larger items as well; that there was no policy requiring the warehouse to hold any items until they were sold to customers, and the stores were free to order and did order items that had not been first ordered by its customers. From our review of the whole record, we believe that the Commission made the findings that should have been made, and we will not disturb them.

K-Mart's further contention that the Commission erred in applying the law to the findings made is based on the legislative purpose stated in the statute which created the exemption: "The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center." G.S. 105-275 (10). Though the purpose of the exemption is certainly to encourage merchandizers to establish distribution centers in this state, that neither enlarges the stated scope of the exemption nor dispenses with the necessity of the property owner proving that he is entitled to the exemption. While our Supreme Court said in *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974), mistakenly relied upon by the appellant, that the phrase "for the purpose of transshipment" must be construed in light of the stated legislative policy, and held that bills of lading for goods shipped into a public warehouse did not have to state that the goods were for transshipment or to bear the name of the ultimate consignee, the Court also recognized that the policy of the statute must be applied in light of the countervailing rule of construction that statutes providing exemption from taxation are strictly construed. "Taxation is the rule; exemption the exception," *Odd Fellows v. Swain*, 217 N.C. 632, 637, 9 S.E. 2d 365, 368 (1940), and one claiming an exemption has the burden of establishing that he is entitled to it. *Canteen Services v. Johnson, Comr. of Revenue*, 256 N.C. 155, 123 S.E. 2d 582, 91 A.L.R. 2d 1127 (1962). The Commission properly concluded that K-Mart failed to establish its right to the exemption. The import of the evidence is not that the goods were held in the warehouse for the "purpose of transshipment" to its "customers," as the statute provides; its import is that the warehoused goods were held for transshipment to K-Mart stores, as and when the stores requested, a situation that the General Assembly has not yet seen fit to exempt from taxation.

Affirmed.

Judges WHICHARD and JOHNSON concur.

CALDWELL'S WELL DRILLING, INC. v. JAMES KENNETH MOORE AND WIFE, MARY JANE MOORE, CHARLES L. McFARLAND AND SANDRA McFARLAND

No. 8524DC1095

(Filed 18 March 1986)

1. **Rules of Civil Procedure § 15.1— denial of motion to amend complaint—no abuse of discretion**

The trial court did not abuse its discretion in denying plaintiff's motion to amend its complaint to reflect allegations made in the answer where the answer was filed on 4 January 1985, plaintiff did not make its motion to amend until 22 April 1985, and there was nothing in the record to indicate why plaintiff waited so long to make its motion.

2. **Laborers' and Materialmen's Liens § 8— no underlying debt—no lien**

Where plaintiff sought a personal judgment against the first defendants based on its contract to drill a well on certain property and to have the personal judgment against the first defendants declared to be a specific lien on the property allegedly conveyed by the first defendants to the second defendants, but plaintiffs took a voluntary dismissal against the first defendants, and there was no allegation that the second defendants were indebted to plaintiff in any amount, the trial court did not err in dismissing plaintiff's claim against the second defendants, since there could be no lien in the absence of an underlying debt.

Judge WEBB dissenting.

APPEAL by plaintiff from *Lacey, Judge*. Judgment entered 23 April 1985 in District Court, MADISON County. Heard in the Court of Appeals 5 March 1986.

This is a civil action wherein plaintiff seeks a judgment against defendants, Charles and Sandra McFarland (hereinafter the McFarlands), for $6,760.00 and to have the judgment declared a lien against property owned by defendants James Kenneth Moore and Mary Jane Moore (hereinafter the Moores).

In its complaint, plaintiff alleged that it contracted with the McFarlands to drill a well in property owned by the McFarlands.

Plaintiff further alleged that the property was conveyed by the McFarlands to the Moores. There is no allegation in the complaint as to when the McFarlands conveyed the property to the Moores. Plaintiff also alleged that the last drilling on the property had been performed on 12 August 1983 and that the claim of lien was filed on 7 December 1983. The Moores filed an answer and a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(1), (2) and (6). The McFarlands also filed an answer and a Rule 12(b)(6) motion to dismiss.

At the hearing on defendants' motions to dismiss, plaintiff announced that it would voluntarily dismiss its claim against the McFarlands and moved to amend its complaint to allege that the McFarlands acted as agents for the Moores. The trial judge denied plaintiff's motion to amend and allowed the Moores' motion to dismiss. From an order dismissing plaintiff's claim against the Moores, plaintiff appealed.

Stephen Barnwell for plaintiff, appellant.

Briggs and Ball, by Forrest F. Ball, for defendants Moores, appellees.

HEDRICK, Chief Judge.

[1] Plaintiff contends that the trial court erred in denying its motion to amend its complaint. After the statutory time for amending pleadings as a matter of course has elapsed, a motion to amend a complaint pursuant to G.S. 1A-1, Rule 15(a) is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable on appeal absent a clear showing of abuse of discretion. *Smith v. McRary*, 306 N.C. 664, 295 S.E. 2d 444 (1982). In the present case, there is no showing that the trial court abused its discretion in denying the motion to amend plaintiff's complaint made when the case came on for hearing on defendants' 12(b) motions to dismiss. In their answer, the McFarlands alleged that they were acting as agents for the Moores in contracting with plaintiff to drill the well. The answer containing this information was filed on 4 January 1985 and plaintiff did not make its motion to amend to allege that the McFarlands were acting as agents of the Moores until 22 April 1985. There is nothing in the record to indicate why plaintiff waited so long to make its motion to amend. This assignment of error has no merit.

[2] Plaintiff also contends that the trial court erred in dismissing its claim against the Moores to have a lien imposed on the property. It is well settled that a statutory lien pursuant to Chapter 44A of the General Statutes "is incident to and security for a debt. There can be no lien in the absence of an underlying debt." *Lowe's v. Quigley*, 46 N.C. App. 770, 772, 266 S.E. 2d 378, 379 (1980) (citation omitted). Without a contract, the lien does not exist. *Id.* Plaintiff has the burden of showing not only that it performed labor or furnished materials for the making of an improvement on defendants' property, but also that the labor was performed or the materials were furnished pursuant to a contract, either express or implied, with the owners of the property. G.S. 44A-8; *Electric Co. v. Robinson*, 15 N.C. App. 201, 189 S.E. 2d 758 (1972).

In the present case, plaintiff sought a personal judgment against the McFarlands based on its contract to drill a well on the property and to have the personal judgment against the McFarlands declared to be a specific lien on the property allegedly conveyed by the McFarlands to the Moores. There is no allegation in the complaint that the Moores are indebted to plaintiff in any amount. If plaintiff had pursued its claim for a personal judgment against the McFarlands and had protected its claim of lien against the property in accordance with the statute, it would be entitled to have any personal judgment obtained against the McFarlands pursuant to the contract for the drilling of the well declared to be a specific lien against the property wherein the well was drilled. Plaintiff, however, did not preserve its claim against the McFarlands. It abandoned its claim for a personal judgment based on the contract to drill the well by taking a voluntary dismissal of its claim against the McFarlands. Thus, when the trial judge granted the Moores' 12(b) motion to dismiss, there was no debt or judgment to be secured by a lien on the property in question. Since the court necessarily considered matters outside the pleadings, the voluntary dismissal of plaintiff's claim for personal judgment against the McFarlands, the 12(b)(6) order was converted to a summary judgment for defendants Moores with respect to the dismissal of plaintiff's claim to have a lien imposed on the property. G.S. 1A-1, Rule 12(b).

The order appealed from is affirmed.

Affirmed.

Judge PARKER concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. Article X § 3 of the Constitution of North Carolina requires that the General Assembly shall provide that mechanics and laborers have an adequate lien on the subject matter of their labor. Pursuant to this constitutional mandate the General Assembly has adopted G.S. 44A-8 which provides:

> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished pursuant to such contract.

The complaint alleges that the work done and materials furnished were pursuant to a contract with the McFarlands who then owned the property. This should comply with the statute. In light of the constitutional mandate that mechanics and laborers should have a lien on the subject of their work I would not extend the statutory requirement, as we have done in this case, to require that the plaintiff be able to get a money judgment against the person who made the contract.

I vote to reverse.

STATE OF NORTH CAROLINA v. JAMES BENJAMIN BEST

No. 859SC1041

(Filed 18 March 1986)

Homicide § 30.2— second degree murder—failure to submit voluntary manslaughter—no error

In a second degree murder prosecution, the trial court did not err in failing to submit voluntary manslaughter as a possible verdict on the theory that defendant killed his victim in the heat of passion brought on by adequate provocation, since words alone are never sufficient provocation to mitigate second degree murder to voluntary manslaughter, or on the theory that defendant's evidence showed that he did not intend to kill deceased but merely to scare him off, since defendant intentionally shot the victim with a rifle at close range; however, the trial court should have instructed on voluntary manslaughter on the theory that defendant acted in self-defense but used excessive force where defendant testified that the victim had threatened to kill him and that immediately prior to the shooting, defendant heard a pistol cock after seeing the victim reach under the seat of his truck.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 10 May 1985 in Superior Court, PERSON County. Heard in the Court of Appeals 3 March 1986.

On 4 December 1984 defendant was charged in a proper bill of indictment with first degree murder. The State presented evidence tending to show that on 5 September 1984 Louis Winstead and his family went to the farm of Bernard Obie to dig potatoes. While Winstead was plowing the potatoes defendant drove by the potato patch and waved to Winstead. He subsequently returned to a location near the potato patch with his tractor. Defendant's tractor started to have mechanical problems, and defendant then asked Winstead's daughter if she would go get some battery cables to start the tractor. When Winstead informed defendant that he did not have time to help, the parties became embroiled in an argument. During the argument defendant accused Winstead of being on his land. During the confrontation defendant was holding a rifle in his hand. Following the argument Winstead resumed plowing potatoes. Shortly thereafter Mr. Obie drove up in his truck. When Obie stopped his truck in front of defendant's tractor, defendant jumped up from behind the tractor, ran toward Obie's truck and fired one shot with his rifle. The shot struck Obie and he died before he could receive medical attention. Winstead also testified on direct examination that three or four

weeks prior to the shooting defendant told him that he had to kill Obie.

Defendant was arrested at his residence a short time thereafter, and the rifle used in the murder was found in a wooded area about 2/10 of a mile from where the shooting occurred. The assistant medical examiner testified that Obie died as a result of the gunshot wound, and at the time of his death had a blood alcohol concentration of .17.

Defendant presented evidence that he and his wife, Obie's daughter, moved to Person County from Washington, D.C., in 1974. Sometime prior to 1979 a dispute over land occurred between defendant and Obie. Because of this dispute sharp confrontations had occurred between defendant and Obie on several occasions. During these confrontations Obie had brandished a gun at defendant. Defendant also testified that on several occasions Obie had stated that he intended to kill defendant and had attempted to run over defendant on several occasions.

Defendant further testified that on 5 September 1984 he had seen Obie with a pistol on his side and a rifle and shotgun in the cab of his truck. Approximately two hours before the shooting defendant was sitting on the porch of a friend when Obie drove by and made gestures as if he were going to drive into the driveway. After this episode defendant went home and asked his wife what was bothering her father. After speaking with his wife defendant drove his tractor to the field where Winstead was working. Defendant denied having any confrontation with Winstead. Defendant testified that when he saw Obie coming down the road he attempted to get back to his house but that Obie drove his truck in front of defendant's tractor and cut off defendant's path. Defendant then stated that he told Obie that he was not bothering him, that he was just trying to get his tractor started. Defendant further testified that he then saw Obie reach down at his seat for something, and that Obie opened his truck door and called defendant a "black son of a bitch." Defendant testified that this statement paralyzed him and that he heard Obie cock a pistol. Defendant further testified that he fired one shot at Obie with the purpose of scaring him and started running. Defendant stated that the reason he ran after firing the shot was because he thought Obie was chasing him.

On rebuttal, the State presented evidence tending to show that prior to the shooting, defendant drove to his home, went inside and was very angry and then he came outside and started yelling and pointing toward the potato patch where the Winsteads were located. At that time, he had a gun in his hand. State's evidence on rebuttal further showed that defendant never mentioned anything about a pistol prior to testifying and that no pistol was found at the scene of the shooting.

Defendant was convicted of second degree murder. From a judgment sentencing him to the presumptive term of 15 years imprisonment, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jo Anne Sanford, for the State.

Assistant Appellate Defender Leland Q. Towns for defendant, appellant.

HEDRICK, Chief Judge.

The sole issue presented for review is whether the court erred in failing to submit voluntary manslaughter as a possible verdict. Defendant contends that this evidence supported submission of voluntary manslaughter on three theories: (1) that defendant killed Obie in the heat of passion brought on by adequate provocation; (2) that defendant's evidence showed that he did not intend to kill the deceased but merely to scare him off; and (3) that defendant acted in self defense except he used excessive force in repelling the deceased because he mistakenly believed that the deceased had a pistol.

The trial court must declare and explain the law arising from the evidence. If the evidence could convince the jury to convict the defendant of a lesser included offense, the court has a duty to charge on the lesser included offense. *See State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979).

Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980). This crime may be reduced to voluntary manslaughter upon a showing that defendant killed his victim in the heat of passion caused by provocation adequate to negate the element of malice. *State v. Burden*, 36

N.C. App. 332, 244 S.E. 2d 204, *disc. rev. denied*, 295 N.C. 468, 246 S.E. 2d 216 (1978). Words alone are never sufficient provocation to mitigate second degree murder to voluntary manslaughter. *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975). The evidence presented by defendant is insufficient to establish that the killing was done in the heat of passion upon adequate provocation. Thus, his first theory must fail.

Defendant's second theory supporting an instruction on voluntary manslaughter also fails. Defendant produced no evidence from which a rational jury could find voluntary manslaughter under the theory that defendant did not intend to kill the victim when he intentionally shot at the victim with a rifle at close range.

Defendant's third theory supporting an instruction on voluntary manslaughter is compelling. Second degree murder may be reduced to voluntary manslaughter if a killing results from the use of excessive force in the exercise of self defense. Excessive force in the exercise of self defense has been described by our Supreme Court as that force used by "[a] defendant who honestly believes that he must use deadly force to repel an attack but whose belief is found by the jury to be unreasonable under the surrounding facts and circumstances. . . ." *State v. Jones*, 299 N.C. 103, 112, 261 S.E. 2d 1, 8 (1980). In the instant case, defendant testified that the victim had threatened to kill defendant and that immediately prior to the shooting defendant heard a pistol cock after seeing the victim reach under the seat. We cannot say that the evidence adduced at trial demonstrates as a matter of law that defendant did not have an honest belief that deadly force was necessary to repel the victim. The trial court held the same view of the evidence to the extent that it believed the evidence supported an instruction on self defense.

Whether excessive force was used in self defense is ordinarily a jury question. It is difficult to imagine a homicide case in which the evidence supports an instruction on self defense but not an instruction on voluntary manslaughter based upon an excessive force theory. *See State v. Thomas*, 184 N.C. 757, 114 S.E. 834 (1922). We hold that the trial court erred in failing to instruct the jury on voluntary manslaughter and order a new trial.

New trial.

Judges WEBB and PARKER concur.

WILLIAM EDGAR PEGRAM v. PINEHURST AIRLINES, INC.

No. 8510SC471

(Filed 18 March 1986)

Negligence § 39— towing airplane—last clear chance—failure to instruct error

In an action to recover for personal injury sustained by plaintiff when an airplane operated by defendant's employees pinned him against the tug he was using to tow the airplane, the trial court erred in failing to instruct on the issue of last clear chance where the evidence tended to show that plaintiff could not accelerate the tug away from the oncoming aircraft and could not jump from the tug without endangering his life so that he could not extricate himself from the position of peril in which he had negligently placed himself; two of defendant's agents were positioned so as to keep a lookout for any possible problems and plaintiff was yelling "stop" while an airport fire truck was honking its horn to warn of the dangerous condition; the plane was traveling so slowly that it could have been stopped in time to avoid collision with the tug had defendant's agents been exercising a proper lookout; defendant's agents failed to use the brakes so as to avoid the impending injury to plaintiff and applied the brakes only after plaintiff had been injured; and plaintiff received severe injuries to his diaphragm and stomach which required hospitalization and surgery.

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

Emanuel and Emanuel by Robert L. Emanuel and George W. Kane III for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by James G. Billings for defendant appellee.

COZORT, Judge.

Plaintiff instituted this action seeking damages for personal injury he received when an airplane operated by employees of Pinehurst Airlines, Inc., pinned him against the tug he was using to tow the airplane. The defendant Pinehurst Airlines, Inc.,

stipulated to its negligence. The trial court instructed the jury on the issue of contributory negligence. The trial court denied the plaintiff's requested instruction on the issue of last clear chance. From a majority verdict finding plaintiff contributorily negligent, plaintiff appeals alleging that the trial court erred in failing to instruct the jury on the issue of last clear chance. We agree. The evidence follows.

Plaintiff William Pegram testified that on the evening of 7 November 1979 he was summoned to the Raleigh-Durham Airport because the defendant's plane had stalled and was blocking two airport runways. At that time plaintiff was the Operation Coordinator at the airport. Plaintiff went to the airport to assist in moving the stalled aircraft, a 68-foot-long twin engine jet weighing 55,000 pounds. Under usual circumstances a tow bar would have been used to tow the aircraft; however, a tow bar was not available for this specific aircraft because neither the airport nor the defendant had the appropriate tow bar. After several unsuccessful attempts to tow the plane, it was agreed that a tug would be used to pull the plane. A tug is a four wheel, open cab vehicle. A chain approximately 25 feet long was attached to the tug and the other end was attached to the right landing gear of the plane. The pilot, Captain Joseph Hudspeth, got into the plane and was seated in the pilot's seat which was located on the left-hand side of the plane. An employee of the defendant was placed in the co-pilot's seat on the right-hand side as a lookout and another employee was positioned at a cargo door or walking along the right main tire close to the right front side of the main landing gear of the plane as a lookout. Only the pilot, who could not see the plaintiff in the tug, could steer and brake the airplane.

As the towing procedure began, plaintiff shouted "turn" to the lookouts. The lookouts relayed this message to the pilot. The pilot refused to turn the aircraft. When the pilot realized he was going to run off the runway, he abruptly turned the aircraft toward the tug. The airplane began to accelerate down an incline and overtake the tug. The plaintiff yelled "stop" to the lookouts. Plaintiff tried to accelerate the tug but was unable to do so. The towing chain hit the runway. Thomas Sanders was following the airplane in an airport fire truck. Sanders testified that as soon as he saw the chain hit the ground, he sounded the horn of the fire truck to alert the crew of the plane to the danger. The tire of the

plane ran over the towing chain. As the plane overtook the tug, Pegram moved the propeller to keep it from hitting him in the head. The engine cowling of the aircraft smashed into the tug, pinning Pegram between the plane and the steering wheel of the tug. Plaintiff suffered serious injuries.

Sanders testified that 10 seconds elapsed between the time the chain hit the ground and the plane hit Pegram. He also stated that the plane was moving between 1½ and 2½ m.p.h. Captain Hudspeth testified by way of deposition that the airplane was moving at a slow walk. Hudspeth also testified that the lookout turned to him and said, " 'Stop.' And I stopped. And I said, 'What's the matter?' He says, . . . 'You've hit the tow vehicle . . . .' " Hudspeth indicated the brakes of the plane were in proper working order during the towing procedure and that the tug was lit, so that there should have been no problem seeing it.

Plaintiff contends that the trial court below erred by failing to instruct the jury on the issue of last clear chance. A plaintiff is entitled to an instruction on last clear chance when the evidence considered in the light most favorable to the plaintiff establishes each and every element of the doctrine, which are the following: (1) plaintiff, by his own negligence, placed himself in a position of peril from which he could not escape; (2) defendant saw, or by the exercise of reasonable care should have seen and understood, the perilous position of plaintiff; (3) defendant had the time and the means to avoid the accident if defendant had seen or discovered plaintiff's perilous position; (4) the defendant failed or refused to use every reasonable means at his command to avoid impending injury to plaintiff; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid impending injury. *Wray v. Hughes*, 44 N.C. App. 678, 262 S.E. 2d 307, *disc. rev. denied*, 300 N.C. 203, 269 S.E. 2d 628 (1980). Considering the evidence in the light most favorable to the plaintiff, we hold that the plaintiff established every element necessary to require the issue to be submitted to the jury.

Plaintiff has satisfied the first element, that he could not escape by exercise of reasonable care from the position of peril in which he negligently or inadvertently placed himself. Plaintiff's evidence tended to show that plaintiff could not accelerate the tug away from the oncoming aircraft and could not jump from the

tug without endangering his life. It is reasonable to conclude that the plaintiff could not extricate himself from the position of peril in which he had negligently placed himself. *Grogan v. Miller Brewing Co.*, 72 N.C. App. 620, 325 S.E. 2d 9 (1985).

Plaintiff has satisfied the second element that defendant, through its agents, knew, or by the exercise of reasonable care should have seen and understood, the perilous position of plaintiff. The plaintiff's evidence tended to show that two of the defendant's agents were positioned so as to keep a lookout for any possible problems: one in the cockpit and one at the cargo door. The pilot indicated that the distance from the tug to the plane was not great and there should have been no problem seeing the tug. Plaintiff was yelling "stop" and an airport fire truck was honking its horn to warn of the dangerous condition. In the light most favorable to the plaintiff, the evidence tended to show that had the defendant's agents maintained a proper lookout, they would have been able to discover plaintiff's perilous position.

The third element of the doctrine of last clear chance, that defendant's agents had the time and means to avoid the injury to the plaintiff by exercise of reasonable care after the discovery of plaintiff's perilous position, has been satisfied by the plaintiff. The plaintiff's evidence tends to show that 10 seconds elapsed from the time the chain hit the ground and the plane collided with the plaintiff. The plaintiff's evidence indicated that the plane was traveling between 1½ and 2½ m.p.h., or at a slow walk, and that the plane could be stopped, if not almost immediately, then at least before the plane would collide with the tug. From this evidence it is reasonable to conclude that had defendant's agents been exercising a proper lookout by the exercise of reasonable care, they had the time and the means to avoid the accident.

The plaintiff's evidence satisfies the fourth element of the doctrine. The defendant's agents failed to use the brakes so as to avoid the impending injury to the plaintiff. The plaintiff did not have the means to stop the plane. The evidence shows that the pilot applied the brakes only after the plaintiff had been hit by the plane. The final element of the doctrine has been satisfied by the plaintiff. The plaintiff's evidence tended to show that he received severe injuries to his diaphragm and stomach which required hospitalization and surgery. From the facts presented, we

find that the trial court erred by failing to instruct the jury on the issue of last clear chance.

Having determined the first assignment warrants a new trial, we find it unnecessary to address the plaintiff's remaining assignments of error.

New trial.

Judges WEBB and BECTON concur.

CAREFREE CAROLINA COMMUNITIES, INC., JOHN B. RICHARD AND WIFE, WILDA L. RICHARD; JEFFREY K. PORTMAN AND WIFE, MARGARET PORTMAN; AND ROBERT FRICKHOEFFER AND WIFE, KAY FRICKHOEFFER v. ROBERT S. CILLEY, TRUSTEE; NC-GA, INC., AND BREVARD FEDERAL SAVINGS & LOAN ASSOCIATION

No. 8529SC1152

(Filed 18 March 1986)

Partnership § 3; Mortgages and Deeds of Trust § 1— profit sharing—no partnership—foreclosure proceeding not enjoined

The trial court did not err in denying plaintiffs' motion for preliminary injunction and allowing foreclosure to proceed where plaintiffs contended that the agreements between plaintiffs and defendants created a partnership rather than a mortgagee-mortgagor relationship and defendants therefore could not foreclose on plaintiffs, but the evidence tended to show that defendants' share in plaintiffs' profits was "additional interest," thus negating the inference that one who shares in the profits from a business is a partner, and the parties' "Option to Purchase and Contract to Purchase" explicitly stated that their dealings did not constitute a partnership. N.C.G.S. § 59-37(4).

APPEAL by plaintiffs from *Friday, Judge.* Order denying preliminary injunction entered 17 May 1985 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 12 March 1986.

Plaintiffs filed an action to enjoin foreclosure on real property. Plaintiffs contend that the option contract, contract to purchase and note entered into between plaintiffs and defendants created a partnership relationship rather than a mortgagee-mortgagor relationship. Plaintiffs point to several provisions in

the contracts between plaintiffs and defendants in support of their contention that a partnership exists:

1) Defendants have the right to approve all work and construction on the real property until the loan is paid.

2) ". . . [S]o long as the financial interest and community image of [defendants] are protected, [defendants agreed] to do everything in their power subject to good business practices to assist and further the successful development by [plaintiffs] of the tract of land . . . ."

3) Plaintiffs agreed not to finalize any phased annexation of more than twenty-five acres at a time until the loan is paid.

4) Plaintiffs, their heirs and assigns agreed to obtain all construction loans from defendants.

5) Defendants agreed to provide a sales promotion office for plaintiffs free of charge.

6) Defendants agreed to pay plaintiffs' attorney fees for closing and plaintiffs' costs of accounting until the loan was paid.

7) In addition to 11% interest for the first five years of the loan and 12½% interest for the last five years of the loan, plaintiffs agreed to pay defendants 15% of the net profit from sales during the first five years of the loan and 10% of the net profit during the last five years of the loan.

From an order denying preliminary injunction, plaintiffs appealed.

Shuford, Best, Rowe, Brondyke & Orr, by James Gary Rowe, for plaintiffs, appellants.

Ladson F. Hart for defendants, appellees.

HEDRICK, Chief Judge.

We note at the outset that an appeal from an order granting or denying a preliminary injunction is interlocutory. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975). Absent a showing that a substantial right will be lost unless the order is reviewed

before final judgment, an appeal from the order should be dismissed. *Id.* However, in order to expedite decision in the public interest, we elect to suspend the rules regarding interlocutory appeals and review the appeal on its merits. N.C. Rules of Appellate Procedure, Rule 2.

The sole issue on this appeal is whether the trial court erred in denying plaintiffs' motion for preliminary injunction and allowing foreclosure to proceed. Ordinarily, to justify issuing a preliminary injunction, the movant must show (1) there is probable cause to believe that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiff's rights during the litigation. *Setzer v. Annas*, 286 N.C. 534, 212 S.E. 2d 154 (1975). The decision to issue or not to issue a preliminary injunction is usually a matter of discretion to be exercised by the trial judge and will not be overturned absent a showing of an abuse of discretion. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975).

Plaintiffs contend that the agreements between plaintiffs and defendants create a partnership and that therefore defendants may not foreclose on plaintiffs. We disagree.

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." G.S. 59-36. As our Supreme Court has stated:

> "A contract express or implied, is essential to the formation of a partnership. . . . Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of 'all the circumstances attendant on its creation and operation.'"
>
> Not only may a partnership be formed orally, but "it may be created by the agreement or conduct of the parties, either express or implied. . . ."

Eggleston v. Eggleston, 228 N.C. 668, 674, 47 S.E. 2d 243, 247 (1948) (citations omitted).

Plaintiffs rely heavily on the fact that defendants were to share in plaintiffs' profits as "additional interest." G.S. 59-37(4) provides:

> The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> . . .
>
> d. As interest on a loan, though the amount of payment vary with the profits of the business.

The profit sharing provisions of the relationship between plaintiffs and defendants fit squarely within G.S. 59-37(4)(d). See *McGurk v. Moore*, 234 N.C. 248, 67 S.E. 2d 53 (1951). The other unusual contract provisions plaintiffs rely upon merely help secure defendants' $1,942,500.00 loan exposure. Furthermore, the "Option to Purchase and Contract to Purchase" explicitly states that:

> The parties mutually agree, understand and covenant that this contract and the sale of the property and the attendant financing, purchase, development and construction does not constitute a partnership between the Parties of the first part, their successors and assigns, and Parties of the second part, their heirs, successors and assigns, as Parties of the first part are acting only as financiers and lenders and the Parties of the second part are acting as purchasers and developers and any phraseology and terminology in any portion of this contract which might tend to indicate to the contrary is not intended nor shall it be interpreted as such as no partnership was ever contemplated and will ever exist within the law or in equity. . . .

The plaintiffs failed to show probable cause to believe that they will be able to establish the partnership rights they assert. Therefore, the trial court did not err in denying a preliminary injunction and allowing foreclosure to proceed. The order appealed from is affirmed.

Affirmed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. SIMON DAVID BOONE

No. 853SC1123

(Filed 18 March 1986)

1. **Telecommunications § 5— obscene phone calls—contents of calls—admissibility of evidence**

In a prosecution of defendant for making harassing, embarrassing and annoying telephone calls, the trial court did not err in allowing witnesses to testify about the actual contents of the telephone calls, though the obscene statements attributed to defendant might have been prejudicial to defendant, since the contents of the statements were relevant to show whether the intent of the calls was to abuse, annoy, threaten, terrify, harass or embarrass the victims of the calls.

2. **Telecommunications § 5; Criminal Law § 162— number of obscene phone calls —failure to object to similar evidence**

In a prosecution of defendant for making harassing, embarrassing and annoying telephone calls, defendant could not complain that the trial court admitted testimony regarding the total number of telephone calls made from defendant's telephone, since defendant failed to object when similar evidence was admitted.

3. **Telecommunications § 5— repeatedly making obscene phone calls—interpretation of "repeatedly"**

In a prosecution of defendant for making harassing, embarrassing and annoying telephone calls in violation of N.C.G.S. § 14-196(a)(3), there was no merit to defendant's contention that the statute required more than one call during a particular day, since the statute proscribes making such calls "repeatedly," but that term does not ordinarily connote a recurrence within a twenty-four hour period.

4. **Telecommunications § 5— making obscene phone calls—no variance between warrants and proof**

There was no variance between the warrants alleging repeated annoying calls to a named victim on given dates and evidence that defendant made more than one call to the victim's apartment on those dates, although the victim did not answer more than one call on each date, since N.C.G.S. § 14-196(a)(3) makes it unlawful for a person to "telephone another repeatedly, whether or not conversation ensues," for the purpose of ". . . harassing . . . any person at the called number."

State v. Boone

APPEAL by defendant from *Barefoot, Judge.* Judgments entered 27 March 1985 in Superior Court, PITT County. Heard in the Court of Appeals 10 March 1986.

Defendant, a self-proclaimed preacher, was convicted of six counts of making harassing, embarrassing and annoying telephone calls in violation of G.S. 14-196(a)(3). The State presented evidence tending to show that several female students at East Carolina University who rented an apartment together received hundreds of telephone calls from defendant from January of 1984 through 16 August 1984. A Police Information Network (PIN) register placed on defendant's phone under a court order indicated that on March 20, March 29, March 30, April 4, April 5, and April 11 over 50 calls were made from defendant's residence to the students' apartment. From judgments sentencing defendant to two consecutive two year active prison terms and one concurrent two year active prison term, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Wilson Hayman, for the State.

Assistant Appellate Defender Gordon Widenhouse for defendant, appellant.

HEDRICK, Chief Judge.

[1] By his first assignment of error defendant contends the trial court erred in denying his motion in limine to exclude the actual contents of the obscene statements attributed to defendant. Defendant argues that the statements should have been excluded under G.S. 8C-1, Rule 403 because the statements' "probative value is substantially outweighed by the danger of unfair prejudice. . . ." G.S. 8C-1, Rule 403.

The essential elements of a G.S. 14-196(a)(3) violation are "(1) repeatedly telephoning another person, (2) with the intent or purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number." *State v. Camp*, 59 N.C. App. 38, 42, 295 S.E. 2d 766, 768 (1982). The actual contents of the statements attributed to defendant are relevant to show whether the intent of the telephone calls was to abuse, annoy, threaten, terrify, harass or embarrass the victims of the calls. "Relevant evidence will not be excluded simply because it

may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it." 1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 80 (2d ed. 1982). We hold that the trial court did not err in allowing witnesses to testify about the actual contents of the annoying telephone calls.

[2] By his next assignment of error brought forward on appeal defendant contends the trial court committed reversible error in admitting testimony regarding the total number of telephone calls made from defendant's telephone. Defendant made a general objection to three questions concerning the total number of telephone calls made from defendant's telephone during particular periods of time. Prior to these objections, defendant allowed Detective Wetherington to testify to the total number of telephone calls made from defendant's telephone at two other times. Defendant also failed to object when the PIN register tapes documenting each call made from defendant's telephone were passed to the jury. "[W]here evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost." *State v. Murray*, 310 N.C. 541, 551, 313 S.E. 2d 523, 530 (1984). Defendant's assignment of error is overruled.

By his fourth assignment of error defendant contends the trial court erred in admitting testimony regarding prior obscene telephone calls made by defendant. Assuming without deciding that the evidence of prior obscene telephone calls was inadmissible under G.S. 8C-1, Rule 404(b), the admission of the evidence was not prejudicial in the light of the overwhelming evidence of defendant's guilt. *See State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. denied*, 414 U.S. 1160, 94 S.Ct. 920, 39 L.Ed. 2d 112 (1974).

By his final assignment of error, defendant urges us to dismiss the 29 March 1984 and 5 April 1984 counts because the arrest warrants charged repeated calls to Susan Byrd on or about these dates while the evidence adduced at trial indicates that Susan Byrd answered only one call from defendant on each of these dates. Defendant argues G.S. 14-196(a)(3) requires more than one call during a particular day and that the variance between the warrants and the evidence is fatal. We address defendant's contentions seriatim.

[3] First, G.S. 14-196(a)(3) does not require more than one abusing, annoying, threatening, terrifying, harassing or embarrassing telephone call per day. The statute prescribes making such calls "repeatedly." Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted. *Transportation Service v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973). Repeatedly is the adverbial form of the term repeated meaning "renewed or recurring again and again." Webster's Seventh New Collegiate Dictionary. The term repeatedly does not ordinarily connote a recurrence within a twenty-four hour period.

[4] Defendant's contention that a fatal variance between the warrant and the evidence is also without merit. The warrants cover repeated calls to Susan Byrd on or about 29 March 1984 and on or about 5 April 1984. The evidence from the PIN register indicates defendant made more than one call to Susan Byrd's apartment on these dates although Ms. Byrd did not answer more than one call on each date. G.S. 14-196(a)(3) makes it unlawful for any person to "telephone another repeatedly, *whether or not conversation ensues*, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number." G.S. 14-196(a)(3) (emphasis added). The State's evidence supports a finding that defendant called Ms. Byrd's apartment repeatedly on the dates in question with the intent to harass. Defendant's assignment of error is overruled.

For the reasons stated above we find defendant had a fair trial free from prejudicial error.

No prejudicial error.

Judges WELLS and MARTIN concur.

WALTER G. BULLINGTON, M.D., KENNETH L. COHEN, M.D., AND J. LAWRENCE SIPPE, M.D., NORTH CAROLINA SOCIETY OF OPHTHALMOLOGY, INC. v. NORTH CAROLINA STATE BOARD OF EXAMINERS IN OPTOMETRY

No. 8510SC1097

(Filed 18 March 1986)

Process § 6— subpoenas issued to individual petitioners—corporate records sought—subpoenas properly quashed

Subpoenas issued to the individual petitioners commanding them to appear before respondent board with all documents in the possession of the N.C. Society of Optometry, Inc. were fatally defective on their face and should have been quashed since the subpoenas purported to require each individual petitioner to produce documents in the possession of a corporation; the corporation was not required by the subpoenas to produce anything through its representatives; and the individuals named in the subpoenas were not designated in the subpoenas to be in any way representatives of the corporation or custodians of documents belonging to the corporation.

APPEAL by respondent North Carolina State Board of Examiners in Optometry from *Bailey, Judge.* Order entered 3 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 12 March 1986.

On 30 July 1984, the North Carolina State Board of Examiners in Optometry [hereinafter the Board] issued subpoenas to Dr. Walter G. Bullington, Dr. J. Lawrence Sippe and Dr. Kenneth L. Cohen commanding them to appear before the Board with all documents in the possession of the North Carolina Society of Ophthalmology, Inc., which support allegations of negligent care and malpractice on the part of 203 licensees of the Board, as presented to the North Carolina Senate Human Resources Committee during the summer of 1983. On 29 August 1984, the individual physicians named in the subpoenas filed with the Board a request to revoke and reconsider the subpoenas, which request was denied. At the hearing on the request to revoke and reconsider the subpoenas, the Board found that the physicians had failed to produce the documents as set forth in the subpoenas "without good cause" and "[t]hat the subpoenas were properly issued and served upon the respondents and that the respondents were properly before the Board," and, based upon these findings, concluded that the respondent physicians were in contempt of the

Board. On 23 October 1984, petitioners, Dr. Bullington, Dr. Cohen, Dr. Sippe and the North Carolina Society of Ophthalmology, Inc., sought judicial review pursuant to G.S. 150A-43 by filing a motion to quash the subpoenas and for a protective order. On 3 July 1985, after a hearing, Judge Bailey entered the following order:

> [I]t appearing to the Court after reviewing the record, reviewing the briefs of the parties and hearing arguments of counsel for the parties that the Petitioners' motion to quash subpoenas issued to Petitioners by Respondents should be granted and the Respondent's decision to issue the subpoenas and not to revoke same should be reversed on the grounds that said subpoenas were issued in excess of the authority of the North Carolina State Board of Examiners in Optometry.

The Board appealed to this Court.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, Julian D. Bobbitt, Jr., and William H. Moss, for petitioners, appellees.

Boyce, Mitchell, Burns & Smith, P.A., by G. Eugene Boyce and Karen Britt Peeler, for respondent, appellant.

HEDRICK, Chief Judge.

We agree with Judge Bailey in quashing the subpoenas and reversing the decision of the Board not to revoke the subpoenas, but for different reasons than set out in the order. We do not agree that the subpoenas "were issued in excess of the authority of the North Carolina State Board of Examiners in Optometry."

The three subpoenas issued to the three individual physicians are fatally defective on their face. The subpoenas purport to require each physician as an individual to produce certain documents belonging to and in the possession of the North Carolina Society of Ophthalmology, a corporation. The North Carolina Society of Ophthalmology, a corporation, is not required by the subpoenas to produce anything through its representatives. The individual physicians named in the subpoenas are not designated in the subpoenas to be in any way representatives of the corporation or custodians of documents belonging to the corporation.

Our decision makes it inadvisable for us to discuss the many issues raised and discussed by the parties in the petition for judicial review and in their respective briefs. G.S. 90-117.4 clearly gives the Board the power in a proper case, and this appears to be a proper case, to "issue subpoenas requiring the attendance of persons and the production of papers and records." The subpoena authority of the Board is limited to "any hearing, investigation or proceeding conducted by it." G.S. 90-117.4. The authority of the Board to enforce its subpoena power necessarily must be decided on a case-by-case basis.

The decision of the superior court quashing the subpoenas and reversing the decision of the Board is

Affirmed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. THELMA RAY POLITE

No. 855SC941

(Filed 18 March 1986)

Criminal Law § 10.1— solicitation to commit felony—elements of underlying felony —allegation not required

In charging one with soliciting another to commit a felony, it is not necessary to allege the elements of the crime solicited.

APPEAL by the State from *Barefoot, Judge.* Order entered 28 June 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 11 February 1986.

Attorney General Thornburg, by Associate Attorney General Abraham Penn Jones, for the State.

No brief filed for defendant appellee.

PHILLIPS, Judge.

The State's appeal is from an order dismissing an indictment. The only question presented is whether in charging one with *so-*

liciting another to commit a felony it is necessary to allege the elements of the crime solicited. Such allegations are not necessary. Soliciting another to commit a felony has long been a misdemeanor at common law. *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936). The crime of solicitation does not depend upon another crime being committed; it consists of trying to get another to commit a crime. 22 C.J.S. *Criminal Law* Sec. 78 (1961); *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977). Thus, the indictment against defendant for soliciting two others to commit the crime of false pretenses does not have to allege, as the court ruled in dismissing it, that defendant obtained something of value. While obtaining something of value is an element of the crime of false pretenses, G.S. 14-100, it is not an element of the crime of soliciting another to commit that crime and the court erred in ruling that it is. The State urges us to also rule that soliciting one to commit the crime of false pretenses is an infamous misdemeanor under the provisions of G.S. 14-3(b) and upon conviction defendant can be sentenced as for a Class H felony as therein authorized. The invitation is declined. Since defendant has neither been tried, convicted, nor sentenced, whether she is to be sentenced under G.S. 14-3(b) or another sentencing statute must be left until another day, which may never come. It is sufficient for this day to just rule that she has been properly indicted for soliciting others to commit the felony of false pretenses and may now be tried on that indictment.

The order dismissing the solicitation indictment is herewith vacated. A three-count indictment charging defendant with false pretenses, which the court also dismissed by the same order, is not affected by this opinion, as that dismissal was not appealed.

Vacated.

Judges ARNOLD and EAGLES concur.

VIRGINIA M. FARR v. THE BOARD OF ADJUSTMENT OF THE CITY OF ROCKY MOUNT, NORTH CAROLINA

No. 847SC10

(Filed 18 March 1986)

ON remand from the North Carolina Supreme Court by their decision herein reported in 315 N.C. 309, 337 S.E. 2d 581 (1985).

Fitch and Butterfield, by G. K. Butterfield, Jr., for petitioner appellant.

Dill, Exum, Fountain & Hoyle, by William S. Hoyle, for respondent appellee.

PHILLIPS, Judge.

As directed by the above decision, we have given further consideration to the contentions made by the appellant in this Court that were not discussed in the decision reported in 73 N.C. App. 228, 326 S.E. 2d 382 (1985) and are of the opinion that those contentions are without merit and should be overruled. But even if the zoning ordinance in question applies to the case, and the record as we read it does not show that it was enacted before the prior property owner built the building involved, we are still of the opinion that the ordinance is unconstitutional for the reasons stated in our prior decision and that the judgment appealed from should be vacated.

Vacated.

Judge BECTON concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

In my opinion, the zoning ordinance in question is not unconstitutional. I do not believe the majority has addressed the principal issue raised on appeal as to whether the occupancy of the accessory building as a residence by the petitioner's son is a violation of the ordinance. The facts found by the zoning board support the conclusion that the occupancy of the accessory building by the petitioner's son is in violation of the ordinance. I vote to affirm the decision of the superior court.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 MARCH 1986

CENTRAL CAROLINA BANK & TRUST CO. v. FAWN VENDORS, INC. No. 8514SC851	Durham (83CVS00140)	Appeal Dismissed
IN RE GENAILLE v. BELK OF HANES MALL No. 8521SC718	Forsyth (84CVS5105)	Affirmed
IN RE STEWART v. E.S.C. OF N. C. No. 8518SC1096	Guilford (84CVS1907)	Affirmed
MIOLA v. NAT. SERVICE IND., INC. No. 8530SC849	Haywood (83CVS681)	Affirmed
PECK v. PECK No. 854DC1137	Onslow (84CVD1346)	Dismissed
STATE v. KIDD No. 8525SC1064	Caldwell (85CRS348)	No error in the trial. Remand for resentencing.
STATE v. KLINE No. 8521SC858	Forsyth (84CRS37280)	No Error
STATE v. MASON No. 854SC859	Onslow (84CRS13301) (84CRS13297)	No error in trial, remanded for resentencing.

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

ACCOUNTANTS

§ 1. Generally

One plaintiff's complaint stated a claim based on third-party beneficiary contract doctrine against certified public accountants who provided an audit for a corporation to which plaintiff extended credit. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 81.

The law implies privity of contract for an intended third-party beneficiary of a contract for accountants to perform an audit of a corporation, and the third-party beneficiary may bring an action in tort for negligent performance of the underlying contract by the accountants. *Ibid.*

A balancing test containing several factors was adopted by the appellate court for determining the liability of professional accountants to third parties. *Ibid.*

One plaintiff's complaint stated a claim against defendant certified public accountants for negligent misrepresentation concerning the preparation of an audit opinion for a corporation which plaintiff relied on to its detriment. *Ibid.*

ACCOUNTS

§ 2. Accounts Stated

The trial court did not err in an action on an account stated by a New York law firm against a client by admitting testimony regarding the subject matter of the New York lawsuit. *Santora, McKay & Ranieri v. Franklin*, 585.

There was sufficient evidence to support an instruction on account stated by implied agreement. *Ibid.*

The trial court erred by instructing the jury on an account stated where the two statements attached to the complaint were not properly verified but the error was harmless because the evidence was admissible under the business records exception. *Ibid.*

There was a basis for establishing an indebtedness in an action on an account stated where defendant failed to object to statements rendered on the account. *Ibid.*

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

A petition for judicial review of the State Bar's denial of a petition for reinstatement to the Bar was properly dismissed for failure to comply with the specificity requirements of G.S. 150A-56. *Vann v. N. C. State Bar*, 173.

§ 8. Scope and Effect of Judicial Review

Petitioner's right to judicial review of a State Personnel Commission opinion affirming the termination of his employment was clearly set forth in N.C.G.S. 150A-51, and respondent's and petitioner's motions for summary judgment were procedurally incorrect; however, the trial court's order allowing respondent's motion for summary judgment was tantamount to affirming the Full Commission's ruling upholding petitioner's dismissal and sufficiently set forth a reviewable basis for affirming the Full Commission's ruling. *Parks v. Dept. of Human Resources*, 125.

ADOPTION

§ 4. Validity of and Attack on Decrees

The trial court did not err in an action for divorce and equitable distribution by dismissing defendant husband's claim of "fraudulent adoption." *Andrews v. Andrews*, 228.

ADVERSE POSSESSION

§ 3. Hostile Character of Possession as Affected by Belief that Land is Included in Description of Claimant's Deed

Evidence before the referee that defendants possessed the disputed area by mistake raised an issue of fact regarding defendants' claim of adverse possession which would entitle them to a jury trial. *Faucette v. Zimmerman*, 265.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

An appeal in an inverse condemnation action was interlocutory in that the issue of damages was unresolved, but the determination of liability was immediately appealable. *City of Winston-Salem v. Ferrell*, 103.

§ 16. Powers of Trial Court after Appeal

The trial court has jurisdiction to rule on a Rule 52(b) motion for amended and additional findings even though notice of appeal has been given. *York v. Taylor*, 653.

The trial court has jurisdiction to rule on a motion for relief from judgment under Rule 60(b) filed contemporaneously with a notice of appeal. *Ibid.*

§ 31.1. Necessity and Timeliness of Objections, Exceptions and Assignments of Error

Plaintiff failed to comply with the requirements of App. Rule 10(b) when arguing that the trial court erred by denying her motion to set aside the verdict based on error in the instructions on contributory negligence. *Tatum v. Tatum*, 605.

ASSAULT AND BATTERY

§ 13. Competency of Evidence

Admission of a knife seized from defendant on another occasion was not prejudicial error in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Mason*, 477.

§ 14.3. Assault with a Deadly Weapon with Intent to Kill; Sufficiency of Evidence

There was sufficient evidence to go to the jury and to convict defendant of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Cain*, 35.

§ 15.2. Assault with a Deadly Weapon with Intent to Kill; Instructions

The court did not err in instructing the jury that a knife is a dangerous or deadly weapon. *S. v. Mason*, 477.

§ 16.1. Necessity of Submitting Question of Defendant's Guilt of Lesser Degrees of the Offense; Submission Not Required

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by not instructing the jury on the lesser

CRIMINAL LAW — Continued

§ 32. Burden of Proof

There was sufficient evidence in a prosecution for second degree murder to allow the reasonable inference that the cause of the victim's death was a criminal agency where no body or other physical remains were found. *S. v. Head*, 1.

§ 34.1. Evidence of Defendant's Guilt of Other Offenses; Inadmissible to Show Character and Disposition to Commit Offense

The trial court erred in admitting testimony by a witness that he had bought "hot tools" from defendant on a date prior to the date in question and that he had been buying tools from defendant for the previous eight years. *S. v. Weaver*, 244.

§ 34.6. Admissibility of Evidence of Other Offenses; to Show Knowledge or Intent

The trial court did not err in a prosecution for false pretenses by allowing the prosecutor to question defendant about his use of false identification four or five years prior to the trial; the use of false identification is probative of a witness's tendency to be truthful. N.C.G.S. 8C-1, Rule 608(b). *S. v. Freeman*, 177.

§ 38. Evidence of Like Facts and Conditions

The trial court did not err in a prosecution for the murder of a realtor by refusing to strike the testimony of another realtor that defendant's house was eerie. *S. v. Head*, 1.

§ 43. Maps, Diagrams and Photographs

Photographs of marijuana purchased by a State's witness from one of defendant's coconspirators were properly admitted for illustrative purposes. *S. v. Riggs*, 398.

§ 48.1. Defendant's Silence Incompetent

The admission of an S.B.I. agent's testimony that, during the course of questioning, defendant "stopped right there and asserted his Constitutional right" violated defendant's right to remain silent and was prejudicial error. *S. v. Hooper*, 93.

§ 66.13. Identification; Pretrial Confrontation

The trial court did not err in a prosecution for assault and discharge of a firearm into an occupied vehicle by denying defendant's motion to suppress identification testimony obtained from a witness who identified defendant in the back of a patrol car. *S. v. Cain*, 35.

§ 66.14. Independent Origin of In-court Identification

The trial court properly permitted an assault and robbery victim to make an in-court identification of defendant where the court found that the identification was of independent origin and was based on the victim's observations at the time of the crimes. *S. v. Mason*, 477.

§ 66.20. Voir Dire to Determine Competency and Admissibility of In-court Identification; Findings of Court

Defendant was not prejudiced by the court's failure to make a formal ruling on defendant's motion to suppress an in-court identification where the court implicitly denied the motion. *S. v. Hicks*, 599.

Defendant was not prejudiced by the court's filing of a written order denying his motion to suppress an in-court identification out of session. *Ibid.*

CRIMINAL LAW — Continued

§ 73.1. Admission of Hearsay Statement as Prejudicial or Harmless Error

There was no prejudicial error in a prosecution for second degree murder where the court allowed a detective to testify that she had called thirteen hospitals in North Carolina regarding anyone matching the description of the missing victim and was advised that they had not treated the victim. *S. v. Head*, 1.

§ 75.7. When Miranda Warning Required

Officers had a right to detain defendants while one officer checked to see if a marijuana field was where a map indicated it would be, and officers could properly ask defendants questions concerning their identity and their business in the area without giving them the Miranda warnings. *S. v. Moore*, 666.

§ 86.1. Impeachment of Defendant

The trial court did not err in a kidnapping prosecution by denying defendant's objection to cross-examination of defendant's father regarding circumstances surrounding the incarceration of defendant's friend. *S. v. McCullough*, 541.

§ 86.2. Credibility of Defendant; Prior Convictions

The trial court did not err in a prosecution for false pretenses by admitting testimony that defendant had been involved in passing bad checks in the past. *S. v. Freeman*, 177.

The trial court did not err in a prosecution for false pretenses by permitting a witness to refer to letters written by defendant while in jail. *Ibid.*

§ 87.1. Direct Examination; Leading Questions

The trial court did not abuse its discretion in a prosecution for assault and discharging a firearm into an occupied vehicle by allowing the State to ask a witness if there were any dissimilarities between defendant and the person he had seen by a trailer just before the shooting. *S. v. Cain*, 35.

§ 88.2. Questions and Conduct Impermissible on Cross-examination

Cross-examination of defendant's wife concerning the number of times she had talked with the district attorney's office about the case was irrelevant and properly excluded. *S. v. Hosey*, 196.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

The trial court did not err in allowing the State's motion to join all offenses made on the day defendant's trial began. *S. v. Riggs*, 398.

§ 98.2. Sequestration of Witnesses

The trial court did not err in denying defendant's motion to sequester all witnesses. *S. v. Riggs*, 398.

§ 101.2. Exposure to Evidence Not Formally Introduced

The trial court did not err in a prosecution for second degree murder by failing to examine the jurors to see whether they could hear *voir dire* testimony from three women who testified that they had previously been the victims of assaultive behavior by defendant. *S. v. Head*, 1.

§ 102.5. Conduct in Examining or Cross-examining Defendant and Other Witnesses

The court's curative instructions rendered harmless any error in the prosecutor's questions to defendant's wife as to whether she had attempted to gather

DIVORCE AND ALIMONY — Continued

§ 24.2. Effect of Separation Agreements

An agreement as to child support adopted by the court was modifiable in the same manner as any other child support order, and the wife was required to show changed circumstances in order to obtain increased child support. *Holthusen v. Holthusen*, 618.

§ 24.8. Modification of Child Support; Where Changed Circumstances Are Not Shown

The findings supported the court's conclusion that there had been no substantial change of circumstances which would warrant an increase in child support. *Holthusen v. Holthusen*, 618.

The trial court erred by concluding that plaintiff wife had made a sufficient showing of a change in circumstances to merit an increase in child support payments. *Mullen v. Mullen*, 627.

§ 24.11. Review of Child Support Orders

An order finding changed circumstances and increasing child support was reversed rather than remanded where the court had insufficient evidence of the child's actual past expenditures to make the requisite specific findings of fact. *Mullen v. Mullen*, 627.

§ 27. Attorney Fees

The trial court did not err in a domestic action in its finding as to plaintiff's attorney's hours and value. *Cobb v. Cobb*, 592.

The trial court did not err in an action for alimony, child support and child custody by finding that plaintiff did not have the means to defray the expenses of the suit. *Ibid.*

The court's findings in a domestic action were not sufficient to support an award of attorney fees. *Ibid.*

§ 30. Distribution of Marital Property in Divorce Action

The release or waiver provisions of the parties' 2 August 1982 separation agreement barred plaintiff wife from an equitable distribution of defendant husband's military pension. *Morris v. Morris*, 386.

Where plaintiff deposited cash received from his mother's estate into a separate account in his name only, used the account to purchase an annuity in his name only, and used the account to purchase a house and lot which were deeded to plaintiff and defendant as husband and wife, the bank account and annuity remained separate property of the plaintiff but the house and lot constituted marital property. *Manes v. Harrison-Manes*, 170.

The trial court did not err in an action for equitable distribution by not expressly addressing all of the factors listed in G.S. 50-20(c) before making an unequal distribution. *Andrews v. Andrews*, 228.

The trial court did not err in an action for equitable distribution by considering as current in a hearing in November 1984 financial statements dated November 1983. *Ibid.*

The trial court did not err in an action for equitable distribution by making an unequal distribution. *Ibid.*

The trial court did not err in an action for equitable distribution by not considering a beach house the couple had deeded to their children as marital property. *Ibid.*

DIVORCE AND ALIMONY — Continued

The trial court did not err in an action for equitable distribution by awarding plaintiff stock in a fast-food franchise. *Ibid.*

EASEMENTS

§ 5. Creation of Easements by Implication or Necessity

A plainly visible and known way will be held to be the location of a way of necessity unless it is not reasonable and convenient for both parties. *Broyhill v. Coppage*, 221.

§ 5.3. Creation of Easements by Implication or Necessity; Sufficiency of Pleadings and Evidence

Plaintiffs' evidence was sufficient to show a necessity for an easement in a roadway across defendants' property at the time of conveyance of plaintiffs' tract from a common ownership in 1931. *Broyhill v. Coppage*, 221.

§ 7.1. Actions to Establish Easements; Evidence

The trial court in an action to establish an easement by necessity properly allowed witnesses to testify regarding the use of the local roadways before their lifetimes. *Broyhill v. Coppage*, 221.

Evidence that plaintiffs maintained and repaired the disputed roadway and that defendants blocked it was not prejudicial to defendants. *Ibid.*

EMINENT DOMAIN

§ 13. Actions by Owner for Compensation or Damages

The trial court properly awarded defendants attorney fees in an inverse condemnation action because the City did not include the property in its Declaration of Taking. N.C.G.S. 40A-8, N.C.G.S. 40A-51(a). *City of Winston-Salem v. Ferrell*, 103.

G.S. 40A-51 provides the sole procedure by which plaintiffs may bring an inverse condemnation action against a city for the alleged taking of their land resulting from aircraft overflights. *Smith v. City of Charlotte*, 517.

A grace period of five months and three weeks between enactment of the two-year statute of limitations of G.S. 40A-51 for inverse condemnation actions and the effective date of the statute afforded landowners a reasonable time within which to bring an action on an existing inverse condemnation claim so as to comply with due process, and plaintiffs' claim was barred by the statute of limitations. *Ibid.*

A complaint alleging the taking of a further flight easement "within the past two years" resulting from increased air traffic failed to allege with reasonable specificity when the alleged taking occurred, but the claim was not dismissed but was remanded to permit plaintiffs to respond to defendant's motion for a more definite statement. *Ibid.*

§ 13.3. Actions by Owner for Compensation or Damages; Pleadings

An inverse condemnation claim was properly before the court where it was asserted as a counterclaim to the City's condemnation action. *City of Winston-Salem v. Ferrell*, 103.

§ 13.4. Actions by Owner for Compensation or Damages; Evidence and Burden of Proof

In a condemnation action for sewer outfall construction easements, the trial court's order finding that a roadway had been inversely condemned was affirmed. *City of Winston-Salem v. Ferrell*, 103.

FIDUCIARIES

§ 1. Generally

The existence of a debtor-creditor relationship between plaintiff bank and defendants did not create a fiduciary relationship which would support a claim for breach of fiduciary duty by plaintiff bank in the sale of the collateral for a promissory note upon default by defendants. *United Virginia Bank v. Air-Lift Associates*, 315.

FIXTURES

§ 1. Generally

Repairs to a chairlift at a recreational park were improvements to real property within the purview of the six-year statute of repose of G.S. 1-50(5). *Little v. National Service Industries, Inc.*, 688.

FRAUDULENT CONVEYANCES

§ 3.4. Sufficiency of Evidence

The trial court erred in entering summary judgment for plaintiff on its claim for an amount for hospital care rendered to defendants' mother and on its claim that a conveyance to defendants from their mother was fraudulent and void as against plaintiff. *Valdese General Hospital, Inc. v. Burns*, 163.

GAMBLING

§ 2. Slot Machines and Punch Boards

The superior court had no jurisdiction to hear a motion for destruction of an illegal slot machine where there was no underlying pending action. *S. v. Campbell*, 468.

§ 4. Games of Chance

Licensing requirements for conducting bingo games were not unconstitutional as applied to plaintiff. *Durham Council of the Blind v. Edmisten, Att'y General*, 156.

GUARANTY

§ 1. Generally

The question of whether the parties intended an ambiguous guaranty agreement to cover only one loan or also to cover further loans was for the jury. *Piedmont Bank and Trust Co. v. Stevenson*, 236.

HIGHWAYS AND CARTWAYS

§ 9. Actions Against Highway Commission

Plaintiff's claim on a highway construction contract was properly dismissed in superior court where plaintiff's first claim was not verified and its second claim was not received within the statutorily prescribed period. *E. F. Blankenship Co. v. N. C. Dept. of Transportation*, 462.

§ 12.3. Cartways; Proceedings to Establish

The evidence in an action to establish a cartway was sufficient to support the court's conclusion that petitioner was not legitimately putting his land to a use ap-

HUSBAND AND WIFE

§ 11.2. Separation Agreements; Construction

The release or waiver provisions of the parties' 2 August 1982 separation agreement barred plaintiff wife from an equitable distribution of defendant husband's military pension. *Morris v. Morris*, 386.

§ 12. Separation Agreements; Revocation and Rescission

The evidence was sufficient to support the trial court's finding that property settlement and alimony payments were mutually dependent so that defendant's obligation to pay under the parties' separation agreement and property settlement did not terminate upon renewal of sexual relations. *Love v. Mewborn*, 465.

INFANTS

§ 4. Protection and Supervision of Infants by Courts Generally

The district court did not have authority to order a mother to submit to a psychological or psychiatric assessment and treatment where her child had previously been adjudicated neglected. *In re Badzinski*, 250.

INJUNCTIONS

§ 5.1. Unconstitutionality of Statute or Ordinance

Plaintiff could properly bring an action to restrain defendants from prosecuting plaintiff for operating bingo games without a license. *Durham Council of the Blind v. Edmisten, Att'y General*, 156.

INSURANCE

§ 29. Right to Proceeds

When an insurer interpleads the claimants to benefits under a life insurance policy, there is a waiver of the restriction and conditions regarding changes of beneficiaries under the policy. *Fidelity Bankers Life Ins. Co. v. Dortch*, 148.

§ 29.1. Change of Beneficiary

The trial court erred in awarding proceeds of a life insurance policy to insured's former wife, the named beneficiary, where it was clear that insured intended for the policy benefits to be paid into his Keogh Plan established to benefit his present wife and daughters, that he did all he could to obtain this result, but that insured's trustee failed to properly execute insured's wishes. *Fidelity Bankers Life Ins. Co. v. Dortch*, 148.

§ 69. Uninsured Motorist Coverage

Uninsured motorist coverages contained in two policies issued to the same insured, each providing coverage in excess of the amount required by statute, cannot be "stacked" or aggregated in light of "other insurance" clauses in each policy. *Government Employees Insurance Co. v. Herndon*, 365.

The underinsured motorist coverage of an automobile policy extended to injuries received by an insured family member while riding in a nonowned vehicle not insured under the policy. *Crowder v. N. C. Farm Bureau Mut. Ins. Co.*, 551.

A liability insurer's written statement was admissible to show underinsurance. *Ibid.*

INSURANCE — Continued

§ 96.1. Time for Giving Notice

An insurer was not relieved of its duty to defend by untimely notice. *Ames v. Continental Casualty Co.*, 530.

§ 122. Conditions

The trial court did not err by granting defendant's motion for a directed verdict at the close of the evidence in an action to recover under a fire insurance policy where plaintiffs failed to comply with a condition precedent for recovery under the policy by not producing copies of bank accounts and F.H.A. loan accounts and by refusing to sign an authorization permitting a representative of defendant to examine their records at banks and other lending institutions. *Chavis v. State Farm Fire and Casualty Co.*, 213.

§ 136. Actions on Fire Policies

The evidence was sufficient to support a jury finding that plaintiff did not knowingly and willfully make a material misrepresentation to defendant so as to void a fire insurance policy under G.S. 58-176(c) with regard to the contents of the closet where the first fire began, the amount of personal property lost in the fire, and plaintiff's whereabouts before and after the fire. *Pittman v. Nationwide Mutual Fire Ins. Co.*, 431.

The trial court properly denied defendant insurer's motion for a directed verdict in an action under a fire insurance policy for additional living expenses and for damage to real property. *Ibid.*

§ 140. Actions on Windstorm Policies

There was no prejudice in an action under an insurance policy for wind damage in the exclusion of evidence that an unidentified person who represented himself to be an insurance agent looked at the building, that another insurance company paid storm damage to property not involved in this case, or that cars situated in the damaged building were damaged. *Allen v. Hartford Accident and Indemnity Co.*, 662.

§ 150. Professional Liability Insurance

The trial court properly concluded that exclusions for other insurance in a subsequent policy were applicable in an action to determine which of two insurance companies was required to provide coverage for a professional malpractice claim based on acts and omissions before 1971. *Ames v. Continental Casualty Co.*, 530.

An insurance company was estopped from denying coverage and was obligated to pay an amount in settlement where it had had the opportunity to raise defenses during litigation but unjustifiably refused to defend. *Ibid.*

In an action between two insurance companies to determine who was responsible for a claim, there was ample evidence to support the conclusion that the settlement of the action by one company was reasonable and made in good faith. *Ibid.*

Two insurance companies had a duty to defend and equity dictated that the defense costs be shared equally where the complaint alleged damages arising during the coverage period of both policies. *Ibid.*

The trial court did not err in its division of obligations between two insurance companies arising from a professional malpractice claim. *Ibid.*

JUDGMENTS

§ 4. Construction and Operation of Judgment

Partial summary judgment for defendant on plaintiff's claim of conversion and for defendant on its counterclaim for an amount due on an open account necessarily determined facts which would defeat plaintiff's unfair trade practices claim, and to allow plaintiff to prevail on this claim would result in inconsistent judgments. *Graham v. Mid-State Oil Co.*, 716.

§ 35. Conclusiveness of Judgments

Plaintiff was estopped from bringing a declaratory judgment action to reinstate his license to practice law by a judgment entered in earlier proceedings before the State Bar and the Bar Council. *Vann v. N. C. State Bar*, 166.

§ 37.3. Preclusion or Relitigation of Issues

Res judicata did not apply to bar plaintiffs' claims to quiet title based on noncompliance with legal formalities in the execution of deeds where the earlier action sought to set aside one of the deeds as a fraudulent conveyance. *Poore v. Swan Quarter Farms, Inc.*, 286.

KIDNAPPING

§ 1. Elements of Offense; Indictments

An indictment for first degree kidnapping was insufficient where the indictment did not allege that the victim was not released in a safe place, seriously injured, or sexually assaulted. *S. v. McCullough*, 541.

A conviction for first degree kidnapping was remanded for entry of a verdict for second degree kidnapping where the indictment was insufficient to allege first degree kidnapping but sufficiently alleged the elements of second degree kidnapping. *Ibid.*

§ 1.3. Instructions

A new trial was not necessary where the court erred in its instructions on first degree kidnapping but the conviction was remanded on other grounds for entry of judgment on second degree kidnapping. *S. v. McCullough*, 541.

LABORERS' AND MATERIALMEN'S LIENS

§ 8. Enforcement of Lien

Where plaintiff took a voluntary dismissal against the prior owners of the property in question based on its contract to drill a well on the property and to have the judgment against the prior owners declared to be a specific lien on the property and there was no allegation that the present owners are indebted to plaintiff in any amount, the trial court properly dismissed plaintiff's claim against the present owners since there could be no lien in the absence of an underlying debt. *Caldwell's Well Drilling, Inc. v. Moore*, 730.

LANDLORD AND TENANT

§ 18. Forfeiture for Nonpayment of Rent

Provisions in a lease authorizing the lessor to terminate the lease and take possession of the property if the tenant petitions to be declared bankrupt could be enforced by the lessor after the tenant's petition in bankruptcy had been dismissed. *Miller v. Parlor Furniture*, 639.

LARCENY

§ 1. Definition; Elements of Offense

Defendant could not properly be convicted and sentenced for both felonious larceny and felonious possession of the same stolen property. *S. v. McCoy*, 273.

§ 4. Warrant and Indictment

An indictment charging defendant with larceny pursuant to a burglary is sufficient to uphold defendant's conviction of larceny pursuant to a breaking or entering. *S. v. McCoy*, 273.

§ 7.2. Identity of Property Stolen

Evidence that defendant was seen leaving the victim's apartment with goods resembling those later reported stolen was sufficient to support an inference that defendant took property belonging to the victim. *S. v. McCoy*, 273.

§ 7.10. Possession of Stolen Property

Evidence was sufficient for the jury in a prosecution for felonious larceny under the doctrine of possession of recently stolen property. *S. v. Grady*, 471.

§ 8. Instructions

The trial court did not err in failing to instruct on misdemeanor larceny where the property was taken pursuant to a breaking or entering of a building. *S. v. Weaver*, 244.

The trial court in a felonious larceny case did not err in refusing to instruct on misdemeanor larceny although the only evidence to show that the stolen property exceeded $400 in value was incompetent evidence of replacement value. *S. v. Morris*, 659.

§ 8.4. Instructions; Possession of Recently Stolen Property

The trial court did not err in instructing on possession of recently stolen property though a wristwatch taken during the crimes in question was found in a police car in which defendant had been placed rather than actually on defendant's person. *S. v. Grady*, 471.

§ 9. Verdict

The trial court properly accepted a verdict convicting defendant of felonious larceny even though he had been acquitted of felonious breaking or entering. *S. v. Weaver*, 244.

LIBEL AND SLANDER

§ 16. Sufficiency of Evidence

Although statements by a country club member that defendant had vandalized golf carts at the club were qualifiedly privileged, a genuine issue of material fact was raised as to whether the member's statements were made without good faith or probable cause so as to constitute actual malice and defeat her claim of qualified privilege. *Ward v. Turcotte*, 458.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from which Statute Begins to Run

A grace period of five months and three weeks between enactment of the two-year statute of limitations of G.S. 40A-51 for inverse condemnation actions and the effective date of the statute afforded landowners a reasonable time within which to

MASTER AND SERVANT — Continued

§ 54. Casual Employees

The trial court's findings and conclusion that a minor was a casual employee and that the Industrial Commission had exclusive jurisdiction over his claim were supported by the evidence. *Lemmerman v. A. T. Williams Oil Co.*, 642.

§ 56. Causal Relation Between Employment and Injury

The evidence was sufficient to establish a causal relationship between plaintiff's obstructive lung disease and his work as a "battery buster" during which he inhaled sulfuric acid fumes. *Cain v. Guyton*, 696.

§ 58. Intoxication of Employee

The evidence supported findings by the Industrial Commission that deceased employee was intoxicated at the time of a one-car accident and that his intoxication was a proximate cause of his death. *Torain v. Fordham Drug Co.*, 572.

§ 66. Mental Disorders

The Industrial Commission did not err by awarding plaintiff total disability compensation for depression where it had previously made a scheduled award under G.S. 97-31(15) (1979) for permanent, partial disability. *Hill v. Hanes Corp.*, 67.

The Industrial Commission did not err by awarding plaintiff temporary total disability after finding that plaintiff had reached maximum medical improvement. *Ibid.*

The evidence was sufficient to support the Industrial Commission's finding that plaintiff is totally disabled due to depression. *Ibid.*

§ 68. Occupational Diseases

The evidence supported a determination of the Industrial Commission that adventitial scarring to the ulnar arteries in both wrists suffered by a carpenter's helper who regularly used a jackhammer in demolition work constituted an occupational disease which was caused by plaintiff's employment with defendant. *Lumley v. Dancy Construction Co.*, 114.

The evidence was sufficient to support the Industrial Commission's conclusion that plaintiff's obstructive lung disease was caused by his exposure to chemical fumes and dust while working in defendant's textile dye house. *Gay v. J. P. Stevens & Co.*, 324.

The fact that levels of toxic substances in the dye houses and the concentration of dust in the warehouse where plaintiff worked were never actually measured did not render an expert medical witness's testimony regarding the effects of those substances on plaintiff mere speculation. *Ibid.*

Plaintiff's claim for an occupational disease was timely filed where plaintiff was first advised by a doctor several months after her claim was filed that her lung disease was related to her work in defendant's mill. *McCubbins v. Fieldcrest Mills, Inc.*, 409.

The evidence was sufficient to support findings that plaintiff's chronic obstructive pulmonary disease was an occupational disease and that plaintiff was disabled. *Ibid.*

The evidence was sufficient to support a finding that plaintiff's allergic contact dermatitis was an occupational disease caused by an insecticide regularly sprayed in defendant employer's place of business. *Carawan v. Carolina Telephone & Telegraph Co.*, 703.

MASTER AND SERVANT — Continued

§ 69. Amount of Recovery

Defendants were not entitled to a credit for compensation in a workers' compensation case in which the Industrial Commission awarded plaintiff temporary total disability for depression after previously awarding compensation for permanent partial disability of both legs. *Hill v. Hanes Corp.*, 67.

§ 77.1. Modification of Award; Change of Conditions

The Industrial Commission did not err by making a subsequent award for mental depression in a back injury case. *Hill v. Hanes Corp.*, 67.

§ 87.1. Cases Not Within Operation of Workers' Compensation Act

Claims against a former employer for intentional infliction of emotional distress through sexual harassment and for negligent retention of an employee who sexually harassed plaintiff were not barred by the exclusivity of remedies provision of the Workers' Compensation Act. *Hogan v. Forsyth Country Club Co.*, 483.

§ 93.3. Expert Evidence

Plaintiff could properly ask his medical expert witness a hypothetical question which asked the doctor to assume facts pertaining to plaintiff's medical history in conjunction with his employment history. *Cain v. Guyton*, 696.

§ 94.1. Sufficiency of Findings of Fact

The Industrial Commission failed to make adequate findings of fact and conclusions of law regarding plaintiff's last injurious exposure to the hazards of chronic obstructive lung disease. *Gay v. J. P. Stevens & Co.*, 324.

§ 94.4. New or Additional Evidence

The Industrial Commission did not err by denying defendant's Rule 60 motions for relief where some of the evidence was discoverable by due diligence before plaintiff's claim was heard and other activities occurred after the Commission's final award. *Hill v. Hanes Corp.*, 67.

MORTGAGES AND DEEDS OF TRUST

§ 1. Definitions and Nature

Agreements between plaintiffs and defendants created a mortgagor-mortgagee relationship rather than a partnership, and the court did not err in allowing foreclosure to proceed. *Carefree Carolina Communities v. Cilley*, 742.

§ 32. Deficiency and Personal Liability

A mortgagor who was a defaulting bidder at the original foreclosure sale was not entitled to prove that the foreclosed property acquired by the creditors at a second sale was worth the sum that it owed them after the difference between the mortgagor's defaulted bid and the final sale price was deducted from the mortgagor's bid deposit. *In re Foreclosure of Otter Pond Investment Group*, 664.

NARCOTICS

§ 2. Indictment

Indictments for obtaining and attempting to obtain a controlled substance by fraud and forgery were sufficient without specific allegations that defendant presented the forged prescriptions with knowledge that they were forged. *S. v. Baynard*, 559.

NARCOTICS — Continued

§ 3.1. Competency and Relevancy of Evidence Generally

The evidence was sufficient to establish a chain of custody and to show that a foil packet purchased from defendant by an undercover agent was received by an SBI chemist who analyzed its contents and determined that the packet contained cocaine. *S. v. Sessoms*, 444.

§ 4. Sufficiency of Evidence

The State's evidence was sufficient to support defendant's conviction of manufacturing cocaine by repackaging, cutting and diluting it even though there was no evidence that defendant intended to distribute it. *S. v. Muncy*, 356.

Defendant was properly convicted of trafficking in cocaine where the evidence showed that 45.8 grams of a mixture containing cocaine were found in defendant's refrigerator. *Ibid.*

The evidence was sufficient to permit the jury to conclude that defendant possessed with the intent to sell and deliver 45 pounds of marijuana. *S. v. Riggs*, 398.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The evidence was sufficient to show that defendants had constructive possession of marijuana found in a house near a marijuana field. *S. v. Moore*, 666.

NEGLIGENCE

§ 2. Negligence Arising from the Performance of a Contract

One plaintiff's complaint stated a claim against defendant certified public accountants for negligent misrepresentation concerning the preparation of an audit opinion for a corporation which plaintiff relied on to its detriment. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 81.

The complaint of plaintiffs, who were not the original owners of a house, was sufficient to state a cause of action for negligence against defendant builder for defects in fireplaces located in the house. *Dellinger v. Lamb*, 404.

§ 30.1. Particular Cases where Directed Verdict is Proper

The trial court did not err by directing a verdict against plaintiffs on a negligence claim arising from the insurance company's allegedly negligent failure to properly prepare test holes in plaintiffs' roof. *Allen v. Hartford Accident and Indemnity Co.*, 662.

§ 34.1. Particular Cases where Evidence of Contributory Negligence is Sufficient

There was sufficient evidence to submit contributory negligence to the jury in an action arising from the unexpected starting of an automobile. *Tatum v. Tatum*, 605.

§ 39. Last Clear Chance

The trial court erred in failing to instruct the jury on last clear chance in an action to recover for injuries sustained by plaintiff when an airplane operated by defendant's employees pinned him against the tug he was using to tow the airplane. *Pegram v. Pinehurst Airlines, Inc.*, 738.

§ 53.8. Duty Owed by Proprietors

In an action to recover for defendant's negligence in driving a truck under a canopy with insufficient clearance, the trial court properly refused to submit an

RAPE AND ALLIED OFFENSES

§ 5. Sufficiency of Evidence

The State produced substantial evidence that defendant had vaginal intercourse with his stepdaughter by force and against her will. *S. v. Hosey*, 196.

§ 6. Instructions

The evidence in a prosecution for rape and incest supported the trial court's instruction that evidence of the State tended to show that the victim, defendant's stepdaughter, allowed defendant to do what he did because she was afraid of him and not because she was willing to have sexual intercourse with him. *S. v. Hosey*, 196.

§ 6.1. Instructions; Lesser Degrees of the Crime

There was no evidence in a rape prosecution of a failed attempt at nonconsensual intercourse and the trial court did not err by failing to give an instruction on the lesser included offense of attempted second degree rape. *S. v. Taylor*, 635.

§ 19. Indecent Liberties with Child

The State's evidence was sufficient to show that defendant took or attempted to take indecent liberties with a minor for the purpose of arousing or gratifying sexual desire. *S. v. Hicks*, 599.

RECEIVING STOLEN GOODS

§ 1. Nature and Elements of the Offense

Defendant could not properly be convicted and sentenced for both felonious larceny and felonious possession of the same stolen property. *S. v. McCoy*, 273.

§ 5.2. Evidence Insufficient

The State's evidence in a prosecution for possession of stolen goods was insufficient to establish that defendant had knowledge or reasonable grounds to believe that property in his car trunk was stolen. *S. v. Allen*, 280.

RETIREMENT SYSTEMS

§ 5. Claims of Members

Petitioner was entitled to have his claim for line-of-duty disability retirement benefits for disability from a heart attack considered under the pension fund act in effect at the time he was hired by the Asheville Police Department in 1960. *In re Application of Walsh*, 611.

ROBBERY

§ 3. Competency of Evidence

The trial court did not err in a prosecution for common law robbery by considering the victim's testimony under cross-examination when ruling on defendant's motion to dismiss. *S. v. McCullough*, 541.

§ 4.2. Common Law Robbery Cases Where Evidence Held Sufficient

There was sufficient evidence to withstand defendant's motion to dismiss the charge of common law robbery. *S. v. McCullough*, 541.

RULES OF CIVIL PROCEDURE

§ 12.1. Defenses and Objections; When and How Presented

Where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss. *Concrete Service Corp. v. Investors Group, Inc.*, 678.

§ 15.1. Amended Pleadings; Discretion of Court

The trial court did not abuse its discretion in denying plaintiff's motion to amend its complaint to reflect allegations made in the answer. *Caldwell's Well Drilling, Inc. v. Moore*, 730.

The trial court did not err in granting plaintiff's motion to amend its pleadings to add one particular defendant on its claims for unfair trade practices. *Concrete Service Corp. v. Investors Group, Inc.*, 678.

§ 23. Class Actions

There was insufficient community of interest between the named plaintiffs and the unnamed plaintiffs to require the trial court to certify as a class action an action alleging that retail installment sales contracts for mobile homes ultimately assigned to defendants fixed a finance rate in excess of the maximum allowed by statute. *Crow v. Citicorp Acceptance Co.*, 447.

§ 52. Findings by Court

The trial court has jurisdiction to rule on a Rule 52(b) motion for amended and additional findings even though notice of appeal has been given. *York v. Taylor*, 653.

§ 53. Referees

When a court orders a compulsory reference, a party is entitled to a jury trial only if the evidence before the referee was sufficient to raise an issue of fact. *Faucette v. Zimmerman*, 265.

The evidence before a referee regarding the location of the true boundary line was insufficient to raise an issue of fact which would entitle defendants to a jury trial. *Ibid.*

A referee could properly hear evidence on the issue of adverse possession even though the issue was not part of the formal pleadings. *Ibid.*

Evidence before the referee that defendants possessed the disputed area by mistake raised an issue of fact regarding defendants' claim of adverse possession which would entitle them to a jury trial. *Ibid.*

§ 59. Amendment of Judgments

The trial court had no authority to amend a judgment under Rule 59 pursuant to a motion made more than 10 days after entry of the judgment. *Coats v. Coats*, 481.

§ 60. Relief from Judgment

The trial court has jurisdiction to rule on a motion for relief from judgment under Rule 60(b) filed contemporaneously with a notice of appeal. *York v. Taylor*, 653.

TAXATION

§ 19.1. Construction of Exemptions

Household appliances passing through appellant's warehouse were not exempted from taxation by G.S. 105-275 where they were held for transshipment to appellant's stores. *In re Appeal of K-Mart Corp.*, 725.

§ 25. Ad Valorem Taxes; Persons and Property Assessable

A corporation's jet aircraft was "situated" or "more or less permanently located" in Rockingham County on 1 January 1984 and was therefore subject to ad valorem taxation by the county. *In re Appeal of Bassett Furniture Industries*, 258.

§ 25.7. Ad Valorem Taxes; Factors Determining Market Value

The Property Tax Commission did not err in determining that the highest and best use of property owned by petitioner and upon which it had granted conservation easements was for hunting, fishing and other recreational activities. *Rainbow Springs Partnership v. County of Macon*, 335.

The Property Tax Commission did not err in failing to make an explicit finding that The Nature Conservancy had affirmative rights to use petitioner's property pursuant to conservation easements. *Ibid.*

§ 25.10. State Board of Assessment

A property owner may, as a matter of right, appeal to the Property Tax Commission when a county or municipal board denies its application for an exemption from ad valorem taxation. *In re Appeal of K-Mart Corp.*, 725.

TELECOMMUNICATIONS

§ 5. Obscene or Threatening Calls

In a prosecution for making harassing, embarrassing and annoying telephone calls, the trial court did not err in allowing witnesses to testify about actual obscene statements made during the calls. *S. v. Boone*, 746.

The statute prohibiting the repeated making of harassing, embarrassing and annoying telephone calls does not require more than one call during a particular day. *Ibid.*

There was no variance between warrants alleging repeated annoying calls to a named victim on given dates and evidence that defendant made more than one call to the victim's apartment on those dates but that the victim did not answer more than one call on each date. *Ibid.*

TRESPASS

§ 2. Forcible Trespass and Trespass to the Person; Intentional Infliction of Emotional Distress

Actions against a former employer for the intentional infliction of emotional distress by sexual harassment are not barred by the exclusivity of remedies provision of the Workers' Compensation Act. *Hogan v. Forsyth Country Club Co.*, 483.

The forecast of evidence of one plaintiff was sufficient to support her claim for the intentional infliction of emotional distress through sexual harassment by defendant's chef, but forecasts of evidence by two other plaintiffs were insufficient to support such a claim. *Ibid.*

TROVER AND CONVERSION

§ 4. Damages

In a prosecution for conversion of a vehicle by a bailee, the evidence did not support the trial court's order that defendant pay $2,507 as restitution to the owner of the vehicle as a condition of probation. *S. v. Maynard.* 451.

TRUSTS

§ 6.1. Trustee; Discretionary Powers

A trustee's power to distribute trust funds to the beneficiary was discretionary, and the trial court erred in requiring the trustee to expend funds from the trust for the general welfare, support, maintenance and benefit of the beneficiary. *Lineback v. Stout,* 292.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

The trial court properly dismissed defendant's counterclaim for violations of the Business Opportunity Sales Act allegedly resulting from plaintiffs' sale of a paper converting company to defendant. *Anchor Paper Corp. v. Anchor Converting Co.,* 144.

Defendants engaged in unfair trade practices in violation of G.S. 75-1.1 by writing letters to 180 persons who had purchased lots from plaintiffs informing them of a possible "improper sewage situation" on their lots which might violate the sales contract and HUD requirements and offering to represent the lot owners if they wished to attempt to obtain a refund of the purchase price. *Pinehurst, Inc. v. O'Leary Bros. Realty,* 51.

Punitive damages may not be awarded in an unfair or deceptive trade practice case brought under G.S. Ch. 75. *Ibid.*

The trial court did not err in awarding attorney fees to plaintiff in an unfair or deceptive trade practice case based on a letter sent by defendants to purchasers of lots from plaintiffs. *Ibid.*

Defendants did not violate the unfair trade practices statute by misrepresenting that engine parts had been replaced within six months prior to the sale of an automobile. *Bailey v. LeBeau,* 345.

The unfair trade practices statute is applicable to commercial transactions also covered by the Uniform Commercial Code. *United Virginia Bank v. Air-Lift Associates,* 315.

Where the last act giving rise to defendants' counterclaim for an unfair trade practice occurred in Virginia, the substantive law of Virginia applied to the counterclaim, and the counterclaim must be dismissed since no statutory basis can be found in Virginia law to support it. *Ibid.*

The evidence was sufficient to show that defendant attorney engaged in actions intended to deceive creditors into extending credit to his father-in-law in violation of G.S. 75-1.1. *Concrete Service Corp. v. Investors Group, Inc.,* 678.

Partial summary judgment for defendant on plaintiff's claim of conversion and for defendant on its counterclaim for an amount due on an open account necessarily determined facts which would defeat plaintiff's unfair trade practices claim. *Graham v. Mid-State Oil Co.,* 716.

UNIFORM COMMERCIAL CODE

§ 10. Warranties in General

The evidence was sufficient to support a finding that the corporate defendant was liable for any warranties made by the individual defendant to plaintiff during negotiations for the sale of a car. *Bailey v. LeBeau*, 345.

§ 11. Express Warranties

The evidence was sufficient to support a finding by the jury that defendants breached an express warranty in the sale of a car that certain engine parts had been replaced within six months. *Bailey v. LeBeau*, 345.

§ 14. Implied Warranties; Fitness for a Particular Purpose

The trial court erred in submitting an issue as to breach of an implied warranty of fitness of a car sold to plaintiff. *Bailey v. LeBeau*, 345.

§ 26. Breach of Warranty; Measure of Damages

The evidence was insufficient to support an award of damages to plaintiff of $2,200 for breach of an express warranty in the sale of a car that certain parts had been replaced within six months. *Bailey v. LeBeau*, 345.

USURY

§ 1. What Constitutes Usury

Endorsements of a note and guaranty agreements which served as security for a loan did not constitute a "thing of value" within the meaning of the statute prohibiting the lender from charging or receiving from the borrower any "thing of value or other consideration" other than the security or collateral pledged to secure payment of the principal and allowable fees and interest. *Northwestern Bank v. Barber*, 425.

§ 5. Forfeiture of Interest for Usury

The trial court did not err in granting a judgment on a promissory note and guaranty agreements which included interest or in allowing plaintiff to amend its complaint so as to reduce the interest sought to that calculated at 12% per annum. *Northwestern Bank v. Barber*, 425.

UTILITIES COMMISSION

§ 2. Nature and Functions of Utilities Commission and Proceedings in General; Franchises and Certificates

An order of the Utilities Commission requiring appellant to apply for a certificate of public convenience and necessity for the operation of water and sewer systems was redundant where the Commission had already found that appellant is operating a utility which serves the public convenience and necessity. *State ex rel. Utilities Comm. v. Mackie*, 19.

§ 19. Regulation of Water Companies

An appellant who provides water service to eighteen customers and sewer service to nineteen customers in an unincorporated village is providing water and sewer services "to or for the public" within the meaning of G.S. 62-3(23)a.2 and is subject to regulation by the Utilities Commission. *State ex rel. Utilities Comm. v. Mackie*, 19.

The Utilities Commission did not err in concluding that appellant's operation of water and sewer systems served the public convenience and necessity. *Ibid.*

WORD AND PHRASE INDEX

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